



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

November 7, 1995

RECEIVED
NOV 07 1995

CORRECTED LETTER

Karen E. Carlson, Esq.
NYS Department of Health
Room 2429 - Corning Tower
Empire State Plaza
Albany, New York 12237

Judith M. Norman, Esq.
Nixon, Hargrave, Devans & Doyle
P.O. Box 1051
Clinton Square
Rochester, New York 14603

OFFICE OF PROFESSIONAL
MEDICAL CONDUCT

Kwan Ho Chung, M.D.
1024 Hilton Parma Corners
P.O. Box 729
Hilton, New York 14468

Effective Date: 11/13/95

RE: In the Matter of Kwan Ho Chung, M.D.

Dear Ms. Carlson, Ms. Norman and Dr. Chung:

Due to a wordprocessing error, the cover letter you received regarding the above referenced matter contained an error.

The first sentence of the letter dated November 6, 1995 should have read "Enclosed is the Determination and Order (95-162) of the Professional Medical Conduct Administrative Review Board in the above referenced matter."

The Determination and Order you received is not a corrected copy.

We are sorry for any inconvenience this may have caused you.

Sincerely yours,

Tyrone T. Butler, Director
Bureau of Adjudication



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

November 6, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Karen E. Carlson, Esq.
NYS Dept. of Health
Rm 2429 Corning Tower
Empire State Plaza
Albany, New York 12237

Judith M. Norman, Esq.
Nixon, Hargrave, Devans & Doyle
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1024 Hilton Parma Corners
P.O. Box 729
Hilton, New York 14468

RE: In the Matter of Kwan Ho Chung

Dear Ms. Carlson, Ms. Norman and Dr. Chung :

Enclosed please find the corrected Determination and Order (No. 95-162) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This corrected copy is being sent to you due to an error in the first document sent to you on September 13, 1995. 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

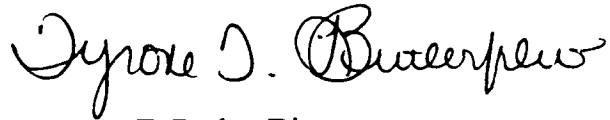
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NOV 07 1995
OFFICE OF PROFESSIONAL MEDICAL CONDUCT

NEW YORK STATE DEPARTMENT OF HEALTH 10

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, prominent "T" and "B".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:

Enclosure

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

IN THE MATTER
OF
KWAN HO CHUNG, M.D.

ADMINISTRATIVE
REVIEW BOARD
DECISION AND
ORDER NUMBER
BPMC 95-162

A quorum of the Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of **ROBERT M. BRIBER, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D.** and **WILLIAM A. STEWART, M.D.**¹, held deliberations on October 13, 1995 to review the Hearing Committee on Professional Medical Conduct's August 1, 1995 Determination finding Dr. Kwan Ho Chung (Respondent) guilty of professional misconduct. Both the Respondent and the Office of Professional Medical Conduct (Petitioner) requested the Review through Notices which the Board received on August 15, 1995 and August 18, 1995. James F. Horan served as Administrative Officer to the Review Board. Karen Eileen Carlson, Esq. filed a brief for the Petitioner, which the Review Board received on September 21, 1995, and a reply brief which the Review Board received on September 25, 1995. Judith M. Norman, Esq. filed a brief for the Respondent, which the Review Board received on September 18, 1995, and a reply brief which the Review Board received on September 29, 1995.

¹Sumner Shapiro did not participate in the deliberations in this case.

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 that the Respondent committed conduct evidencing moral unfitness in the practice of medicine, that the Respondent willfully, physically and verbally abused a patient, that the Respondent practiced medicine fraudulently, that the Respondent committed negligence on more than one occasion and that the Respondent failed to maintain adequate records. The allegations concern the Respondent's treatment of a single person, Patient A, and involve medical care which the Respondent provided to Patient A on December 2, 1992 , December 9, 1992 and December 30, 1992. At that time, the Respondent was also treating the Patient's terminally ill husband.

The Committee determined that the Respondent was not guilty of conduct evidencing moral unfitness to practice medicine, was not guilty of practicing the profession fraudulently and was not guilty of negligence on more than one occasion. The Committee found that the Respondent was guilty on three specifications of willful, physical and verbal abuse of a patient and was guilty of failing to maintain adequate records.

