



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

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

September 12, 1996

Karen Schimke
Executive Deputy Commissioner

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Anne Gayle, Esq.
NYS Department of Health
5 Penn Plaza-6th Floor
New York, New York 10001

Eduardo Cacas, M.D.
REDACTED

Richard A. Finkel, Esq.
Meissner, Kleinberg & Finkel
275 Madison Avenue
New York, New York 10016

Effective Date: 09/19/96

RE: In the Matter of Eduardo Caballero Cacas, M.D.

Dear Ms. Gayle, Dr. Cacas and Mr. Finkel:

Enclosed please find the Determination and Order (No.96-91) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
Empire State Plaza
Corning Tower, Room 438
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 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,

REDACTED

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:rlw

Enclosure

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

COPY

IN THE MATTER
OF
EDUARDO CACAS, M.D.

ADMINISTRATIVE
REVIEW BOARD
DETERMINATION
ARB NO. 96-91

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

The 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 a Determination by a Hearing Committee on Professional Medical Conduct (Committee), which found the Respondent **DR. EDUARDO CACAS** (Respondent) guilty for professional misconduct and placed the Respondent on probation for two years. Board Members **ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D.** participated in the review and now render this Determination. The Board sustains the Committee's Determination that the Respondent committed professional misconduct in violation of N.Y. Education Law (Educ. L.) §6530(9)(c). We modify the Committee penalty to provide that the Respondent shall be restricted permanently to practicing in a facility licensed pursuant to Pub.H.L. Article 28 or operated by a governmental agency such as the N.Y. Department of Correctional Services or the U.S. Veteran's Administration.

Administrative Law Judge **JAMES F. HORAN** served as the Board's Administrative Officer.
RICHARD A. FINKEL, ESQ. (Meissner, Kleinberg & Finkel) represented the Respondent.
ANNE GAYLE, ESQ. (Associate Counsel, NYS Department of Health) represented the
Petitioner.

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 Educ. L. §6530. The Petitioner filed charges with BPMC alleging that the Respondent violated Educ. L. §6530(9)(c):

- having been found guilty in an adjudicatory proceeding of violating a state or federal statute or regulation, when the violation would constitute professional misconduct.

The Petitioner brought this case as an expedited proceeding pursuant to Pub.H.L. §230(10)(p). The purpose of such a proceeding is to determine the nature and severity for the penalty to be imposed for the conduct, Matter of Siddiqui Index No. 73383 (Third Dept. June 6, 1996). The charges arose following a proceeding against the Respondent by the New York State Department of Social Services (DSS).

Three BPMC Members, **EDMUND O. ROTHCHILD, M.D. (Chair)**, **ROBERT R. BERGMANN, M.D.** and **MICHAEL A. GONZALEZ, RPA** comprised the Committee who conducted a hearing in the matter and who rendered the April 19, 1996 Determination. Administrative Law Judge **MARC P. ZYLBERBERG** served as the Committee's Administrative Officer. The Committee determined that DSS excluded the Respondent from the Medicaid program for two years and ordered the Respondent to pay restitution amounting to One Hundred Forty-Two Thousand Eight Hundred Sixty-Two Dollars (\$142,862.00). The DSS decision found that the Respondent failed to maintain records for fourteen ordered patient services, that fully disclosed the medical necessity for and the nature and extent of medical care, services or supplies furnished, or failed to comply with other requirements from the DSS Medicaid Regulations at Title 18 New York Codes, Rules and Regulations (NYCRR). The records covered orders from June 6, 1988 to July 10, 1989.

The Committee concluded that the Respondent's conduct in violating the Social Services recordkeeping regulation amounted to professional misconduct by a physician in violation of N.Y. Educ. L. §6509 and Title 8 NYCRR §29.2. The Committee voted to suspend the Respondent's medical license for one year, stayed the suspension and placed the Respondent on two years

probation. The probation included a provision that limits the Respondent to practicing in a supervised setting, such as an institution licensed pursuant to Pub.H.L. Article 28, and bars the Respondent from practicing in a private setting.

The Committee rejected the Petitioner's request that the Committee revoke the Respondent's license. The Committee found no evidence to indicate fraud or bad faith on the Respondent's part. The Committee accepted the Respondent's explanation that he entered private practice naively. The Committee stated that they did not condone the Respondent's failure to maintain or provide adequate and accurate medical records, but they felt that the Respondent was capable to learn from his errors and rehabilitate himself.

REVIEW HISTORY AND ISSUES

The Petitioner filed a Notice requesting this review, which the Board received on May 10, 1996. The Notice stayed the Committee's penalty automatically, pending this Determination from the Board (Pub.H.L. §230-c(4)(a)). The Record for review contained the Committee's Determination, the hearing transcripts and exhibits, the Petitioner's brief and reply brief and the Respondent's brief.

By letter dated May 17, 1996 the Respondent requested a one month extension in the time period for filing briefs in this case. At deliberations on June 7, 1996, the Board granted the request, and provided the Respondent until July 8, 1996 to file a brief. The Board provided the Petitioner seven days from the date they received that brief to file an answer to any issues which the Respondent raised. The Board received the Petitioner's brief on June 17, 1996, the Respondent's brief on July 5, 1996 and the Petitioner's reply on July 15, 1996.

