



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Lorna McBarnette
Executive Deputy Commissioner

April 15, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Gabriel Covo, M.D.
17 West 67th Street
New York, New York 10023

Nathan L. Dembin, Esq.
Thurm & Heller
26 Broadway
New York, New York 10004

Roy Nemerson, Esq.
New York State Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza - Sixth Floor
New York, New York 10001-1810

RE: In the Matter of Gabriel Covo, M.D.

Dear Dr. Covo, Mr. Dembin and Mr. Nemerson:

Enclosed is the Determination and Order of the Professional Medical Conduct Administrative Review Board.

This Determination and Order will be deemed effective upon receipt or seven (7) days after mailing by certified or express 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
Enclosures

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

-----X
IN THE MATTER : ADMINISTRATIVE
OF : REVIEW BOARD
GABRIEL COVO, M.D. : DETERMINATION
AND
-----X NO. BPMC 91-12-A

A quorum of the Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of Robert M. Briber, Edward C. Sinnott, M.D. and William A. Stewart, M.D.¹ held deliberations on April 8, 1992 to review the Professional Medical Conduct Hearing Committee's (hereinafter the "Hearing Committee") January 2, 1992 Determination (attached) dismissing misconduct charges against the Respondent, Gabriel Covo, M.D. James F. Horan, Esq. served as Administrative Officer to the Board. The Department of Health requested the review through a Notice dated January 21, 1992. Roy Nemerson, Esq. submitted a Brief on behalf of the Department of Health, and Nathan L. Dembin, Esq. submitted a Brief on behalf of the Respondent, Gabriel Covo, M.D.

SCOPE OF REVIEW

Public Health Law §230(10)(i) and §230-c(i) provides that the Board may review a Determination by the Hearing Committee of the State Board for Professional Medical Conduct. Public

¹ At the time at which the Administrative Review Board met for deliberations in this case, the New York State Senate had confirmed three members of the five-member Administrative Review Board that was created pursuant to Chapter 606, of the Laws of 1991.

Health Law §230-c(4)(b) provides that the Board shall review:

1. whether or not the hearing committee's determination and penalty are consistent with the committee's findings of fact and conclusions of law; and
2. whether or not the penalty is appropriate and within the scope of penalties permitted by Public Health Law §230-a.

The Board may remand a case to the Committee for reconsideration and further proceedings.

The Administrative Officer determined based upon the provisions of §230-c(4)(c) of the New York State Public Health Law that the Review Board could conduct deliberations in this matter with a three-member quorum provided that any determination reached shall be valid only if affirmed unanimously by all three members present.

HEARING COMMITTEE DETERMINATION

The Office of Professional Medical Conduct (OPMC) charged the Respondent with practicing medicine in New York State while his license was suspended. Specifically, OPMC had charged that Dr. Covo was practicing medicine while employed by Martin Barander, M.D. from February 1989 through June 1991.

By a two-to-one vote, the Hearing Committee concluded that the preponderance of the evidence demonstrated that Dr. Covo's employment by Dr. Barander did not constitute the practice

of medicine and the Hearing Committee dismissed the charge against the Respondent.

The Hearing Committee's one dissenting member concluded that the Respondent's job with Dr. Barander was to provide "professional medical services".

ISSUES FOR REVIEW

The Department argues that the Hearing Committee's conclusion dismissing the charge against the Respondent:

- is inconsistent with the facts found by the Hearing Committee;
- is inconsistent with the Respondent's testimony;
- is inconsistent with uncontested evidence; and
- is wrong as a matter of law.

The Respondent's counsel argues that the facts and the record demonstrate that the Respondent's function was solely technical and that the Respondent did not engage in the practice of medicine.

ADMINISTRATIVE REVIEW BOARD DETERMINATION

By a unanimous vote, the Review Board has determined that the Hearing Committee's Findings of Fact are not consistent with their Determination that Dr. Covo was not practicing medicine. The Review Board has determined, based upon the Hearing Committee's Findings, that Dr. Covo's employment by Dr. Barander did constitute the practice of medicine.

Dr. Covo's duties at Dr. Barander's office consisted of taking blood pressure readings while a nuclear medicine technician supervised patients during a bicycle exercise tolerance test (Finding of Fact #6). The Respondent testified that he was able to make a judgement as to whether the patient could continue the tolerance test based upon his 33 years of experience practicing medicine (Finding of Fact #7). These activities amount to diagnosing physical conditions and, therefore, constitute the practice of medicine as defined in New York Education Law §6521. The Hearing Committee also found Respondent never informed Dr. Barander that his license was suspended (Finding of Fact #11). The Review Board drew a negative inference from the Respondent's failure to inform Dr. Barander of his suspension. If the Respondent had believed that his activities did not constitute the practice of medicine, then there was no need to withhold information about the status of his license.

The Review Board finds that the Respondent was practicing while his license was suspended as specified in the original Statement of Charges.

Although the Review Board finds that the Respondent practiced medicine while suspended, we do not feel that the penalty of revocation is appropriate or consistent with the Findings of Fact. The Respondent's practicing while his license was suspended and his failure to undergo a psychiatric evaluation under his prior probation do raise the question as to whether the Respondent is ready to return to the practice of medicine. (The

Hearing Committee determined in Finding of Fact #3 that the Respondent had not undergone a psychiatric evaluation as mandated by his previous terms of probation.)

Therefore, we hereby determine that the Respondent's license should remain suspended until the Respondent has completed an evaluation and a course of re-training as specified below. The suspension shall remain in effect until the Respondent:

1. Completes the Phase I Evaluation of the Physician Prescribed Education Program (PPEP) of the Department of Family Medicine, SUNY Health Science Center at Syracuse and the Department of Medical Education at St. Joseph's Hospital and Health Center Syracuse;² and
2. If the Phase I evaluation indicates that he is a candidate for re-education, then the Respondent must complete Phase II of the PPEP, or an equivalent program, successfully.

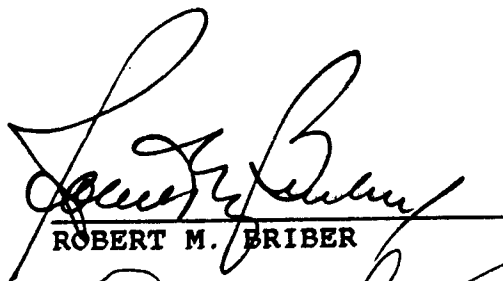
² Department of Family Medicine, 479 Irving Avenue, No. 200, Syracuse, New York 13210.

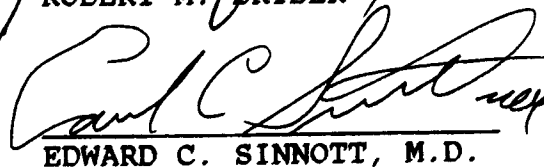
ORDER

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

1. The January 2, 1992 Determination of the Hearing Committee on Professional Medical Conduct is hereby overruled; and
2. The suspension of the Respondent's license to practice medicine in the State of New York is continued as modified in the above Determination.

DATED: Albany, New York
April 8, 1992


ROBERT M. ERIBER


EDWARD C. SINNOTT, M.D.


WILLIAM A. STEWART, M.D.