



STATE OF NEW YORK  
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*

February 25, 2000

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Phillip F. Waterman, II, M.D.  
904 Robala Drive  
Cape Coral, Florida 33919

Phillip F. Waterman, II, M.D.  
650 Del Prado Avenue  
Fort Meyers, Florida 33919

Paul R. Maher, Esq.  
NYS Department of Health  
433 River Street – Fourth Floor  
Troy, New York 12180

Bruce D. Lamb, Esq.  
Burton & Lamb  
201 East Kennedy Boulevard  
Tenth Floor  
Tampa, Florida 33602

RECEIVED  
Physician Monitoring

FEB 29 2000

Office of Professional  
Medical Conduct

**RE: In the Matter of Phillip F. Waterman, II, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 99-279) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,



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**

**Phillip F. Waterman, MD. (Respondent)**

**Administrative Review Board (ARB)**

**A proceeding to review a Determination by a  
Committee (Committee) from the Board for  
Professional Medical Conduct (BPMC)**

**Determination and Order No. 99-279**

**Before ARB Members Grossman, Lynch, Shapiro, Price and Briber  
Administrative Law Judge James F. Horan drafted the Determination**

**For the Department of Health (Petitioner):  
For the Respondent:**

**Paul R. Maher, Esq.  
Bruce D. Lamb, Esq.**

In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 1999-2000), we consider whether to impose a sanction against the Respondent's New York Medical License, following a sister state's (Florida) determination disciplining the Respondent for record keeping violations. After a hearing below, a BPMC Committee voted against imposing any penalty, due to mitigating factors in the case. The Petitioner now asks the ARB to modify that Determination and censure and reprimand the Respondent. The Respondent asks that the ARB consider whether the record keeping violations actually constituted misconduct under New York Law. After considering the record and the briefs from the parties, we affirm the Committee Determination sustaining the misconduct charge and imposing no penalty. We hold that the Respondent received an appropriate sanction for his misconduct from the penalty against him in the Florida proceeding.

### Committee Determination on the Charges

In the Amended Statement of Charges in this proceeding, the Petitioner alleged that the Respondent violated N. Y. Educ. Law §§ 6530(9)(d) (McKinney Supp. 1999) by committing professional misconduct, because:

- the duly authorized professional disciplinary agency from a sister state, Florida, took action against the Respondent's License in that state, for,
- conduct that would constitute professional misconduct, if the Respondent had committed such conduct in New York.

The Florida action resulted from a Consent Agreement that the Respondent entered into with the Florida Board of Medicine (Florida Board). The Petitioner contended that the Respondent's misconduct in Florida would constitute misconduct if committed in New York, under the following categories:

- practicing medicine with negligence on more than one occasion, a violation under N. Y. Educ. Law § 6530(3)(McKinney Supp. 1999-2000);
- practicing medicine with gross negligence, a violation under N. Y. Educ. Law §6530(4)(McKinney Supp. 1999-2000);
- practicing medicine with incompetence on more than one occasion, a violation under N. Y. Educ. Law § 6530(5)(McKinney Supp. 1999-2000);
- practicing medicine with gross incompetence, a violation under N. Y. Educ. Law § 6530(6)(McKinney Supp. 1999-2000);
- performing professional services without authorization, a violation under N. Y. Educ. Law § 6530(26) (McKinney Supp. 1999-2000); and,
- failing to maintain accurate records, a violation under N. Y. Educ. Law § 6530(32) (McKinney Supp. 1999-2000) .

An expedited hearing (Direct Referral Proceeding) ensued pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney Supp. 1999-2000), before a BPMC Committee, who rendered the

Determination which the ARB now reviews. In such a Direct Referral Proceeding, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The Committee found that the Florida Board began an action against the Respondent's Florida License, charging misconduct in the Respondent's treatment for an Obstetrics patient. The Respondent and the Florida Board settled that action through the Florida Consent Agreement, in which the Respondent neither admitted nor denied that the allegations in the Administrative Complaint. Through the Consent Agreement, the Respondent agreed to accept the following penalty:

- a Letter of Concern from the Florida Board,
- an Order that the Respondent spend three days with a Perinatologist, observing technique and treatment of fetus and maternal patients in early gestational stages;
- twenty hours continuing medical education (CME) in pre-natal risks, and,
- a Six Thousand Dollar (\$6,000.00) Fine.

