



STATE OF NEW YORK DEPARTMENT OF HEALTH

K. Lammie

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Mark R. Chassin, M.D., M.P.P., M.P.H.
Commissioner

August 11, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Dennis T. Bernstein, Esq.
Apicella, Bernstein & Milano
111 Lake Avenue
P.O. Box 269
Tuckahoe, New York 10707

Jeffrey H. Rudell, M.D.
65 East 96th Street
New York, New York 10128

Paul Stein, Esq.
New York State Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza - Sixth Floor
New York, New York 10001-1810

RE: In the Matter of Jeffrey Holmes Rudell, M.D.

Dear Mr. Bernstein, Dr. Rudell and Mr Stein:

Enclosed please find the Determination and Order (No. BPMC-92-40-A) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

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 than 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)].

Very truly yours,

Tyrone T. Butler, nam

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nam
Enclosure

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

-----X
IN THE MATTER : ADMINISTRATIVE
OF : REVIEW BOARD
JEFFREY HOLMES RUDELL, M.D. : DETERMINATION
AND
ORDER
-----X ORDER NO. BPMC-92-40-A

A quorum of the Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of Robert M. Briber, Maryclaire B. Sherwin, Edward C. Sinnott, M.D. and William A. Stewart, M.D.¹ held deliberations on July 8, 1992 to review the Professional Medical Conduct Hearing Committee's (hereinafter the "Hearing Committee") May 19, 1992 Determination revoking Dr. Jeffrey Holmes Rudell's license to practice medicine in New York State. Dr. Rudell requested the review through a Notice of Appeal received on May 28, 1992. James F. Horan, Esq., served as Administrative Officer to the Review Board. Dennis T. Bernstein, Esq. submitted a brief on behalf of Dr. Rudell and Paul Stein, Esq. submitted a reply brief on behalf of the Department of Health.

¹ At the time at which the Administrative Review Board met to deliberate this case, the New York State Senate had confirmed only four members of the five-member Administrative Review Board that was created pursuant to Chapter 606 of the Laws of 1991.

SCOPE OF REVIEW

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.

PHL §230-c(4)(b) permits the Review Board to remand a case to the hearing committee for further consideration.

PHL §230-c(4)(c) provides that the Review Board's determinations shall be based upon a majority concurrence of the Review Board.

HEARING COMMITTEE DETERMINATION

The Department of Health charged the Respondent in two specifications with practicing medicine fraudulently, in one specification with engaging in conduct which evidences moral unfitness to practice medicine and in one specification with

willfully abusing a patient.

The Hearing Committee sustained the charges of moral unfitness, willfully abusing a patient and the first charge of fraudulently practicing medicine based upon their findings in relation to the Respondent's conduct on March 28, 1991 toward a patient hereinafter designated as Patient A. The Hearing Committee found that the Respondent's conduct toward Patient A did not constitute or resemble a medically accepted examination or treatment, and that instead, the Respondent's conduct was sexual in nature, deliberate and intentional, and was verbally and physically abusive to the patient.

The Hearing Committee sustained the second charge of fraudulently practicing the profession based on their finding that the Respondent deliberately misstated the reasons why he was terminated from a prior fellowship on an application for appointment to the medical staff of St. Clare's Hospital in New York City in May 1985.

The Hearing Committee voted unanimously to revoke Dr.

Rudell's license to practice medicine in New York State.

THE ISSUES FOR REVIEW

The Respondent's brief presents nine questions in challenging the Hearing Committee's Determination and Order.

1. Is the Determination and Order defective due to the failure of the Hearing Committee to state its reasons for imposing the penalty of revocation?
2. Is the Determination and Order defective due to the failure of the Hearing Committee to specifically rule on each of the proposed findings of fact submitted by the licensee?
3. Does the failure of the Department of Health to adopt rules governing the amended procedures on hearings and appeals and to prepare a summary of such procedures invalidate the proceedings conducted under the amended procedures?
4. Should any of the specifications be dismissed based upon any of the grounds set forth in the licensee's prehearing motion seeking dismissal of the Specification of Charges?
5. Was it proper to allow evidence of the taped telephone conversation?
6. Should the licensee have been given the opportunity to be heard on mitigation of penalty after the findings of guilt but before the imposition of the penalty?
7. Should the licensee's prehearing motion seeking the recusal of the Chairman of the Hearing Committee have been granted?
8. Is the determination of the Hearing Committee supported by substantial evidence?
9. Is the imposition of the penalty of revocation inappropriate?

REVIEW BOARD DETERMINATION

At the outset, the Review Board notes that the issues raised by the Respondent in Questions 2, 3, 4, 5 and 7, above, are legal or procedural issues which are beyond the Review Board's jurisdiction as noted under the Scope of Review section of this Determination.

Hearing Committee Determination and Order

Under Issue 8 in his Brief, the Respondent questions whether the Hearing Committee's Determination and Order is supported by substantial evidence. The Review Board believes that the Hearing Committee's Determination and Order is supported by substantial evidence and is consistent with the Hearing Committee's findings of fact and conclusions of law. The Review Board votes unanimously to sustain the Hearing Committee's Determination and Order, **except** that we sustain the finding as to Specification A3 only to the extent noted below.

The testimony by Patient A, corroborated by the taped telephone conversation between Patient A and the Respondent,

provided the Hearing Committee with sufficient evidence to find the Respondent guilty of willfully abusing a patient, moral unfitness to practice medicine and one charge of fraudulently practicing medicine.

As to the Hearing Committee's Determination and Order on Specification A3, it is the Review Board's understanding that the Hearing Committee sustained Specification A3 to the extent that the Hearing Committee found that the Respondent moved his finger in and out of Patient A's vagina in a sexual manner. The Hearing Committee did not sustain the portion of Specification A3 that specified that the Respondent's finger was ungloved. Based upon that understanding, the Review Board sustains the Hearing Committee's Determination on that Specification.

