



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 19, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Karen E. Carlson, Esq.
NYS Department of Health
Corning Tower - Room 2438
Empire State Plaza
Albany, New York 12237

Douglas E. Rowe, Esq.
1000 Reynolds Arcade Building
16 East Main Street
Rochester, New York 14614

Murli Agrawal, M.D.
51 East Main Street
Hornell, New York 14843

RE: In the Matter of Murli Agrawal, M.D.

Dear Ms. Carlson, Mr. Rowe and Dr. Agrawal:

Enclosed please find the Determination and Order (No.96-190) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

A handwritten signature in black ink that reads "Tyrone T. Butler". The signature is written in a cursive style with a large initial "T" and a long, sweeping underline.

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH
ADMINISTRATIVE REVIEW BOARD FOR
PROFESSIONAL MEDICAL CONDUCT

COPY

IN THE MATTER

OF

MURLI AGRAWAL, M.D.

Administrative Review from a Determination by a Hearing
Committee on Professional Medical Conduct

ADMINISTRATIVE
REVIEW BOARD
DETERMINATION
ARB NO. 96-190

The New York State Department of Health (Petitioner) requests pursuant to New York Public Health Law (PUB.H.L.) §230-c(4)(a) (McKinney's Supp 1996), that the Administrative Review Board for Professional Medical Conduct (Board) review and modify an August 20, 1996 Determination by a Hearing Committee on Professional Medical Conduct (Committee), which found that the Respondent Murli Agrawal, M.D. (Respondent) practiced medicine with negligence on more than one occasion and which placed the Respondent's New York Medical license on one year's probation. The Petitioner asks that the Board add a practice monitor or examining room chaperon, as a condition to the probation. After reviewing the record in this case and conducting Deliberations on October 18, 1996, Board Members **ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D.,¹ EDWARD C. SINNOTT, M.D.** and **WILLIAM A. STEWART, M.D.** vote to sustain the Committee's Determination that the Respondent practiced with incompetence on more than one occasion, in treating two patients. The Board votes three to two to sustain the Committee's Determination to place the Respondent's New York medical license on probation for one year.

Administrative Law Judge **JAMES F. HORAN** served as the Board's Administrative Officer and drafted this Determination.

DOUGLAS E. ROWE, ESQ. represented the Respondent.

KAREN EILEEN CARLSON, ESQ. (Assistant Counsel, NYS Department of Health) represented the Petitioner.

¹ Dr. Price participated in the deliberations by telephone.

COMMITTEE DETERMINATION ON THE CHARGES

PUB.H.L. §230(7) authorizes three member panels from the State Board for Professional Medical Conduct (BPMC) to conduct disciplinary proceedings to determine whether physicians have committed professional misconduct in violation of New York Education Law (EDUC.L.) §6530 (McKinney Supp. 1996). The Petitioner filed charges with BPMC alleging that the Respondent :

- practiced medicine with moral unfitness, in violation of EDUC.L. § 6530(20);
- willfully abused a patient, in violation of EDUC.L. § 6530(31);
- practiced medicine with incompetence on more than one occasion, in violation of EDUC. L. § 6530(5); and,
- failed to maintain accurate medical records, in violation of EDUC. L. § 6530(32).

The charges arose from the treatment which the Respondent provided to two patients, whom the record refers to as Patients A and B, to protect their privacy. The charges alleged that, while providing medical care to Patients A and B, the Respondent had touched both Patients' breasts without medical justification and in a manner that failed to conform to acceptable medical standards.

