



STATE OF NEW YORK DEPARTMENT OF HEALTH

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

Paula Wilson
Executive Deputy Commissioner

August 9, 1993

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

German Zhitlovsky, M.D.
1 James Court
Nanuet, New York 10954

Daniel Guenzburger, Esq.
NYS Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza - Sixth Floor
New York, New York 10001-1810

Irving O. Farber, Esq.
Meiselman, Farber, Packman
& Eberz, P.C.
118 North Bedford Road
Mt. Kisco, New York 10549

RE: In the Matter of German Zhitlovsky, M.D.

Dear Dr. Zhitlovsky, Mr. Farber and Mr. Guenzburger:

Enclosed please find the Determination and Order (No. ARB-93-50) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

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IN THE MATTER	:	<u>ADMINISTRATIVE</u>
	:	<u>REVIEW BOARD</u>
OF	:	<u>DETERMINATION</u>
	:	<u>AND ORDER</u>
GERMAN ZHITLOVSKY, M.D.	:	<u>ARB NO. 93-50</u>

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The Administrative Review Board for Professional Medical Conduct (Review Board), consisting of ROBERT M. BRIBER, MARYCLAIRE B. SHERWIN, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D. held deliberations on June 22, 1993 to review the Professional Medical Conduct Hearing Committee's (Committee) April 2, 1993 Determination finding Dr. German Zhitlovsky guilty of professional misconduct, suspending his license for at least six months and placing him on five years probation. Both the Respondent and the Office of Professional Medical Conduct (OPMC) requested the review through Notices which the Review Board received on April 12, 1993. James F. Horan served as Administrative Officer to the Review Board. Daniel Guenzburger, Esq. submitted a brief for OPMC on May 10, 1993. Irving O. Farber, Esq. submitted a letter on Dr. Zhitlovsky's behalf on June 1, 1993.

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.

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.

HEARING COMMITTEE DETERMINATION

The Office of Professional Medical Conduct charged the Respondent with committing professional misconduct by committing a crime in New York and committing an act which would constitute a crime in New York, with fraudulently obtaining his license, with willfully filing a false report, with habitual abuse of alcohol and with violating probation.

The Hearing Committee determined that the Respondent had been convicted of three Driving while intoxicated offenses in New York State, and had been convicted of Forgery in New Jersey. The Committee found that the Respondent had committed fraud in obtaining his New York license by concealing three convictions for

driving under the influence of alcohol. The Hearing Committee found that the Respondent had willfully submitted a false report by instructing his attorney to submit a forged letter to a New Jersey Court and by misrepresenting on his driver's license application that he had been convicted of a traffic related crime or offense. The Hearing Committee found that the Respondent had habitually abused alcohol from the time he received his New York license in 1982.

The Hearing Committee voted to suspend the Respondent's license for five years, with a minimum suspension of six months and the balance stayed. The Committee placed the Respondent on five years probation, to commence at the time he surrenders his license. The terms of probation are set out at pages 17-20 in the Hearing Committee's Determination. The terms include the requirements that the Respondent continue treatment, with a health care professional or in a treatment program approved by OPMC, and that the Respondent report to a sobriety monitor.

REQUESTS FOR REVIEW

The Office of Professional Medical Conduct has asked that the Review Board correct three portions of the Hearing Committee Determination. OPMC asks that the Review Board order a fixed period of suspension. OPMC asks that the Review Board amend the Hearing Committee Determination to provide that a violation of the probationary terms shall be subject to a violation proceeding. Finally, OPMC asks that the Review Board amend Probation Term 7 to

provide that OPMC has the authority to approve the Respondent's choice of a treatment program and any treating health care professional.

In his letter on behalf of Dr. Zhitlovsky, Mr. Farber raises seven points for review, challenging evidence used at the hearing (Points a-b), asserting that Dr. Zhitlovsky is not currently an alcohol abuser (Points c-d), and challenging the Hearing Committee's penalty (Points e-g).

REVIEW BOARD DETERMINATION

The Review Board has considered the entire record below and the briefs which counsel have submitted.

The Review Board finds that the issues which Mr. Farber raises in Points a and b in his letter on Dr. Zhitlovsky's behalf, challenging the hearing testimony by Dr. Griffin and the use of the Respondent's driver's license application as a basis for one of the charges against the Respondent, are procedural matters which are beyond the scope of review established for the Review Board by Public Health Law Section 230-c(4)(b).