The Respondent did admit that the facts alleged in the Administrative Complaint would, if proved, constitute violations of Chapter 458, Florida Statutes.

The Committee determined that the Florida Consent Agreement constituted a disciplinary action by a sister state. They then discussed whether they could make a determination that the Respondent's conduct in Florida would constitute misconduct in New York, without any admissions by the Respondent to the Florida charges in the Consent Agreement. The Committee held that they could make such a determination, because the Respondent waived an adjudication in Florida by entering into a stipulation of settlement. The Committee held that the Consent Agreement, that included a penalty, raised the inference that the allegations against the Respondent held some validity, Matter of Hatfield v. Dept. of Health, 245 A.D.2d 703, 665

N.Y.S.2d 755 (Third Dept. 1997). The Committee determined further that the Respondent's Florida conduct would amount to failing to maintain accurate records if the Respondent had committed such conduct in New York.

The Committee voted to impose no penalty against the Respondent. The Committee concluded that the Florida conduct occurred in 1992 and involved only a single patient. The Committee also noted that the Respondent gave up practicing Obstetrics and limited his practice to gynecology in 1994, that the Respondent complied with the educational provisions in the Florida Agreement, that he will comply with the fine payment terms within the applicable time limits and that no other blemish appears on the Respondent's record other than the case at issue.

#### **Review History and Issues**

The Committee rendered their Determination on November 10, 1999. This proceeding commenced on November 18, 1999, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and the Respondent's response brief. The record closed when the ARB received the response brief on December 21, 1999.

The Petitioner argues that the ARB should impose an appropriate penalty to ensure that the Respondent recognizes fully the misconduct he has committed. The Petitioner contends that the ARB would meet our responsibility to protect the public by ordering a censure and reprimand in this case. In response, the Respondent calls our attention to the differing standards between New York and Florida over which record keeping violations constitute misconduct. The Respondent also argues that the Committee acted within their authority under N. Y. Pub. Health Law § 230-a (McKinney Supp. 1999-2000), by imposing no penalty against the Respondent.

### Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent's conduct in Florida would amount to failing to maintain accurate records. We also affirm the Committee's Determination to impose no penalty in this case.

**Record Keeping Charge:** The Respondent argued that the standards for record keeping violations differed between New York and Florida, thus raising the question whether the Respondent's Florida conduct would amount to misconduct under New York Law. The Respondent's brief (page 2) states that Florida may discipline a physician for failing to keep written medical records justifying the course of treatment of the patient. Respondent's counsel pointed out at hearing that the New York standard provides for discipline for failure to maintain an accurate record. He argued that nothing in the Florida Administrative Complaint mentioned inaccurate records [Hearing Transcript page 32].

Under N. Y. Educ. Law § 6530 (32)(McKinney Supp. 1999-2000) professional misconduct includes failing to maintain a record for each patient that accurately reflects the evaluation and treatment of the patient. The New York Courts have ruled that a record fails to reflect evaluation and treatment accurately, if the record fails to convey objectively meaningful medical information concerning the patient treated to other physicians, Bogdan v. N.Y.S. Bd. For Prof. Med. Cond., 195 A.D.2d 86, 606 N.Y.S.2d 381 (Third Dept. 1993). The Florida Administrative Complaint alleged that the Respondent failed to record notes documenting genetic counseling and failed to obtain a signed consent for amniocentesis [Petitioner Exhibit 1, Florida Administrative Complaint page 4]. The Committee held that by entering that Florida Consent Agreement, the Respondent raised the inference that the allegations against him held some validity, Matter of Hatfield v. Dept. of Health, (supra).

We hold that the Florida charges and the inference, that the Respondent's stipulation raised, produced evidence sufficient to prove that the Respondent prepared an incomplete record for the patient at issue. That incomplete record would fail to convey objectively meaningful information about that patient's condition to a subsequent treating physician. We hold this sufficient to prove that the Respondent's conduct, for which Florida disciplined him, would constitute failure to maintain a record that accurately reflected the evaluation and treatment for that patient under New York Law.