The Committee found that the Respondent was guilty of willfully abusing Patient A during an examination on December 2, 1992 by touching inappropriately the Patient's anal area without medical justification, while at the time telling the Patient to relax. The Committee found that the Respondent verbally and physically abused Patient A on December 9, 1992 by pinching the nipple of the Patient's breast inappropriately and without medical justification, while asking the Patient if she was stimulated. The Committee also found that during the December 9, 1992 examination, the Respondent inserted his fingers into Patient A's vaginal and anal areas without medical justification or indication. The Committee found further that during this examination, the Respondent rubbed Patient A's clitoris while asking her if this gave her pleasure. The Committee found that there was no medical justification for this conduct. The Committee found that the Respondent also made remarks to the Patient during this examination which the Committee found to be inappropriate. The Committee found that during an examination of the Patient on December 30, 1992 that the Respondent fondled Patient A's buttox, without medical justification.

The Committee found that the Respondent had failed to keep adequate medical records for Patient A. The Committee found that the Respondent failed to adequately describe skin lesions on Patient A in records for the examinations of December 2, December 9 and December 30, 1992. The Committee found that the Respondent had failed to record adequately the indication for prescribing Ceclor for Patient A on December 2, 1992. The Committee found that the Respondent failed to adequately perform or document a pelvic examination that the Respondent performed on Patient A on December 9, 1992.

In reaching their Determination on the major allegations concerning willful, physical and verbal abuse, the Committee determined that Patient A was a more credible witness than the Respondent. The Committee found that Patient A's testimony was bolstered by testimony from her treating psychiatrist, Dr. Letourneu, in which Dr. Letourneu testified that the Respondent suffered from a borderline personality disorder, but did not generally fabricate lies and had never fabricated any story to him. The Committee found that Patient A's testimony was also bolstered by a taped conversation between the Respondent and Patient A, which was received in evidence as Petitioner's Exhibit 4A. Concerning psychiatric testimony about Patient A's mental illness, the Committee gave

greater weight to the testimony by Dr. Letourneau, than to testimony by the Respondent's psychiatric expert Dr. Theresa Miller. On the issue of medical records the Committee gave greater weight to the testimony by the Petitioner's witness Dr. Robert Tatelbaum, than testimony by the Respondent's expert Dr. Paul Rapoza or by the Respondent's other witness Dr. Frank Chafel.

The Committee concluded that the Respondent had touched Patient A inappropriately during three physical examinations and that his comments regarding massage, stimulation and Patient A's lack of sexual activity were tantamount to sexual abuse. The Committee noted that no female patient should ever be subjected to abuse of that nature. The Committee also concluded that the Respondent had demonstrated his lack of skill in record documentation. The Committee concluded, however, that the Respondent's inappropriate actions and words were not for his own sexual gratification, but some misguided attempt to help Patient A during an extremely stressful period in her life. The Committee found that the Respondent appeared to be naive in areas of human sexuality when answering questions posed by the Hearing Committee. The Committee voted to suspend the Respondent's license for a period of three years. The Committee then stayed the suspension for two and a half years and placed the Respondent on probation. The Committee also banned the Respondent permanently from performing pelvic examinations upon female patients. The terms of probation require that the Respondent complete an Office of Professional Medical Conduct approved course in medical record keeping during the six month period in which the Respondent's license is actually suspended.

The Hearing Committee concluded that the Respondent would be sufficiently penalized economically through the six month suspension from practice. They also noted that the Respondent faces financial exposure due to a pending lawsuit by Patient A. The Committee noted that the Respondent has practiced in the town of Hilton, New York since 1976 and this is the only complaint of professional misconduct against him. The Committee stated that for those reasons the Respondent's license should not be revoked.

REQUESTS FOR REVIEW

RESPONDENT: The Respondent has requested that the Review Board overturn the finding that the Respondent is guilty of willful abuse of Patient A. Respondent asks further that the Review Board overturn the Hearing Committee's penalty and substitute a penalty which the Respondent recommends.

The Respondent argues that he is not guilty of wilful abuse because there was no evidence at the hearing that the Respondent knew or should have known that his conduct was harmful or unreasonable. The Respondent argues that the Hearing Committee's Determination is inconsistent in sustaining the charges of willful abuse because the Committee found that Dr. Chung's actions and his words were not for his gratification, but some misguided attempt to help Patient A during an extremely stressful period in her life. The Respondent's brief contests all of the Committee's conclusions sustaining the allegations of willful abuse against the Respondent. The Respondent argues further that the general findings of fact do not accurately reflect Dr. Chung's testimony.