The Review Board votes to sustain the Hearing Committee's Determination finding Dr. Zhitlovsky guilty of professional misconduct. The Hearing Committee's findings and conclusion are consistent with its Determination on all the charges, including the charge that the Respondent was a habitual alcohol abuser.

The Review Board votes to sustain the Hearing

Committee's Determination to suspend the Respondent's license and place the Respondent on five years probation, except that we amend the penalty in three areas.

1. We modify the wording of the penalty to clarify that the Respondent's license is suspended for five years, with all but six months stayed, and that the Respondent shall be on probation for five years, commencing with the surrender of his license. The wording of the Hearing Committee's penalty appeared to make the period of the actual suspension indefinite, which would be inappropriate under the provisions of Public Health Law Section 230-a.

2. For clarification, Probation Term 7, from page 19 of the Hearing Committee Determination, is modified to require that the Respondent continue in treatment, with either a health care professional approved by OPMC or in a treatment program approved by OPMC. The wording of that condition in the Hearing Committee Determination is not clear that the treating professional would require approval by OPMC.

3. Probation Term 12, on Hearing Committee Determination page 20, is amended to provide that the violation of any probation condition shall result in a probation violation proceeding conducted pursuant to Public Health Law Section 230(19). The term as written in the Hearing Committee's Determination does not reflect accurately the penalties which are available in a probation violation proceeding conducted under Public Health Law Section 230(19).

The Review Board believes that the Hearing Committee Penalty as amended is consistent with the Hearing Committee's findings and conclusions concerning the Respondent's misconduct and his alcohol abuse. The Respondent was serving an existing term of probation when he when he suffered a relapse in his mental attitude. The Committee noted that the Respondent's has complied previously in response to external pressure. The Committee's probationary terms are an attempt to continue exerting such pressure. The Committee also imposed a suspension as a penalty for the Respondent's past misconduct. The Review Board believes that this penalty is appropriate. The new probationary period will allow the Respondent to continue his recovery and remain in active practice.

ORDER

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

1. The Hearing Committee's April 2, 1993 Determination finding Dr. German Zhitlovsky guilty of professional misconduct is sustained."

2. The Hearing Committee's Determination to suspend the Respondent's license and place the Respondent on five years probation is sustained, except that it is modified in three places.

a. The Determination is modified to provide that the Respondent's licence shall be suspended for five years, with all

but six months suspended. The Respondent shall be on probation for five years as provided for in the Hearing Committee Determination.

b. Probationary Term 7, on Hearing Committee Determination page 19, is amended to provide that the Respondent shall continue therapy either with a health care professional approved by OPMC or in a treatment program approved by OPMC.

c. Probationary Term 12, on Hearing Committee Determination page 20, is amended to provide that a violation of the probationary terms shall result in a probation violation proceeding conducted pursuant to Public Health Law Section 230(19).

ROBERT M. BRIBER

WINSTON S. PRICE, M.D.

MARYCLAIRE B. SHERWIN

EDWARD C. SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF GERMAN ZHITLOVSKY, 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. Zhitlovsky.

DATED: Albany, New York

August 3, 1993

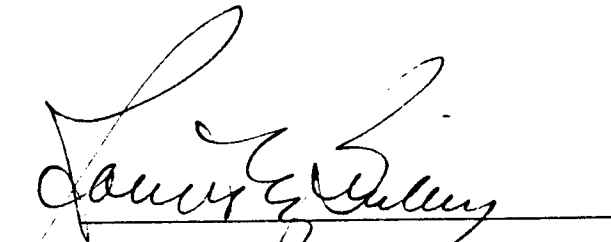
Maryclaire B. Sherwin
MARYCLAIRE B. SHERWIN

IN THE MATTER OF GERMAN ZHITLOVSKY, 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. Zhitlovsky.

DATED: Albany, New York

July 7, 1993



ROBERT M. BRIBER

IN THE MATTER OF GERMAN ZHITLOVSKY, M.D.

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 Dr. Zhitlovsky.

DATED: Brooklyn, New York

JULY 27th, 1993



WINSTON S. PRICE

IN THE MATTER OF GERMAN ZHITLOVSKY, 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. Zhitlovsky.

DATED: Albany, New York

July 26, 1993

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

EDWARD C. SINNOTT, M.D.

IN THE MATTER OF GERMAN ZHITLOVSKY, 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. Zhitlovsky.

DATED: Albany, New York
August 4, 1993

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

WILLIAM A. STEWART, M.D.