



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

Karen Schimke
Executive Deputy Commissioner

July 23, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David W. Smith, Esq.
NYS Dept. of Health
5 Penn Plaza-Sixth Floor
New York, New York 10001

Thomas A. Conway, Esq.
Featherstonhaugh, Conway, Wiley & Clyne, LLP
99 Pine Street
Albany, New York 12207

Edmund Carloni, M.D.
300-F High Point Road
Hartsdale, New York 10530

RE: In the Matter of Edmund Carloni, M.D.

Effective Date: 07/30/96
Dear Mr. Smith, Mr. Conway and Dr. Carloni:

Enclosed please find the Determination and Order (No. 96-53) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. The 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.

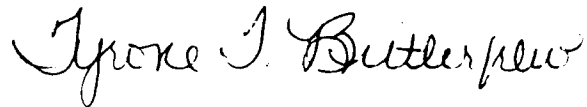
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified 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,

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 "B".

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
EDMUND CARLONI, M.D.

ADMINISTRATIVE
REVIEW BOARD
DECISION AND
ORDER NUMBER
BPMC 96-53

The Respondent, **EDMUND CARLONI, M.D.** (Respondent), has requested that the Administrative Review Board for Professional Medical Conduct (Review Board) review and vacate a Determination by a Hearing Committee for Professional Medical Conduct (Hearing Committee), which revoked the Respondent's license to practice medicine in New York State. Review Board members **ROBERT M. BRIBER, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D., SUMNER SHAPIRO** and **WILLIAM A. STEWART, M.D.**, conducted deliberations in this case on May 17, 1996. Dr. Stewart participated in the deliberations by telephone. Administrative Law Judge **JAMES F. HORAN** served as the Board's Administrative Officer. The Board sustains the Hearing Committee's Determination that the Respondent committed professional misconduct by prescribing controlled substances inappropriately for five (5) patients. By a 4-1 vote, the Board also sustains the Committee's Determination to revoke the Respondent's license to practice medicine in New York State.

HEARING COMMITTEE DETERMINATION

The Office of Professional Medical Conduct (Petitioner) charged that the Respondent committed professional misconduct by violating the following New York Education Law Provisions:

- practicing with negligence on more than one occasion
NY Education Law §6530(3)(McKinney Supp. 1996);
- practicing with incompetence on more than one occasion
NY Education Law §6530(5)(McKinney Supp. 1996);

- failing to maintain adequate records
NY Education Law §6530(32)(McKinney Supp. 1996); and
- violating Public Health Law Article 33
NY Education Law §6530(9)(e)(McKinney Supp. 1996).

The charges related to the Respondent's care for five (5) patients between 1990 and 1994. The record refers to the patients by the initials A-E, to protect the patients' privacy.

Hearing Committee members **F. MICHAEL JACOBIOUS, M.D.**, Chairperson, **DIANE E. GARNEAU, M.D.** and **KENNETH KOWALD** rendered their Determination on March 13, 1996. Administrative Law Judge **STEPHEN BERMAS** served as the Committee's Administrative Officer.

The Hearing Committee determined that the Respondent was guilty on all charges, in all five (5) patient cases. The Committee found that in all five (5) cases:

- the Respondent failed to perform an adequate history or take an adequate history;
- the Respondent failed to treat or evaluate the patients' conditions;
- the Respondent failed to provide a justification for his diagnosis;
- the Respondent prescribed controlled substances inappropriately; and
- the Respondent's notes for the patient were inaccurate or incomplete.

As to Patient A, the Committee found that the Respondent continued to give Prozac, Elavil, Tylenol #4, Valium and Dilaudid to Patient A, even though the Patient was on Methadone for the entire time the Respondent treated the Patient. In Patient B's case, the Committee found that the Respondent prescribed Zantac and Valium without medical justification. In Patient C's case, the Committee found that the Respondent prescribed Ativan and Valium together inappropriately. In Patient D's case, the Committee found that the Respondent prescribed Darvon, Valium, Percocet and Tylenol #4, in excessive doses and despite knowing Patient D had an existing drug problem. In Patient E's case, the Committee found that the Respondent prescribed Prozac, Tylenol #4, Darvocet, Valium and Xanax in excess and without medical justification.

