



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 24, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

Louis John Del Giorno, M.D.
630 Winchester Avenue
Martinsburg, West Virginia 25401

Eric M. Davis, P.C.
180 West 80th Street
Suite 215
New York, New York 10024

Louis John Del Giorno, M.D.
11238 Eastwood Drive
Hagerstown, Maryland 21742

Effective date: 10/01/96

RE: In the Matter of Louis John Del Giorno , M.D.

Dear Ms. Kaplan, Dr. Del Giorno and Mr. Davis:

Enclosed please find the Determination and Order (No. ARB-96-92) 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.

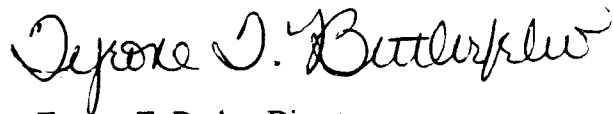
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

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
LOUIS JOHN DEL GIORNO

ADMINISTRATIVE
REVIEW BOARD
DETERMINATION
ARB NO. 96-92

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

The Respondent **LOUIS JOHN DEL GIORNO, M.D.** (Respondent) requests, pursuant to 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 vacate a Determination by a Hearing Committee on Professional Medical Conduct (Committee), which revoked the Respondent's New York medical license, upon finding that the Respondent committed professional misconduct. Review Board Members **ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D.** and **WILLIAM A. STEWART, M.D.** held deliberations on the review on June 28, 1996, with Administrative Law Judge **JAMES F. HORAN** serving as the Board's Administrative Officer. The Board sustains the Hearing Committee's Determination that the Respondent committed professional misconduct by violating New York Education Law (Educ. L.) §6530(9)(d) (McKinney's Supp 1996) and we sustain the Committee's Determination revoking the Respondent's New York medical license.

The Law Offices of **ERIC M. DAVIS, P.C.** represented the Respondent in this review.

MARCIA KAPLAN, ESQ. represented the Office of Professional Medical Conduct (Petitioner).

THE COMMITTEE'S DETERMINATION ON THE CHARGES

Pub H.L. §230(7) authorizes the State Board for Professional Medical Conduct (BPMC) to conduct disciplinary proceedings to determine whether physicians have committed professional misconduct by violating Educ. L. §6530. The Petitioner filed charges with BPMC alleging that the Respondent had violated Educ. L. §6530 (9)(d) by:

- having disciplinary action taken by a duly authorized professional disciplinary agency for another state; and
- for conduct which would constitute professional misconduct if committed in New York State.

The Petitioner brought this case as an expedited proceeding pursuant to Pub.H.L. §230(10)(p). The purpose for 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 before the Florida Board of Medicine (Florida Board), during which the Respondent relinquished his Florida medical license.

Three BPMC members, **EDMUND O. ROTHSCHILD, M.D.** (Chair), **ROBERT R. BERGMANN, M.D.** and **MICHAEL A. GONZALEZ, R.P.A.** comprised the Committee who conducted a hearing and rendered a Determination in this case on April 19, 1996. Administrative Law Judge **MARC P. ZYLBERBERG** served as the Committee's Administrative Officer. The Committee determined that:

- in 1992, the Florida Board charged that the Respondent had committed gross or repeated malpractice or failure to practice medicine with acceptable care, skill or provide acceptable treatment for five patients and that the Respondent failed to keep written medical records justifying treatment; and
- in February, 1995, the Respondent relinquished his Florida license, agreed to never apply for Florida licensure and agreed that the voluntary relinquishment constituted disciplinary action.

The Committee also found that the Trustees for Humana Hospital Northside in Florida had revoked the Respondent's clinical privileges and medical staff membership in 1989. The Humana Trustees determined that the Respondent had rendered care in three cases, that fell well below the community standard, and that the Respondent rendered borderline or questionable care in several other cases.

The Committee concluded that the Florida Board had taken disciplinary action against the Respondent for conduct which would constitute negligence on more than one occasion and failing to maintain adequate records, if committed in New York. The Committee concluded that insufficient evidence existed to demonstrate that the Respondent's Florida conduct would have constituted gross negligence in New York. The Committee stated that the Florida Complaints and Humana Documents in evidence demonstrated that the Respondent's care, treatment and management for five patients deviated significantly from acceptable medical care standards. The Committee stated further that other evidence indicated that the Respondent failed to maintain at least several patients' records accurately or properly. The Committee found little credibility in the Respondent's testimony, such as his assertion that his Florida surrender was involuntary and that he was unaware that the surrender would produce consequences in other states.

The Committee voted to revoke the Respondent's New York medical license, stating that the Respondent's conduct evidences that he lacked complete honesty and fitness to practice. The Committee also voted to deny the Respondent's request for a dismissal in the interests of justice, because they found that the request lacked merit. The Committee stated that the Respondent refuses still to accept his errors in judgment, that even the Respondent's colleagues at Humana found the Respondent's care to be deficient and that the passage in time from the misconduct was of no consequence.