On the second charge of fraudulently practicing medicine, relating to the application for privileges at St. Clare's, the Review Board finds that the testimony of Dr. Cortell and Respondent's Exhibit 3 provided the Hearing Committee with sufficient evidence to find the Respondent guilty on that charge.

Penalty

The Respondent questions under his Issue 1 whether the Hearing Committee's penalty is defective due to the Hearing Committee's failure to state the reasons for invoking the penalty.

By a vote of 3 to 1, the Review Board finds that the penalty of revocation is consistent with the Hearing Committee's findings of fact and conclusions of law. Specifically, the three member majority finds that the following conclusions concerning Patient A, which the Committee set out on Page 10 of its Determination and Order, are sufficient reasons to impose the penalty of revocation:

"The Hearing Committee further concludes that the Respondent's conduct toward Patient A on March 28, 1991, did not constitute or even resemble any medically accepted examination or treatment for rectal bleeding or for any other medical complaint expressed by Patient A.

The Respondent's conduct toward Patient A was sexual in nature, it was deliberate and intentional, and it was verbally and physically abusive to the patient.

By failing to inform Patient A that he was ceasing medical evaluation and treatment and commencing a sexually abusive series of acts, the Respondent intentionally and knowingly concealed from Patient A the true nature of his acts, intending that she continue to submit to intimate physical conduct under the false belief that medical care was being rendered."

The fourth member of the Review Board votes to remand the Penalty portion of the Hearing Committee's Determination and Order so that the Hearing Committee may set out its reasons for imposing this penalty within the Penalty section of the Determination and Order.

The Respondent's Issue 9 questions whether the penalty is appropriate. By a vote of 4-0, the Review Board finds that the penalty of revocation is appropriate in this case in which a physician has been found guilty of sexually abusing a patient, and, by the same vote, the Review Board finds that the penalty is within the scope of penalties permitted under Public Health Law §230-a.

The Respondent's Issue 6 questions whether the Respondent should have had an opportunity to be heard on mitigation of penalty after the findings of guilt. The Review Board notes that Hearing Committees do not conduct a separate penalty phase at the end of their hearings. The Respondent had the opportunity to present evidence on mitigation at the hearing,

such as introducing the character witness Dr. Hyman. The Administrative Officer also allowed certain questioning by the Respondent's counsel on grounds that the evidence might be relevant to mitigation. The Respondent's Counsel had an opportunity to argue mitigation during his summation and in proposed findings of fact and conclusions of law. The Department's attorney used his summation (T. 1214) and his proposed findings of fact to argue for the penalty of revocation.

Finally, in his brief to the Review Board, the Respondent argues on mitigation on pages 40-42 in asking the Review Board for a lesser penalty. In view of the Review Board's Determination sustaining the finding that the Respondent abused a patient sexually, the Review Board does not believe that any mitigation is possible. The appropriate remedy in a case such as this is revocation.

ORDER

NOW, based upon this Determination, the Review Board

issues the following Order:

1. The May 19, 1992 Determination by the Hearing Committee on Professional Medical Conduct is hereby sustained, except that the Hearing Committee's findings as to Specification A3 are sustained as noted above.
2. The Hearing Committee's Determination revoking the license of Jeffrey Holmes Rudell, M.D. to practice medicine in the State of New York is sustained.

ROBERT M. BRIBER
MARYCLAIRE B. SHERWIN
EDWARD C. SINNOTT, M.D.
WILLIAM A. STEWART, M.D.

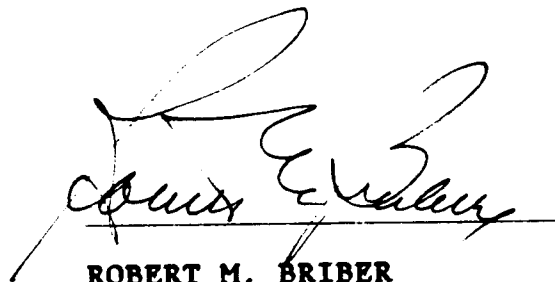
IN THE MATTER OF JEFFREY HOLMES RUDELL, M.D.

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. Rudell.

DATED: Albany, New York

~~July~~ _____, 1992

August 6

A handwritten signature in cursive script, appearing to read "Robert M. Briber", written over a horizontal line.

ROBERT M. BRIBER

IN THE MATTER OF JEFFREY HOLMES RUDELL, M.D.

MARYCLAIRE B. SHERWIN, a member of the Administrative Review Board for Professional Medical Conduct concurs in the Determination and Order in the matter of Dr. Rudell.

DATED: Malone, New York

July 21, 1992



MARYCLAIRE B. SHERWIN

IN THE MATTER OF JEFFREY HOLMES RUDELL, M.D.

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 Dr. Rudell.

DATED: Syracuse, New York

July 24, 1992

A handwritten signature in cursive script that reads "William A. Stewart".

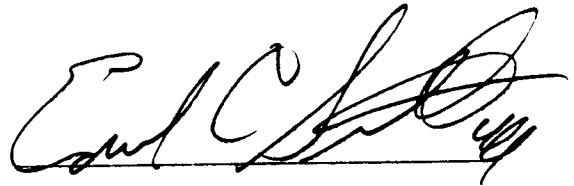
WILLIAM A. STEWART, M.D.

IN THE MATTER OF JEFFREY HOLMES RUDELL, 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. Rudell.

DATED: Roslyn, New York

~~July~~ 4, 1992

A handwritten signature in cursive script, appearing to read "Edward C. Sinnott", written over a horizontal line.

EDWARD C. SINNOTT, M.D.