The Committee also determined that the Commissioner of Health had found the Respondent guilty for violating Public Health Law Article 33, by prescribing Ativan, Valium, Xanax and/or Percocet improperly.

The Committee voted to revoke the Respondent's license to practice medicine in New York State.

PROCEDURAL HISTORY

The Board received the Respondent's Notice requesting that the Board review the Committee Determination on March 25, 1996. The Review Notice stayed the Committee's penalty automatically, pending the Board's final determination on the review [Public Health Law §230-c(4)(a) (McKinney Supp. 1996)]. Thomas A. Conway, Esq. and Andrew W. Kirby, Esq. represented the Respondent on the review. David W. Smith, Esq. represented the Petitioner.

On April 11, 1996, the Board's Administrative Officer extended the time for the Respondent to submit a brief from April 25, 1996 to May 3, 1996. The extension did not delay the Board's scheduled deliberations in the case. The Board received the Respondent's brief on May 3, 1996, and the Petitioner's reply on May 7, 1996. On May 16, 1996, the Board received a letter from the Respondent in reply to the Petitioner's reply brief. On May 20, 1996, the Board received an additional letter from the Petitioner. The Board did not consider these letters because Public Health Law §230-c(4)(a) permits parties to submit a brief and a reply. The parties may not file any submission responding to reply briefs.

REQUESTS FOR REVIEW

The Respondent has asked that the Review Board vacate the Hearing Committee's Determination revoking the Respondent's license. The Respondent raised five (5) issues on review:

Point I: The Statement of Charges and the Determination and Order of the Hearing Committee were vague, inaccurate, confusing, inadequate, conclusory and fatally defective.

Point II: The Petitioner failed to prove its charges by a preponderance of the evidence

Point III: The Petitioner's failure to call any of the Patients to testify undermines its charges that the Respondent failed to perform adequate physical examinations and/or take medical histories

Point IV: The Petitioner failed to show by preponderance of the evidence that the Respondent failed to maintain adequate medical records for Patient A through E.

Point V: There is no evidence of patient harm, financial gain or fraudulent intent sufficient to sustain an order of revocation.

The Petitioner urges the Board to sustain the Hearing Committee's Determination. The Petitioner contends that the Review Board can not deal with issues such as the vagueness in the Statement of Charges, lack of proof and lack of patient harm. The Petitioner contends that the Hearing Committee alone can judge credibility and that the Committee's finding on record keeping alone would justify revoking the Respondent's license.

THE BOARD'S 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.

REVIEW BOARD DETERMINATION

A. GUILT ON THE CHARGES

The Review Board votes 5-0 to sustain the Hearing Committee's Determination that the Respondent practiced medicine with negligence on more than one occasion and with incompetence on more than one occasion, that the Respondent failed to maintain adequate records, and that the Respondent violated Public Health Law Article 33. The Committee's Determination is consistent with their findings and conclusions concerning the Respondent's treatment for Patients A through E.

We reject the contentions at Point I, in the Respondent's Brief, that the Charges were overly broad or confusing. The Charges provided the Respondent with sufficient notice about the patient care at issue and provided the Respondent an opportunity to present a defense on those issues. We also reject the Respondent's contention that charges alleging negligence and incompetence are mutually exclusive, because these misconduct categories require different proof elements. The same conduct can form the grounds for findings that a Respondent committed both negligence and incompetence, Matter of Minielly, _____ AD2d _____, 634 NYS2d 856, 1995 N.Y. App. Div. LEXIS 12692 (Third Dept. 1995).

The Board finds that preponderant evidence supports the Committee's findings and Determination. We reject the contentions in the Respondent's Brief at Points I, II and III, that the Committee's findings are unsupported and insufficient, that the Committee failed to assess witness credibility and that failing to call patients as witnesses undermined findings about those patients' care. The Committee found that Petitioner's expert, Dr. Howard, an internist, testified credibly about the proper standards for medical practice and record keeping. Dr. Howard's testimony, the

Respondent's records in evidence (Petitioner Exs. 3-7), and the Respondent's Article 33 Stipulation

(Petitioner Ex. 8) support the Committee's findings. The Committee as the fact finder possessed the authority to reject contradictory testimony from the Respondent or his expert, Dr. Yapalter. The Board's review on the specific charges follows.