REVIEW HISTORY AND ISSUES

The Respondent filed a Notice requesting a review, which the Board received on May 8, 1996. The Notice stayed the Committee penalty automatically, pending the Board's final Determination on the review (Pub.H.L. §230-c (4)(a)). The Record for the review contained the Committee

Determination, the hearing transcript and exhibits, the Respondent's brief and the Petitioner's reply brief. The Board received the Respondent's brief on June 12, 1996 and the Petitioner's reply brief on June 20, 1996.

The Respondent's brief asks that the Board reverse the Committee's Determination or in the alternative impose a less severe penalty. The Respondent asserts that the underlying charges in Florida resulted from a dispute between the Respondent and a Humana staff member. The brief raises five issues for review, which the Board summarizes below.

1. The Committee's Determination and penalty are inconsistent and inappropriate because the Board failed to give weight to the Respondent's testimony that a Florida prosecutor misled the Respondent about the consequences from relinquishing his Florida license and because the Committee ignored a recommendation in the Humana action from a Trustee's Executive Committee.
2. The Respondent did not relinquish his Florida license voluntarily and therefore New York should not revoke the Respondent's New York license.
3. New York can not revoke the Respondent's license because the Florida Board never adjudicated the charges against the Respondent and no admissions appear in the Respondent's signed relinquishment.
4. Revocation denies the Respondent due process because the Respondent had no notice that relinquishing his Florida license would result in repercussions in other states.
5. The Board should dismiss the charges against the Respondent in the interests of justice because the underlying conduct occurred seven years ago and because the Respondent lacked notice about the repercussions from relinquishing his Florida license.

The Petitioner's reply brief makes three points in response:

- a. the Respondent's due process claims are beyond the Board's limited scope of review;
- b. the record supports the Committee's penalty; and
- c. the Committee considered and rejected the Respondent's request for a dismissal in the interests of justice, and the Board should do the same.

THE BOARD'S REVIEW AUTHORITY

Pub.H.L. §230(10)(i), §230-c(1) and §230-c(4)(b) authorize the Board to review determinations by hearing committees for professional medical conduct and to decide:

- 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.

Pub.H.L. §230-c(4)(b) permits the Board to remand a case to the Committee for further consideration. Pub.H.L. §230-c(4)(c) provides that the Review Board's Determinations shall be based upon a majority concurrence of the Review Board.

The Board has the authority to 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 in deciding credibility issues, 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 considered the record in this case and the parties' submissions. The Board votes 5-0 to sustain the Committee's Determination that the Respondent's Florida misconduct would constitute misconduct in New York in violation of Educ. L. §6530 (9)(d). The Board votes 5-0 to sustain the Committee's Determination to revoke the Respondent's New York medical license. The Board finds that the Committee's Determinations are consistent with their findings and conclusions and that the evidence before the Committee supported the Committee's findings. The Respondent's brief repeats the same points throughout each issue he raises. He challenges his Florida relinquishment, he questions how the Committee could make a Determination without a Florida guilt adjudication or admission by the Respondent and he argues that the circumstances in the case require either a reduction in the Committee's penalty or a dismissal. The Board discusses each point below.

FLORIDA RELINQUISHMENT: On February 7, 1995, the Respondent signed a document relinquishing his Florida medical license (Petitioner Ex. 3). That document indicates that the Respondent relinquished his license voluntarily and that the relinquishment represented disciplinary action that the Florida Board would report to other State Medical Boards and to the National Practitioner's Data Bank. The Respondent may not reopen or repudiate that document before the Committee or the Board. The Board agrees with the Committee that the Respondent's statement contradicting the Relinquishment Terms lacks credibility.

COMMITTEE DETERMINATION ON GUILT: The Respondent argues that the Committee could not base guilty findings on the Florida Relinquishment, because the Relinquishment contained no admission to the Florida misconduct charges. The Board rejects that argument. The 1988 cases that the Respondent uses to support his argument-Halyalkar v. Board of Regents, 72 NY2d 261, 532 NYS 2d85, 1988 NY LEXIS 1690 (1988); Matter of Sood v. Commissioner of Education 137 AD2d 918, 524 NYS 2d 584, 1988 NY App Div. LEXIS 1609 (Third Dept. 1988)-came from the courts prior to the date that the Legislature enacted Educ. L. §6530(9)(d) (Chapter 606, Laws of 1991), the statute under which the Petitioner brought these charges against the Respondent. To prove that the Respondent violated Educ. L. §6530 (9)(d), the Petitioner must show only that another state's disciplinary agency instituted a disciplinary action against the Respondent, that resulted in a voluntary surrender for conduct which, if committed in New York, would constitute misconduct in New York.