**Penalty:** The Petitioner argued that the Committee's determination to impose no penalty in this case failed to ensure the Respondent's awareness about his inappropriate conduct. We disagree. The Respondent has already completed CME and observation under the Florida penalty and will complete paying a Six Thousand Dollar Fine (\$6000.00). In addition, to defend the New York action, the Respondent undertook the expenses to engage counsel and to travel to New York for the hearing. We hold that these actions by the Respondent have ensured his awareness about his conduct.

The ARB also disagrees with the Petitioner's assertion that the public's protection requires any additional sanction. An appropriate penalty for record keeping deficiencies would include some retraining. The Respondent has already completed CME and observation in Florida. This incident also constituted the only misconduct in this Respondent's career and the Respondent has ceased practicing Obstetrics. We see no useful purpose to any further sanction against the Respondent.



**ORDER**

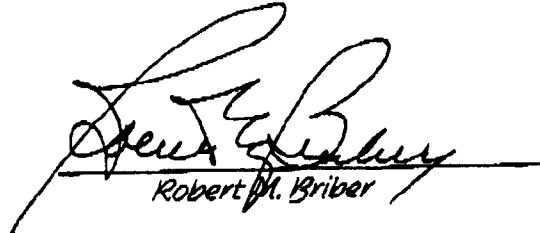
**NOW**, with this Determination as our basis, the ARB renders the following **ORDER**:

1. The ARB **AFFIRMS** the Committee's Determination that the Respondent committed professional misconduct.
  
2. The ARB the **AFFIRMS** Committee's Determination to impose no sanction against the Respondent.

**Robert M. Briber  
Sumner Shapiro  
Winston S. Price, M.D.  
Stanley L. Grossman, M.D.  
Therese G. Lynch, M.D.**

**In the Matter of Phillip H. Waterman, M.D.**

Robert M. Briber, an ARB Member, concurs in the Determination and Order  
in the Matter of Dr. Waterman.  
Dated: January 17, 2000

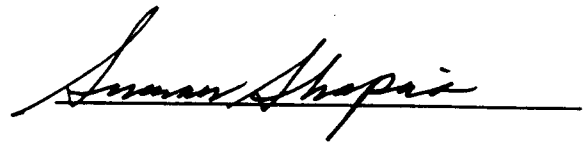


Robert M. Briber

**In the Matter of Phillip H. Waterman, M.D.**

**Sumner Shapiro**, an ARB Member concurs in the Determination and Order in the Matter  
of Dr. Waterman.

Dated: January 24, 2000

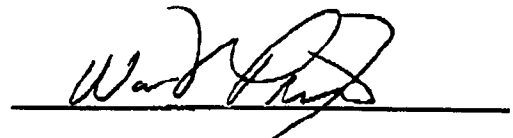
A handwritten signature in cursive script, reading "Sumner Shapiro", is written over a horizontal line.

**Sumner Shapiro**

**In the Matter of Phillip H. Waterman, M.D.**

**Winston S. Price, M.D.**, an ARB Member concurs in the Determination and Order in the Matter of Dr. Waterman.

Dated: 2/11, 2000

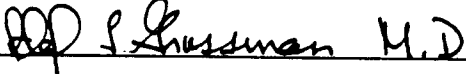
A handwritten signature in cursive script, appearing to read "Winston S. Price", is written over a horizontal line.

**Winston S. Price, M.D.**

**In the Matter of Phillip H. Waterman, M.D.**

**Stanley L. Grossman**, an ARB Member concurs in the Determination and Order in the Matter of Dr. Waterman.

Dated: February 18 2000

  
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**Stanley L. Grossman, M.D.**

**In the Matter of Phillip H. Waterman, M.D.**

**Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in  
the Matter of Dr. Waterman.**

Dated: Jan 19, 2000

A handwritten signature in cursive script that reads "Therese G. Lynch". The signature is written in black ink and is positioned above a horizontal line.

**Therese G. Lynch, M.D.**