VIOLATING PUBLIC HEALTH LAW ARTICLE 33: The Board sustains the Committee's Determination that the Respondent violated Public Health Law Article 33. The Respondent signed a stipulation (Petitioner Ex. 8) in which he admitted to violating:

- Public Health Law §3304(a), which outlaws among other things dispensing controlled substances except as expressly allowed by Article 33;
- Public Health Law §3350, which outlaws prescribing, administering and dispensing controlled substances to addicts or habitual controlled substance users; and
- 10 NYCRR §80.76, which prohibits prescribing, administering or dispensing controlled substances to addicts or habitual controlled substance users.

The Respondent agreed that he had prescribed the substances Ativan, Valium, Xanax and/or Percocet in quantities to detoxify five (5) individuals.

The Respondent's Stipulation constitutes preponderant evidence to support the Committee's Determination that the Respondent violated Public Health Article 33 (FF 42) and that the Respondent was, therefore, guilty of professional misconduct [N.Y. Edu. Law §6530 (a)(e) (McKinney Supp. 1996)]. The Board rejects the argument in the Respondent's Brief Point I that the Committee erred in not considering the circumstances surrounding the Stipulation. The Respondent signed that Stipulation voluntarily and he may not relitigate or seek to reopen that proceeding before the Hearing Committee or the Review Board. The Board also rejects the testimony from the Respondent and his expert, Dr. Yapalter, challenging the Stipulation. The Board finds that Dr. Yapalter did more to damage his own credibility than to aid the Respondent's case, when Dr. Yapalter testified that he would like to believe it is legitimate practice to provide addicted persons with controlled substances, "but of course you would run afoul of the law and regulations" (Tr. p. 502).

RECORD KEEPING: The Board sustains the Committee's Determination that the Respondent failed to maintain adequate records for Patients A through E. An adequate patient record must contain sufficient information to provide a subsequent treating physician with sufficient information concerning the treatment to this patient, during the time while under the record-keeping physician's care. Dr. Howard's testimony and the records themselves demonstrate that the Respondent did not maintain adequate records for the five (5) patients whose cases the Board reviewed in this proceeding. If a physician has failed to document a procedure, order, or diagnosis, then the Board and the Hearing Committee can presume that the physician did not perform the procedure or make the order or diagnosis.

The evidence from the Hearing supports the Committee's conclusion that Dr. Yapalter was not a credible witness about record adequacy (Committee Determination page 3). Dr. Yapalter noted that he is not an internist (Tr. p. 410), admitted that the Respondent's records were sparse or did not indicate treatment (Tr. pp. 437, 479, 488), and demonstrated his own unfamiliarity with how general practitioners prepare records (Tr. p. 438).

NEGLIGENCE/INCOMPETENCE: Dr. Howard's testimony and the Respondent's records in evidence (Petitioner's Exs. 3-7) provided preponderant evidence to prove that the Respondent's care for Patients A through E failed to meet accepted medical standards and to demonstrate that the Respondent lacked necessary knowledge to practice medicine safely and effectively. Dr. Howard testified as to what constitutes acceptable care and testified that the Respondent's records demonstrated that the Respondent did not provide acceptable care to Patients A through E. The Respondent failed to perform adequate examinations or obtain adequate histories, he failed to justify his diagnoses, he failed to evaluate or treat medical problems adequately, he prescribed medication without justification, and he prescribed controlled substances inappropriately. Proof on the negligence and incompetence charges did not require patient testimony. Dr. Howard's testimony and the Respondent's records proved the charges sufficiently. The Board rejects the contention at the Respondent's brief Point I, that the record did not support the Committee's Findings 13, 20, 27, 34 and 41. Dr. Howard's testimony provided the grounds for those Findings.

