



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

December 31, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Jude Brearton Mulvey, Esq.
NYS Department of Health
Corning Tower Room 2503
Empire State Plaza
Albany, New York 12237

Frederick Stern, Esq.
50 E. 42nd Street
New York, New York 10017

Keith Howard, R.P.A.
1304 33rd Avenue
Long Island City, New York 11106

RE: In the Matter of Keith Howard, R.P.A.

Dear Ms. Mulvey, Mr. Stern and Mr. Howard:

Enclosed please find the Determination and Order (No.97-246) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct
New York State Department of Health
Hedley Park Place
433 River Street-Fourth Floor
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

Handwritten signature of Tyrone T. Butler in black ink.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH (Petitioner)

COPY

IN THE MATTER

OF

KEITH HOWARD, R.P.A. (Respondent)

Proceeding to review a Determination by a Hearing Committee
(Committee) from the Board for Professional Medical Conduct (BPMC)

**ADMINISTRATIVE
REVIEW BOARD
(Board)
DETERMINATION
AND ORDER
ARB 97-246**

Before: ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D., Board Members.

After a hearing into charges that the Respondent committed professional misconduct, a BPMC Committee sustained charges that the Respondent obtained a License fraudulently, practiced fraudulently, filed a false report and committed criminal acts. The Committee voted to suspend the Respondent from practice for six months and then stayed the suspension. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997), the Petitioner asks the Board to modify the Committee's Determination, to find the Respondent guilty under a further misconduct specification, to overturn the Committee's sanction and to revoke the Respondent's License. The Respondent contends that the Board lacks the authority to substitute our judgement for the Committee's and that the facts justify a stayed suspension as the penalty in this case. After considering the hearing record and the parties' briefs, the Board finds the Committee's penalty an inappropriate sanction for the Respondent's repeated misconduct. We vote to suspend the Respondent's License for five years, to stay the suspension for the last four years six months and to place the Respondent on probation during the stayed suspension period. The probation terms appear in the Appendix to this Determination.

Administrative Law Judge **JAMES F. HORAN** served as the Board's Administrative Officer.
FREDERICK C. STERN and ARNOLD MARSHALL, Esqs. represented the Respondent.
JUDE BREARTON MULVEY, Esq. represented the Petitioner.

COMMITTEE DETERMINATION ON CHARGES

Three BPMC Members, **MICHAEL GONZALEZ, R.P.A., Chair, STEVEN LAPIDUS, M.D. and DAVID T. LYON, M.D.**, comprised the Committee who conducted the hearing in this matter, pursuant to N.Y. Pub. Health Law §§ 230(7) & 230(10)(p) (McKinney's Supp. 1997), and who rendered the Determination which the Board now reviews. Administrative Law Judge **CHRISTINE C. TRASKOS** served as the Committee's Administrative Officer. The Committee sustained charges that the Respondent violated N. Y. Educ. Law §§ 6530(1), 6530(2), 6530(9)(a)(iii), 6530(20) & 6530(21) (McKinney's Supp. 1997), by committing misconduct under the following categories:

- obtaining a license fraudulently,
- practicing the profession fraudulently,
- being convicted for a crime in New York or another jurisdiction, and
- making or filing a false report.

The Committee dismissed a charge that the Respondent committed conduct that evidences moral unfitness in medical practice. The record revealed criminal convictions for the Respondent in New York, in 1972, for criminal possession of stolen property, and in 1990, in New Jersey, for possession of a firearm with a purpose to use it against another person and for knowing possession of a handgun without a permit. The record revealed further that the Respondent filed applications for Licensure in New York in 1978 and for employment at Woodhull Medical Center in 1984, in which he denied any past criminal convictions. The Committee concluded that the Respondent's misconduct resulted from poor judgement and found mitigating evidence to demonstrate that revoking the Respondent's License would be against the community's best interest. The Committee voted to suspend the Respondent's License for six months and stayed the entire suspension.

REVIEW HISTORY AND ISSUES

The Committee rendered their Determination on October 13, 1997. The Petitioner then commenced this proceeding on October 22, 1997, when the Board received the Notice requesting a

Review pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997). The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and reply brief and the Petitioner's brief and reply brief.

The Petitioner asks that the Board overturn the Committee, sustain the moral unfitness charge and revoke the Respondent's License. The Petitioner alleges that the Committee allowed the Respondent improperly to relitigate his criminal convictions, that the Respondent's false answers on applications and his criminal conduct demonstrates moral unfitness and that the Respondent's deceitful and criminal conduct warrants revocation.

The Respondent contends that the Board lacks the authority to "rehear" the case and superimpose our discretion over the Committee's judgement. The Respondent contends that the Committee's Determination recognizes the Respondent's fault and the interests of justice.

REVIEW BOARD DETERMINATION

All Board Members participated in this case and have considered the record and the parties' briefs in making our Determination. We sustain the Committee's Determination on the charges and we overturn the Committee's Determination on the penalty.