The Petitioner requests that the Board revoke the Respondent's license to practice medicine and fine the Respondent Ten Thousand Dollars (\$10,000.00). The Petitioner contends that all mitigating evidence before the Committee had already been considered and rejected in the DSS proceeding. The Petitioner asserts that by obtaining funds from Medicaid without maintaining records, that are necessary to ensure proper expenditures of Medicaid funds, that the Respondent harmed patients who depend on the program.

The Respondent's brief raised three points:

- the delay in bringing charges in this case provides the basis to dismiss the charge;
- the proceeding against the Respondent violates the constitutional ban on ex post facto laws; and
- the Committee imposed an appropriate sanction.

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's failure to maintain records for ordered services under the Medicaid program constitutes professional misconduct. We modify the Committee's

Penalty Determination and vote to limit the Respondent permanently to practice in a supervised setting.

The DSS proceeding determined that the Respondent violated that Department's regulations by failing to maintain any Medicaid records for fourteen ordered patient services under the Medicaid program. In violating that regulation, the Respondent's conduct in 1988 to 1989 also constituted professional misconduct in violation of Educ. L. §6530(9)(c), §6509 and Title 8 NYCRR §29.2(3). The Respondent argued that the constitutional prohibition against ex post facto laws barred this proceeding against the Respondent, because the Respondent's misconduct occurred before the New York Legislature enacted the current Educ. L. §6530(32), the provision which now defines physician misconduct to include failing to maintain adequate records (Laws of 1991, Chapter 606). We reject that argument. The Board finds that Educ. L. §6509 and Title 8 NYCRR §29.2(3), which were effective in 1988 to 1989, included inadequate recordkeeping in the definition for physician misconduct.

The Respondent also alleged that the delay in commencing this proceeding against the Respondent requires a dismissal. The Board will not consider that argument, because New York Civil Practice Law and Rules Article 78 (McKinney's Supp 1996) provides the Respondent the forum in which to argue that a delay in commencing this proceeding caused him prejudice, Matter of Gold, 215 AD2d 18, 632 NYS2d 276 (Third Dept. 1995), lv. denied 87 NY2d 805.

As to the penalty for the Respondent's misconduct, the Board agrees with the Hearing Committee that the Respondent's conduct does not warrant revoking his license or imposing a fine in addition to the fine from the DSS proceeding. Nothing in the record proved that the Respondent committed fraud or that he practiced in bad faith.

The record does demonstrate that the Respondent failed to maintain any record for the services which formed the basis for the DSS inquiry into the Respondent's practice. The Board finds this to be a serious deficiency in the Respondent's practice. The Board rejects the Respondent's explanation that his poor recordkeeping resulted from naivete. The DSS Determination rejected that defense. The

Board agrees with the Committee that restricting the Respondent to a supervised, licensed practice setting will assure that the Respondent will maintain acceptable records within that institution's requirements. The Board disagrees with the Committee about the proper duration for that restriction.

All physicians are responsible to maintain records that will provide information to subsequent treating physicians about the patient's treatment and history, while under the record keeper physician's care. The Respondent assumed additional legal and regulatory recordkeeping responsibilities when he agreed to provide services to patients in the Medicaid program. The Respondent's complete failure to produce records for any services about which DSS inquired demonstrates such a serious deficiency in the Respondent's practice that the Board concludes that the restriction on the Respondent's practice must be permanent.

The Board overturns the Hearing Committee's penalty placing the Respondent on probation. As the practice limitation will be permanent, we see no reason to require probation terms. The Board limits the Respondent's patient care to practice in a facility licensed under Pub.H.L. Article 28 or operated by a government agency, such as the New York Department of Correctional Services or the Veteran's Administration.

ORDER

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

1. The Board **SUSTAINS** the Hearing Committee's April 19, 1996 Determination finding the Respondent guilty for professional misconduct.
2. The Board **OVERTURNS** the Hearing Committee's penalty.
3. The Board **LIMITS** the Respondent's license to practice in a supervised setting, as we discuss in our Determination.

ROBERT M. BRIBER
SUMNER SHAPIRO
WINSTON S. PRICE, M.D.
EDWARD SINNOTT, M.D.
WILLIAM A. STEWART, M.D.

IN THE MATTER OF EDUARDO CACAS, 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. Cacas.

DATED: Schenectady, New York

Aug 21, 1996

REDACTED

ROBERT M. BRIBER

IN THE MATTER OF EDUARDO CACAS, 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. Cacas.

DATED: Delmar, New York

AUGUST 21, 1996

REDACTED

SUMNER SHAPIRO

IN THE MATTER OF EDUARDO CACAS, 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. Cacas.

DATED: Brooklyn, New York

8/23, 1996

REDACTED

WINSTON S. PRICE, M.D.

IN THE MATTER OF EDUARDO CACAS, 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. Cacas.

DATED: Roslyn, New York

Aug 22, 1996

REDACTED

EDWARD C. SINNOTT, M.D. /

IN THE MATTER OF EDUARDO CACAS, 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. Cacas.

DATED: Syracuse, New York

10 Sept., 1996

REDACTED

WILLIAM A. STEWART, M.D.