The Committee acted within their authority in rejecting conflicting testimony or documentation. Neither the Board nor the Hearing Committee must accept the Respondent's explanation concerning his treatment for Patient A through E. The Respondent admitted that he prescribed medication inappropriately to Patients A through E, but claimed that he was detoxifying the Patients to wean them away from the medication. The Board finds that Respondent's records do not reflect any plan to wean the Patients from the controlled substances or detoxify the Patients. We note that the Respondent's expert, Dr. Yapalter, conceded that the Respondent's records failed to indicate anything about detoxifying the patients (Tr. p. 488). The Board finds that if care, a care plan, an order or a diagnosis do not appear in physician records, then no care or diagnosis occurred, and the care plan and order did not exist. The Board and the Committee can reject the Respondent as a credible witness because his testimony conflicts with the information in his records. The Board and the Committee can also question the Respondent's credibility as a witness due to his interest in this proceeding's outcome.

The Board also rejects testimony from Dr. Yapalter concerning the Respondent's treatment for Patients A through E. Dr. Yapalter was not an independent expert. The Respondent had worked for a long time in a clinic which Dr. Yapalter operated and Dr. Yapalter referred patients to the Respondent. Dr. Yapalter's long standing professional relationship with the Respondent affected Dr. Yapalter's testimony. In answer to a question about whether the Respondent performed an adequate examination on Patient A, Dr. Yapalter stated, "*Well, knowing Dr. Carloni, I knew that he would examine the patient.*" (Tr. p. 432) Dr. Yapalter also demonstrated that he lacked expertise in general practice. (Tr. pp. 410, 438-440, 478). Dr. Yapalter described general practice as follows:

"And the general practitioner is to see a patient, find out what's bothering them. And (sic) then the patient usually expects to be given some kind of medication.

I mean doctors are often accused of being 'pill pushers', which is an unkind way of referring to the fact that doctors feel obliged to give medications to patients to help them. And that's largely their stock and trade."

The Board has already noted Dr. Yapalter testified that he would like to consider it legitimate practice to provide addicted patients with addictive substances, although that would run afoul of law and regulations (Tr p. 502). The Board finds that the Hearing Committee acted within their authority as fact finder when they found Dr. Yapalter lacked credibility in his testimony concerning whether the Respondent provided adequate medical care.

The Board considered the objections which Point I in the Respondent's brief raised concerning the evidence on which the Committee based Fact Findings 11, 25, 32 and 39. The Board sustains these findings. The Committee cited to evidence which they found credible, and all that evidence taken together supported the Committee's Findings.

B. PENALTY

The Review Board votes 4-1 to sustain the Hearing Committee's Determination revoking the Respondent's license. Public Health Law §230-a authorizes revocation as a misconduct penalty. Revocation is consistent with the Committee's findings and conclusions, that the Respondent provided controlled substances to controlled substance addicts or habitual users and that the Respondent practiced with negligence and incompetence on repeated occasions, over several years, in treating five (5) patients.

The Respondent's Brief Point V characterized revocation as an overly harsh penalty in this case, because the Respondent had committed no fraud or patient harm and obtained no financial gain. The Board agrees that the evidence showed no fraud and/or improper financial gain. The Board finds, however, that controlled substance abuse poses a public health menace, that justifies revoking the license from a physician who provides controlled substances to controlled substance addicts or abusers, Matter of Binenfeld, _____ AD2d _____, 640 NYS2d 924; 1996 N.Y. App. Div LEXIS 3926 (Third Dept. 1996).

Any physician must know that prescribing addictive substances to addicts or habitual users violates the law and proper medical standards. The Respondent had contact with addicted persons from his years working in Dr. Yapalter's clinic, yet the Respondent continued to prescribe controlled substances for addicted persons or habitual users. The Respondent testified that he realized that after treating Patient C, that Patient C was not interested in detoxification, but had only been interested in obtaining medication from the Respondent (Tr. p. 298). Despite the experience with Patient C and past experience with addicts, the Respondent continued the same treatment pattern for other controlled substance addicts or users in subsequent years when he treated Patients A, D and E. The Respondent also provided controlled substances to a patient when he knew the patient obtained the same drug from another source. The Respondent testified that he prescribed Valium for Patient B after learning that Patient B obtained Valium on the street. The Respondent felt he could prescribe the Valium solely because the Patient stated that he no longer received Valium from another source (Tr. pp. 254-255).