The Respondent argues that the proposed penalties are harsh and inappropriate and would destroy Dr. Chung's medical practice rather than restore him to accepted standards of medicine. The Respondent argues that the six month suspension will cause a hardship to the Respondent's rural practice, would lead to the loss of hospital and HMO privileges and would lead to the loss of future private practice or employment.

The Respondent contends that the Committee's concerns regarding the Respondent's practice could be addressed by an alternative penalty which would censure and reprimand the Respondent and place him on probation for a three year period. The Respondent recommends that the provisions of probation include a practice monitor and a satisfactory completion of an Office of Professional Medical Conduct approved course in medical record keeping during the first six months of probation. The Respondent also recommends a ban on the Respondent's non-emergency pelvic examinations or an alternative requirement that a female chaperon be present during all pelvic examinations of female patients. The Respondent also recommends medical public service in an area approved by the Office of Professional Medical Conduct.

In reply to the Petitioner's brief the Respondent argues that the Review Board should not overturn the Hearing Committee's Determination and reinstate the charge of moral unfitness to practice medicine. The Petitioner argues that the Hearing Committee was in the best position to determine whether the facts supported the charge of moral unfitness and the Committee did not sustain that charge.

PETITIONER: The Petitioner has asked that the Review Board overturn the Hearing Committee and find that the Respondent was guilty of moral unfitness in the practice of medicine. The Petitioner argues further that the Hearing Committee's penalty in this case was inappropriate and asks that the review Board revoke the Respondent's license to practice medicine in New York State.

The Petitioner contends that the Hearing Committee's findings of fact support the Determination that the Respondent was guilty of moral unfitness, based upon findings that the Respondent had inappropriate physical contact with Patient A over the course of three examinations, without medical justification, and that the Respondent spoke inappropriately to the Patient during those three examinations. The Petitioner argues further that the Respondent's willful, verbal and physical abuse of Patient A was clearly sexual in nature and leads to the conclusion that the Respondent is morally unfit to practice.

The Petitioner argues that the penalty imposed by the Hearing Committee is ineffective in light of the findings by the Committee and argues further that irreparable harm will be caused if the Respondent continues to practice medicine in New York State. The Petitioner contends that there is no basis in the record for the Committee to conclude that the Respondent's actions were not for his own sexual gratification. The Petitioner argues that the penalty by the Hearing Committee is insufficient, that the lifetime ban on pelvic examinations is clearly ineffective and that the penalty does not address Respondent's verbal abuse of Patient A. The Petitioner argues that the six month suspension does not address the serious nature of the Respondent's conduct. The Petitioner argues that the Respondent has violated the trust between a patient and physician and that the Respondent should not be given another chance to do more harm.

In reply to the Respondent's brief, the Petitioner contends that the record in this case supports the Committee's Determination that the Respondent willfully, physically and verbally abused Patient A.

REVIEW BOARD DETERMINATION

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

The Review Board votes 4-0 to sustain the Hearing Committee's Determination that the Respondent was guilty of willful, physical and verbal abuse of a patient. The Review Board finds that the Hearing Committee's Determination is consistent with their findings of fact and their conclusions that the Respondent had inappropriate physical contact and made inappropriate remarks to a patient on three separate occasions in December of 1992. The Review Board rejects the Respondent's contention that the Respondent's conduct was not willful. The record is clear that the Respondent pinched Patient A's nipple, inserted his fingers into the Patient's vaginal and anal areas, massaged her clitoris and fondled her buttox. None of this conduct was for a legitimate medical reason. None of the conduct was accidental or incidental to a legitimate medical purpose. The physical conduct coupled with the Respondent's remarks at each separate December, 1992 examination demonstrate willful, verbal and physical abuse. The three incidents taken together establish a pattern which demonstrates clearly that the Respondent willfully abused the Patient. The audio tape that was in evidence as Petitioner's Exhibit 4A establishes further that the Respondent intended to continue such conduct with this Patient. The audiotape indicates that, as an inducement to the Patient to allow the Respondent to perform future examinations, the Respondent offered to visit the Patient at her home and to continue treating her even though she had lost her medical coverage.

By a vote of 4-0, the Review Board overturns the Hearing Committee's Determination that the Respondent was not guilty of moral unfitness in the practice of medicine. The Review Board concludes that the Hearing Committee's finding concerning the Respondent's repeated physical and verbal abuse of Patient A supports a determination that the Respondent was guilty of moral unfitness.

The Review Board sustains the Hearing Committee's Determination that the Respondent was guilty of failing to maintain adequate records for Patient A.

