



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

April 12, 1996

Karen Schimke
Executive Deputy Commissioner

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Dianne Abeloff, Esq.
NYS Dept. of Health
5 Penn Plaza-6th Floor
New York, New York 10001

James R. Slater, Esq.
585 6th Street
Brooklyn, New York 11215

William Capote, M.D.
945 B Morris Park Avenue
Bronx, New York 10462

EFFECTIVE DATE JULY 1, 1996

RE: In the Matter of William Capote, M.D.

Dear Ms. Abeloff, Mr. Slater and Dr. Capote:

Enclosed please find the Determination and Order (No. 96-01) 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.

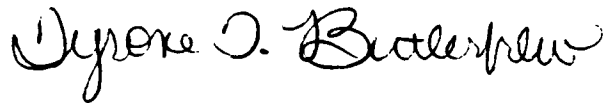
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

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IN THE MATTER : ADMINISTRATIVE
: REVIEW BOARD
OF : DECISION AND
: ORDER NUMBER
WILLIAM CAPOTE, M.D. : BPMC 96-01
-----X

The Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of SUMNER SHAPIRO, ROBERT M. BRIBER, WINSTON S. PRICE, M.D., EDWARD SINNOTT, M.D.,¹ and WILLIAM A. STEWART, M.D. held deliberations on March 15, 1996 to review the Hearing Committee on Professional Medical Conduct's (hereinafter the "Hearing Committee") December 26, 1996 Determination finding Dr. Capote guilty of professional misconduct. The Petitioner requested the Review through a Notice which the Board received on January 16, 1996. Larry G. Storch served as Administrative Officer to the Review Board. Dianne Abeloff, Esq. filed a brief for the Petitioner which the Review Board received on February 20, 1996. James R. Slater, Esq. filed a brief for the Respondent which the Review Board also received on February 20, 1996. Mr. Slater also filed a reply brief for the Respondent which the Review Board received on February 27, 1996.

¹ Dr. Sinnott recused himself from participation in the administrative review of this matter. He did not participate in the discussion of the case, nor did he vote on the outcome.

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 Petitioner charged the Respondent with three specifications of professional misconduct, including allegations of the fraudulent practice of medicine, and of being found guilty in an adjudicatory proceeding of violating state regulations, pursuant to a final decision, and no appeal is pending, and when the violation would constitute professional misconduct pursuant to Education Law §6530(2), (3) and (35). The fraud allegations concern Respondent's provision of prenatal services to two patients.

The Hearing Committee sustained one specification of professional misconduct, based upon a determination that the Respondent was excluded, after a hearing, from the Medicaid program for a period of five years for violating 18 NYCRR §515.2. The Hearing Committee did not sustain two specifications of fraudulent practice of medicine.

The Hearing Committee found that Respondent is a physician licensed to practice medicine in New York State and was so licensed at all times pertinent to the proceedings. The Committee also found that on or about November 30, 1993, Respondent was excluded, after a hearing, from the Medicaid program for a period of five years for violating 18 NYCRR §515.2. More specifically, the Hearing Committee found that Respondent billed for services not rendered, ordered unnecessary laboratory tests, failed to follow up on abnormal laboratory results, improperly performed spirometry tests and failed to document medical records in conformity with Medicaid requirements.

The Hearing Committee further found that from in or about August 1988 through March 1989, Respondent provided prenatal care to Patient A. From in or about August 1989 through in or about March 1990, Respondent provided prenatal care to Patient B. The Hearing Committee further found that at the times that he provided prenatal care to both patients, Respondent knew that he did not have admitting privileges at Our Lady of Mercy Hospital.

The Hearing Committee further found that although both Patient A and Patient B believed that Respondent was going to

deliver their babies, there was no testimony from either patient that Respondent ever affirmatively represented that he would deliver their babies. The Hearing Committee did not sustain the specifications of fraud regarding Respondent's prenatal care rendered to Patients A and B.

The Committee voted to limit the Respondent's license to practice medicine to the practice of obstetrics and gynecology until such time as he is able to convince the Office of Professional Medical Conduct that he has successfully completed additional accredited training in any other field or fields of medical practice. The Hearing Committee further voted to place Respondent on probation for a period of five years.

REQUEST FOR REVIEW

PETITIONER: On appeal, the Petitioner has asked that the Review Board overturn the sanction imposed by the Hearing Committee. The Petitioner requests that the Respondent's license to practice medicine be revoked. The Petitioner argues that the fact that Respondent was trained in obstetrics and gynecology, and that the majority of his practice prior to his employment at the Apollo Clinic was in OB/GYN does not mean that when Respondent practiced in other areas of medicine he had free reign to practice substandard medicine and to cheat the Medicaid system. The Petitioner argues that the sanction imposed by the Hearing Committee allows a physician to practice medicine fraudulently and negligently outside his specialty, and then come before the

Board and argue that he cannot be held accountable for his actions since he was practicing outside his specialty. The Petitioner also argues that Respondent presented no mitigating factors which would warrant a sanction less severe than revocation.