The Respondent's practice and testimony demonstrate that he lacks the skill or knowledge to prescribe controlled substances safely or to supervise detoxification for addicts or habitual users. The Respondent has also demonstrated that he lacks the motivation, insight or ability to retrain in medicine, because he has failed to learn from his past exposure to addicted persons and he has failed to learn from his past treatment mistakes, such as those to which he stipulated (Petitioner Ex. 8). The evidence demonstrated that the Respondent's practice constitutes a menace to the public health and demonstrates that the Respondent lacks the aptitude to correct his practice deficiencies.

The Board discussed the penalty in this case at length. One Board Member felt that we could protect the public by limiting the Respondent to practice in a structured setting and by denying him the authority to prescribe controlled substances. The four (4) member majority found that alternative unsuitable. The Respondent practiced other substandard medicine, in addition to prescribing improperly. The Respondent failed to perform adequate examinations or obtain adequate histories, he failed to treat or evaluate patient conditions and he prescribed medications without justification and against contraindications. The majority felt that a supervised setting alone would not provide sufficient protection or remediation to address the Respondent's practice

deficiencies. Only a residency-level retraining program could address these substandard practice problems, and as we concluded already, the Respondent lacks the motivation, ability and insight to benefit from retraining. The majority found that the Respondent lacks the skill and knowledge to practice safely, even in a restricted setting, and we found that the Respondent can not improve his skills. The majority concluded that we can protect the public only by revoking the Respondent's license to practice in New York State.

ORDER

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

1. The Review Board **SUSTAINS** the Hearing Committee's March 13, 1996 Determination finding the Respondent guilty of professional misconduct.

2. The Review Board **SUSTAINS** the Committee's Determination revoking the Respondent's license to practice medicine in New York State.

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

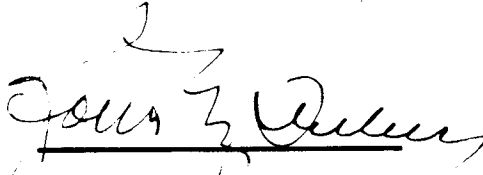
WILLIAM A. STEWART, M.D.

IN THE MATTER OF EDMUND CARLONI, 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. Carloni.

DATED: Schenectady, New York

July 15, 1996

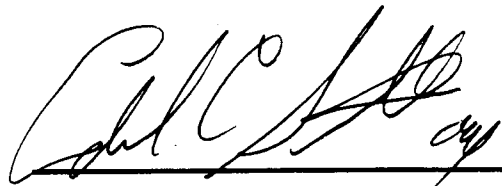

ROBERT M. BRIBER

IN THE MATTER OF EDMUND CARLONI, 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. Carloni.

DATED: Roslyn, New York

July 17, 1996

A handwritten signature in cursive script, appearing to read "Ed. C. Sinnott", written over a horizontal line. The signature is fluid and somewhat stylized.

EDWARD C. SINNOTT, M.D.

IN THE MATTER OF EDMUND CARLONI, 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. Carloni.

DATED: Brooklyn, New York

7/10/96, 1996

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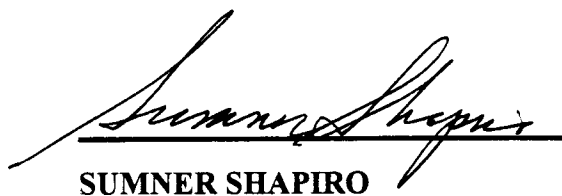
WINSTON S. PRICE, M.D.

IN THE MATTER OF EDMUND CARLONI, M.D.

SUMNER SHAPIRO, a member of the Administrative Review Board for Professional Medical Conduct, affirms that he took part in the deliberations in Dr. Carloni's case and that this Determination reflects the decision by the Board's majority.

DATED: Delmar, New York

July 19, 1996


SUMNER SHAPIRO

IN THE MATTER OF EDMUND CARLONI, 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. Carloni.

DATED: Syracuse, New York

17 July, 1996

A handwritten signature in cursive script that reads "William A. Stewart". The signature is written in black ink and is positioned above a solid horizontal line.

WILLIAM A. STEWART, M.D.