The Review Board rejects the Respondent's contention that the Committee's Determination should be nullified because the Committee's general findings do not accurately reflect Dr. Chung's testimony. The Hearing Committee as finder of fact are the proper body to make determinations as to the credibility of witnesses. The finder of fact may accept or reject the evidence that is submitted to them. In this case, the Committee found Patient A to be a credible witness and found the Respondent to lack credibility. Patient A's testimony was clearly bolstered by the audio tape recording in evidence as Petitioner's Exhibit 4A. The Respondent's admissions on the audio tape support the determination that the Respondent was guilty of willful abuse and moral unfitness.

By a vote of 3-1, the Review Board sustains the Hearing Committee's Determination to prohibit the Respondent from performing pelvic examinations on female patients, to suspend the Respondent's license for three years with two and a half years of the penalty stayed, to require the Respondent to undergo a course in medical record keeping and to place the Respondent on probation for two and one half years. The dissenting member of the Review Board votes to revoke the Respondent's license to practice medicine in New York State.

The Review Board's majority finds that the Respondent's willful abuse of this Patient and his morally unfit conduct merit a severe sanction. His conduct is serious enough to warrant the revocation of his license. The majority, however, defers to the Hearing Committee's judgement that the penalty they have crafted will guarantee the continued protection of the public and will ensure that the Respondent does not commit such conduct in the future. The period of the actual suspension is clearly warranted in this case. The Respondent's misconduct toward Patient A indicates further that he should not be allowed to perform pelvic examinations on female patients again. The Respondent's record keeping deficiencies warrant a course of retraining.

The Review Board modifies the Hearing Committee's Determination to place an additional limitation on the Respondent's license. The Review Board limits the Respondent's license to require that there shall be a chaperon present at any time that the Respondent examines or treats a female patient.

ORDER

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

1. The Review Board **SUSTAINS** the Hearing Committee's August 1, 1995 Determination finding the Respondent guilty of willfully abusing a patient and failing to maintain adequate records.
2. The Review Board **OVERRULES** the Hearing Committee's Determination that the Respondent was not guilty of moral unfitness in the practice of medicine.
3. The Review Board **SUSTAINS** the charge that the Respondent was guilty of moral unfitness in the practice of medicine.
4. The Review Board **LIMITS** the Respondent's license to prohibit him from performing pelvic examinations on female patients.
5. The Review Board **LIMITS** the Respondent's license to require that he have a chaperon present during any examination of a female patient.
6. The Review Board **SUSPENDS** the Respondent's license for a period of three years, and stays the final two and a half years of the penalty.
7. The Respondent shall complete a course, approved by the Office of Professional Medical Conduct, in medical record keeping during the six month period in which his license is actually suspended.

8. The Respondent shall be on probation for two and one half years following the time of his actual suspension. The terms of that probation are set out in Appendix II of the Hearing Committee's Report.

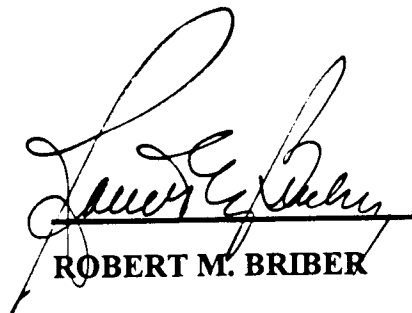
ROBERT M. BRIBER
WINSTON S. PRICE, M.D.
EDWARD SINNOTT, M.D.
WILLIAM A. STEWART, M.D.

IN THE MATTER OF KWAN HO CHUNG, 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. Chung.

DATED: Albany, New York

Oct 27, 1995




ROBERT M. BRIBER

IN THE MATTER OF KWAN HO CHUNG, 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. Chung.

DATED: Brooklyn, New York

10/25/, 1995



WINSTON S. PRICE, M.D.

IN THE MATTER OF KWAN HO CHUNG, 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. Chung.

DATED: Roslyn, New York

Oct 27, 1995

A handwritten signature in cursive script, reading "Edward C. Sinnott, M.D.", written over a horizontal line.

EDWARD C. SINNOTT, M.D.

IN THE MATTER OF KWAN HO CHUNG, M.D.

WILLIAM A. STEWART, M.D., a member of the Administrative Review Board for Professional Medical Conduct, affirms that he took part in the deliberations in the matter of Dr. Chung and that this Determination reflects the decision of the majority in this case.

DATED: Syracuse, New York

30 Oct., 1995

William A Stewart

WILLIAM A. STEWART, M.D.