The Petitioner also argues that the Hearing Committee's factual findings concerning the two specifications of fraud and the conclusions of law on these specifications are inconsistent. The Petitioner urges that the Second and Third Specifications be sustained since Respondent failed to disclose the fact that he was no longer on the staff of Our Lady of Mercy Hospital.

In reply to the Petitioner's request for a heavier penalty, Respondent contends that revocation is not an appropriate sanction for the Hearing Committee's single finding of guilt. The Respondent also contends that the Hearing Committee's factual findings concerning the allegations of fraud regarding Patients A and B are not inconsistent with the Committee's conclusion that these allegations should not be sustained.

RESPONDENT: The Respondent raised two points in his brief. The Respondent argued that the absence of a stipulated record as well as the requirement to simultaneously submit briefs of appeal voids the appellate review by the Review Board and denies Respondent due process of law. The Respondent argues that PHL §230-c(4) requires the submission of a stipulated record and that the absence of a stipulated record impaired the Respondent in

developing his brief on appeal.² The Respondent also challenges the provisions of PHL §230-c that allow the charging party to appeal the findings of a trier of fact and that allows the appealing party thirty days to prepare a brief, but gives the other party no notice of the basis for appeal and only seven days to respond. The Respondent requests that the Petitioner's original notice of review be set aside and that the Petitioner be required to refile the Notice of Review and present a proposed record to the Respondent. The Respondent also asks that the Commissioner of Health require either party to an appeal to set forth their grounds for their appeal in the Notice of Appeal.

In the Respondent's second point, the Respondent asks that the Review Board modify the Hearing Committee's Determination to reduce the period of probation to six months. The Respondent contends that a review of case law from the Third Department, concerning the criteria for reviewing penalties in professional disciplinary cases, leads to the conclusion that the Hearing Committee's penalty in this case was too severe.

REVIEW BOARD DETERMINATION

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

² At the time our Administrative Officer acknowledges receipt of a Notice of Review, he advises the parties that it is not necessary to submit a stipulated record, as PHL §230-c(4) directs, because the record from the hearing is transferred to our Administrative Officer by the Hearing Committee's Administrative Officer.

Determination on the Respondent's motion to set aside the Petitioner's appeal and on both parties' request for a change in the Hearing Committee's penalty.

RESPONDENT'S MOTION: The Review Board denies the Respondent's request that the Petitioner be required to refile the notice of review, set forth the reasons for the appeal and submit a stipulated record. There is no requirement that the party seeking a review set forth the reason for review in this notice. In any event, Public Health Law §230-c already limits the Review Board's scope of authority to consideration of whether a Hearing Committee's Determination is consistent with the Committee's findings and conclusions and whether the penalty is appropriate and within the scope of penalties provided under Public Health Law §230-c.

As to the record, the Review Board interprets the provisions of §230-c requiring a stipulated record to mean that parties may not submit evidence to the Review Board that was not before the Hearing Committee. To assure that the parties may not submit new evidence our Administrative Officer instructs the parties by letter at the time we receive a Notice of Review that the parties may not submit evidence to the Board that was not before the Hearing Committee.

The Administrative Officer also instructs the parties that the Board does not require the parties to submit the record to the Board. At the end of a hearing, the Hearing Committee's Administrative Officer is the custodian of the record and returns

the hearing record to the Bureau of Adjudication in Albany - the same office in which our Administrative Officer works. At the time our Administrative Officer receives a Notice of Review, the record is already in the custody of his office. In the absence of any stipulation by the parties otherwise limiting the record for our review or any challenge by the parties to the content of the record, the Board assumes that a review involves the whole record from the hearing below.

Due to the limited scope of our review, the Board has adapted simplified procedures for both parties to follow in a review. The Review Board sees no prejudice which the Respondent has suffered due to the simplified procedures which we follow. The Respondent is familiar with the record of the hearing and makes reference to the transcript in his brief to the Review Board.

HEARING COMMITTEE'S DETERMINATION: The Review Board votes 4-0 to sustain the Hearing Committee's Determination that the Respondent committed professional misconduct, as defined by Education Law §6509(c). This Determination was consistent with the Committee's factual findings. The Committee's findings demonstrated that Respondent was excluded, after a hearing, from the Medicaid program for a period of five years for violating 18 NYCRR §515.2. The Committee's findings demonstrated that the Respondent billed for services not rendered, ordered unnecessary laboratory tests, failed to follow up on abnormal laboratory results, improperly performed spirometry tests and failed to document medical records

in conformity with Medicaid requirements.