Three BPMC Members, **Steven V. Grabiec, M.D. (Chair), William W. Faloon, M.D.** and **Trena DeFranco** comprised the Committee who conducted the hearing in the matter and who rendered the Determination which the Board now reviews. Administrative Law Judge Jeffrey Armon served as the Committee's Administrative Officer. The Committee determined that the Respondent practiced with incompetence on more than one occasion in treating Patients A and B, but the Committee sustained no other charges. The Committee found medical justification for the Respondent to perform breast examinations on both Patients A and B, during brief examinations. The Committee found, however, that the Respondent's examination, a brief touching in both cases, failed to conform to the proper medical procedure for conducting breast examinations. The Committee found no sexual motivation in the Respondent's conduct, because the Respondent contact with the Patients' breasts was short in duration. The Committee also found no intent by the Respondent to abuse the Patients. In reaching their findings, the Committee relied on factual testimony from Patients A and B, and from Patient A's daughter, who accompanied her mother to the examination in question in that case. The

Committee relied on testimony from both parties' expert witnesses in reaching their conclusion that medical justification existed for the Respondent to perform breast examinations on both Patients. The Committee found that the Respondent lacked credibility, when he testified that he did not perform a breast examination on Patient A and did not unhook Patient A's brassiere.

The Committee concluded that the Respondent demonstrated that he lacked skill or knowledge necessary to practice medicine, because he lacked proper technique to perform breast examinations. The Committee found that such technique includes preparing patients adequately for what would occur in the examining room. The Committee found that the Respondent's failure to inform the Patients that he was about to perform a breast examination contributed to the Patients' perceptions that the Respondent performed the examinations improperly. The Committee concluded that the failure to communicate, coupled with the inadequate examination, constituted incompetent practice.

The Committee voted to suspend the Respondent's New York Medical License for one year, to stay the suspension and to place the Respondent on probation for one year. The probation requires that the Respondent complete successfully a course in the proper technique for performing breast examinations. The Committee provided that the course shall address psycho-social issues relating to conducting such examinations, including preparing and communicating with patients before and during the examinations. The Committee stated that an improvement in the Respondent's communication skills and in his awareness about patient perceptions would eliminate the inadequacies that the Respondent demonstrated when he treated Patients A and B. The Committee rejected requiring that a chaperon be present when the Respondent examines females, because the Committee concluded that the Respondent's misconduct resulted from incompetence rather than sexual gratification.

REVIEW HISTORY AND ISSUES

The Petitioner filed a Notice requesting this review, which the Board received on August 28, 1996. Pursuant to PUB.H.L. §230-c(4)(a), the Notice stayed the Committee's penalty automatically, pending this Determination from the Board. The Record for review contained the Committee's Determination, the hearing transcripts and exhibits, the Petitioner's brief, the Respondent's brief and

the Respondent's reply brief . The Board received the Petitioner's brief on September 30, 1996, the Respondent's brief on October 8, 1996 and the Respondent's reply brief on October 8, 1996.

The Petitioner's review brief focuses on the Committee's Determination to exclude a monitor or chaperon from the terms for the Respondent's probation. The Petitioner characterizes the Committee's penalty as woefully short for rectifying the Respondent's misconduct, because the penalty would fail to prevent similar misconduct during the probation period. The Petitioner argues that the Respondent will be unable to improve his insensitive technique or poor bedside manner overnight, if at all. The Petitioner asks that the Board modify the Probation terms, to include a requirement for a chaperon or a monitor, to ensure that female patients will receive clear, concise medical treatment from the Respondent.

The Respondent argues that the Committee's penalty is appropriate, because the penalty will allow the Respondent to continue in practice while he completes the course that will enable him to develop the sensitivity, that the Committee found the Respondent to lack. The Respondent requests that the Board leave the Committee's Determination undisturbed.

THE BOARD'S REVIEW AUTHORITY

New York Public Health Law (PHL) §230(10)(i), §230-c(1) and §230-c(4)(b) provide that the Review Board shall review:

- whether or not a hearing committee determination and penalty are consistent with the hearing committee's findings of fact and conclusions of law; and
- whether or not the penalty is appropriate and within the scope of penalties permitted by PHL §230-a.

Public Health Law §230-c(4)(b) permits the Review Board to remand a case to the Hearing Committee for further consideration. Public Health Law §230-c(4)(c) provides that the Review Board's Determinations shall be based upon a majority concurrence of the Review Board.

The Review Board may substitute our judgement for that of the Hearing Committee, in deciding upon a penalty Matter of Bogdan 195 AD 2d 86, 606 NYS 2d 381 (Third Dept. 1993), in determining guilt on the charges, Matter of Spartalis 205 AD 2d 940, 613 NYS 2d 759 (Third Dept.