As to the Petitioner's challenge to the determination to dismiss the moral unfitness charge, we note first that the charge involves "conduct in medical practice". We, therefore, reject the Petitioner's contention that the Respondent's criminal conduct provides a basis for sustaining the charge. The Respondent's criminal activity occurred separately from his professional practice. Next, we reject the Petitioner's assertion that, in reviewing the charge, we must focus only on the conduct and ignore the person. The Committee dismissed the charge upon finding that the Respondent's false applications resulted from bad judgement rather than inherent dishonesty and upon finding mitigating factors that showed the Respondent to be morally fit to practice as a Physician's Assistant. We find the Committee acted appropriately in making that judgement.

The Respondent's brief asserted erroneously that the Board lacks the authority to substitute our judgement for the Committee's. The Board's statutory authority, to determine whether the

Committee rendered an appropriate penalty, permits the Board to remedy a Committee penalty we find inappropriate, by substituting our judgement for the Committee's, Matter of Kabnick v. Chassin, 89 NY 2d 828, 652 NYS2d 722 (1996); Matter of Bogdan v. Med. Conduct Bd. 195 AD2d 86, 606 NYS2d 381 (Third Dept. 1993). We exercise that authority in this case, because we find that the Committee's penalty inconsistent with findings that demonstrate that the Respondent committed misconduct repeatedly. Such repeated misconduct warrants a severe sanction and we find the Committee's stayed suspension to constitute no real sanction against the Respondent.

We reject the Petitioner's request that we revoke the Respondent's License, because we find mitigating circumstances in the record. The Respondent's 1972 criminal conviction occurred during the Respondent's youth. He spent time in prison for that offense and he corrected his life's path following the conviction. Although the Board finds the Respondent's 1990 criminal conviction deeply troubling, the Respondent served a long prison sentence for that conduct, the Respondent has committed no other misconduct since and he has shown great dedication to his family in the years since that conduct. Also, we have also rejected revocation previously as a penalty for criminal conduct, when we found sufficient mitigating circumstances and when the conduct occurred separately from professional practice, Matter of Pirodsky (ARB 92-59B). The Respondent's false applications standing alone could warrant revocation as a penalty, Matter of Jadoo v. DeBuono, 235 AD2d 644, 651 NYS2d 738 (Third Dept. 1997), although revocation can constitute too severe a sanction, when the record reveals certain mitigating factors, Matter of Sarfo v. DeBuono, ___ AD2d ___, 652 NYS2d 852 (Third Dept. 1997). In Sarfo, the case involved a physician who filed an employment application that failed to disclose his preclusion from Medicaid. After the Board revoked his License, the Appellate Division for the Third Department overturned the sanction and remanded for a new penalty, upon finding that the Respondent subsequently contacted the potential employer and informed them about his Medicaid exclusion. In this case, the Committee found that the Respondent disclosed his past lies to the State Education Department and that the disclosure triggered this proceeding (see Committee Determination, page 12).

Despite the mitigating evidence for each offense, the Board finds that the Respondent's repeated misconduct, especially the fraudulent applications, warrants an actual period on suspension,

with a long term on probation to follow. We vote to suspend the Respondent's License for five years, we stay the suspension for the last four years and six months and we place the Respondent on probation for the four years and six months following the actual suspension. The probation terms appear in the Appendix to this Determination. Although we voted unanimously to reject revocation as a penalty, we came to that decision only after long discussions over two separate deliberation days. The Respondent should be aware that he came desperately close to losing his License.

ORDER

NOW, based upon this Determination, the Review Board renders the following **ORDER**:

1. The Board **SUSTAINS** the Committee's Determination the Respondent committed professional misconduct.
2. The Board **OVERTURNS** the Committee's Determination suspending the Respondent from practice for six months and staying the suspension.
3. The Board **SUSPENDS** the Respondent from practice for five years and we **STAY** that suspension for all but six months.
4. The Board **PLACES THE RESPONDENT ON PROBATION** for four years and six months, to commence following the actual six month suspension, under the Probation Terms that we enumerate in the Appendix to this Determination.

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

APPENDIX

Terms of Probation

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.
2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), Corning Tower Building, 4th Floor, Empire State Plaza, Albany, New York 12237; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
4. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.

5. Respondent's professional performance may be reviewed by the Director of OPMC. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with Respondent and his staff at practice locations or OPMC offices.

6. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations regarding controlled substances.

7. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he or she is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.

IN THE MATTER OF KEITH HOWARD, R.P.A.

WILLIAM A. STEWART, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Mr. Howard.

DATED: Syracuse, New York

29 Dec, 1997



WILLIAM A. STEWART, M.D.

IN THE MATTER OF KEITH HOWARD, R.P.A.

WINSTON S. PRICE, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Mr. Howard.

DATED: Brooklyn, New York

12/28, 1997



WINSTON S. PRICE, M.D.

IN THE MATTER OF KEITH HOWARD, R.P.A.

EDWARD C. SINNOTT, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Mr. Howard.

DATED: Roslyn, New York

Dec 27, 1997



EDWARD C. SINNOTT, M.D.