The Review Board votes 4-0 to sustain the Hearing Committee's Determination that the Second and Third Specifications of professional misconduct should be dismissed. This Determination was consistent with the Hearing Committee's factual findings.

The Review Board votes 4-0 to overturn the Committee's penalty, because the penalty is not consistent with the Committee's findings and because the penalty is not appropriate for the serious misconduct which the Respondent committed. The Review Board votes to revoke the Respondent's license to practice medicine in New York State.

In making their penalty determination, the Hearing Committee relied on the fact that the Respondent's misconduct involved the general practice of medicine, and did not involve obstetrics or gynecology. Thus, the Hearing Committee chose to limit the Respondent's practice to obstetrics and gynecology and to place him on probation for five years.

The record of this proceeding clearly established that the Respondent fraudulently billed the Medicaid program for ophthalmic echography tests for eleven patients, which were never performed. He ordered numerous, unnecessary laboratory tests for each of the twenty patients which were the subject of the underlying DSS action. The Respondent repeatedly billed the Medicaid program for useless spirometry tests. In addition, he failed to address positive syphilis tests for three patients and failed to address numerous abnormal blood test results reported

for each of the patients. The Decision by the DSS Administrative Law Judge (Petitioner's Exhibit #3) is replete with other examples of inadequate medical care rendered by the Respondent. For example, seven of the twenty patients at issue were diagnosed and medicated for hypertension on their first office visits. All of these patients had either normal or slightly elevated blood pressure.

Fraud in the practice of medicine is serious misconduct. Integrity is essential to the practice of medicine. A physician must deal honestly with other physicians, with medical facilities, with government regulators, with third party payors, and especially with patients. Neither retraining nor continuing medical education can correct fraud in a physician's conduct. The Review Board finds that the Respondent's fraudulent conduct as established in the DSS proceeding is serious enough to call for the revocation of the Respondent's license to practice medicine in New York State. The Respondent presented no evidence of mitigating factors which would merit a sanction less severe than revocation.

ORDER

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

1. The Review Board SUSTAINS the Hearing Committee's December 26, 1995 Determination finding the Respondent guilty of professional misconduct.
2. The Review Board OVERTURNS the penalty which the Hearing Committee imposed through their Determination.
3. The Review Board VOTES 4-0 to revoke the Respondent's license to practice medicine in New York State.

SUMNER SHAPIRO

ROBERT M. BRIBER

WINSTON S. PRICE, M.D.

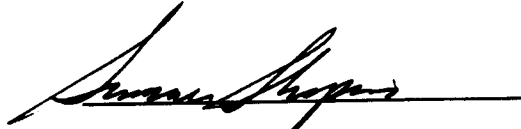
WILLIAM A. STEWART, M.D.

IN THE MATTER OF WILLIAM CAPOTE, 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. Capote.

DATED: Delmar, New York

April 3, 1996




SUMNER SHAPIRO

IN THE MATTER OF WILLIAM CAPOTE, 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. Capote.

DATED: Brooklyn, New York

4/5, 1996

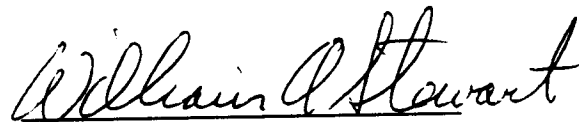

WINSTON S. PRICE, M.D.

IN THE MATTER OF WILLIAM CAPOTE, M.D.

WILLIAM A. STEWART, M.D., a member of the
Administrative Review Board for Professional Medical Conduct,
concurrs in the Determination and Order in the Matter of Dr.
Capote.

DATED: Syracuse, New York

2 April, 1996

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.

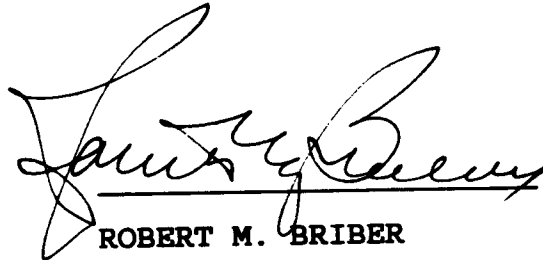
WILLIAM A. STEWART, M.D.

IN THE MATTER OF WILLIAM CAPOTE, 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. Capote.

DATED: Syracuse, New York

April, 1996



ROBERT M. BRIBER