1994), and on issues of credibility Matter of Minielly __AD 2d __, 634 NYS 2d 856, 1995 N.Y. App. Div. LEXIS 12692 (Third Dept. 1995).

THE BOARD'S DETERMINATION

The Board has considered the record below and the parties' briefs. The Board sustains the Committee's Determination that the Respondent practiced with incompetence on more than one occasion, when he performed inadequate breast examinations on Patients A and B, and when he failed to prepare and communicate with the Patients prior to and during the examinations. The Board votes four to one to sustain the Committee's Determination that the Respondent committed no other misconduct in treating Patients A and B. The majority agrees with the Committee that the evidence demonstrates that the Respondent's actions resulted from poor technique and communication skills rather than sexual misconduct. The Board Member who dissents from that vote would find the Respondent guilty for willful harassment and moral unfitness. The dissenting Member bases his conclusion on the testimony by the Patients and on the Committee's Determination that the Respondent lacked credibility as a witness.

The Board votes three to two to sustain the Committee's Determination to suspend the Respondent's license, stay the suspension and place the Respondent on probation, without a chaperon or monitor. The majority have concluded that the Respondent's conduct resulted from incompetence rather than sexual misconduct. The majority can see no function that a chaperon would play in improving the Respondent's technique or communications skills. Further, the majority sees no purpose for a practice monitor. A practice monitor usually reviews medical records and consults with a probationer on a regular basis, such as once every three months. A monitor would have no idea from records or consultation, whether the Respondent has improved his technique or skills. The majority finds that the Committee's probation penalty will address the Respondent's needs appropriately. One dissenting member would sustain the penalty otherwise, but would include a practice monitor as a probation condition. The other dissenting member, who voted to find the Respondent guilty for additional misconduct, would revoke the Respondent's New York Medical License.

ORDER

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

1. The Board **SUSTAINS** the Hearing Committee's August 20, 1996 Determination finding the Respondent guilty for professional misconduct.

2. By a three to two vote, the Board **SUSTAINS** the Hearing Committee's penalty suspending the Respondent's license, staying the suspension and placing the Respondent's license to practice medicine in New York State on one year's probation.

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

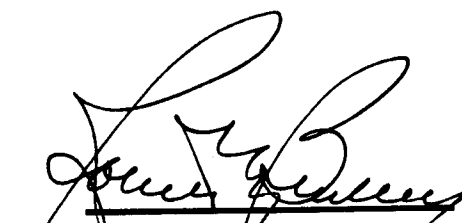
WILLIAM A. STEWART, M.D.

IN THE MATTER OF MURLI AGRAWAL, M.D.

ROBERT M. BRIBER, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Agrawal.

DATED: Schenectady, New York

11/20, 1996



ROBERT M. BRIBER

IN THE MATTER OF MERLI AGRAWAL, M.D.

SUMNER SHAPIRO, a member of the Administrative Review Board for Professional Medical
Conduct, concurs in the Determination and Order in the Matter of Dr. Agrawal.

DATED: Delmar, New York

Nov. 19, 1996

A handwritten signature in cursive script, appearing to read "Sumner Shapiro", written over a horizontal line.

SUMNER SHAPIRO

IN THE MATTER OF MURLI AGRAWAL, M.D.

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 Dr. Agrawal

DATED: Roslyn, New York

Nov 19, 1996



EDWARD C. SINNOTT, M.D.

IN THE MATTER OF MURLI AGRAWAL, M.D.

WILLIAM A. STEWART, M.D., a member of the Administrative Review Board for Professional Medical Conduct, affirms that he took part in the Deliberations in the Matter of Dr. Agrawal, and that this Determination reflects the decision by the Board's majority in this case.

DATED: Syracuse, New York

20 Nov, 1996

A handwritten signature in cursive script that reads "William A. Stewart". The signature is written in black ink and is positioned above the printed name.

WILLIAM A. STEWART, M.D.