The evidence before the Committee demonstrated that the Florida Board filed two complaints against the Respondent in 1992 for misconduct in treating five patients. The Respondent then relinquished his license voluntarily in 1995. The evidence from the Florida action and the Humana proceeding supports the Committee's Determination that the Respondent's Florida conduct would constitute:

- practicing medicine with negligence on more than one occasion, in violation of Educ. L. §6530(3); and
- failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient, in violation of Educ. L. §6530(32).

DISMISSAL IN THE INTEREST OF JUSTICE: Educ. L. §6530 permits a Hearing Committee to dismiss charges in the interests of justice. The Committee considered the Respondent's request for such a dismissal in this case and found no merit to the request. The Committee found the passage of seven years since the misconduct to be of no consequence. The Committee stated that the Respondent's care and treatment for five patients fell below acceptable medial standards and that even the Respondent's peers at Humana found his care to be deficient. The Committee found the Respondent's care to be deficient.

The Respondent now requests that the Board dismiss this case in the interests of justice. The Respondent bases his request on the grounds which the Committee rejected when the Committee denied the motion at the hearing. The Respondent also bases the request on the two grounds which the Board considered and rejected above. The Board agrees with the Committee that nothing in this case supports a dismissal in the interests of justice.

PENALTY: The Respondent requests that the Board reduce the Committee's penalty. The Respondent again raises the same arguments in this request that the Board has rejected above. The Respondent also notes that he maintains a license currently in West Virginia. The Board denies the request and sustains the Hearing Committee's penalty. The Committee found the Respondent's misconduct to be very serious and found that the Respondent still fails to accept his errors in judgment. The Respondent's failure to accept his errors indicates he is an inappropriate candidate for retraining or remediation. Absent a means, such as retraining, to improve the Respondent's deficient medical skills, the Board and the Committee can protect the health of this State's citizens only by preventing the Respondent from practicing here. We note that Florida terminated their action against the Respondent only after he signed a document that relinquished his license and guaranteed that he would never apply again for Florida licensure. The Board finds that New York should provide our citizens the same protection that the Florida Board guaranteed to their citizens. We find no reason to decrease the penalty in this case because certain other states find the Respondent's deficient medical skills to be acceptable. The Board votes to revoke the Respondent's license to practice medicine in New York State.

ORDER

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

- 1 The Board **SUSTAINS** the Committee's April 19, 1996 Determination finding the Respondent guilty for professional misconduct.

- 2 The Board **SUSTAINS** the Committee's Determination to revoke 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.

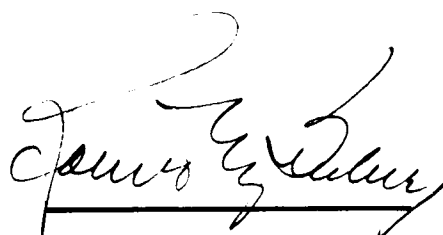
WILLIAM A. STEWART, M.D.

IN THE MATTER OF LOUIS JOHN DEL GIORNO, 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. Del Giorno.

DATED: Schenectady, New York

Aug 9, 1996

A handwritten signature in cursive script, appearing to read "Robert M. Briber", written over a horizontal line.

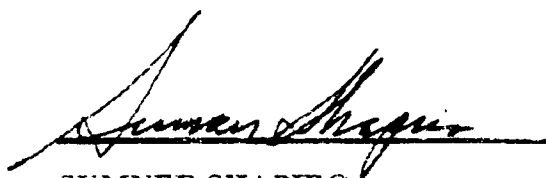
ROBERT M. BRIBER

IN THE MATTER OF LOUIS JOHN DEL GIORNO, 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. Del Giorno

DATED: Delmar, New York

AUG. 10, 1996

A handwritten signature in cursive script, appearing to read "Sumner Shapiro", is written over a solid horizontal line.

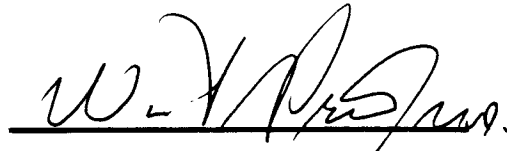
SUMNER SHAPIRO

IN THE MATTER OF LOUIS JOHN DEL GIORNO, 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. Del Giorno.

DATED: Brooklyn, New York

9/3/96, 1996


WINSTON S. PRICE, M.D.

IN THE MATTER OF LOUIS JOHN DEL GIORNO, 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 Del
Giorno

DATED: Roslyn, New York

Aug 9, 1996

A handwritten signature in black ink, appearing to read "Edward C. Sinnott", written over a horizontal line.

EDWARD C. SINNOTT, M.D.

IN THE MATTER OF LOUIS JOHN DEL GIORNO, 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. Del Giorno.

DATED: Syracuse, New York

9 Aug, 1996



WILLIAM A. STEWART, M.D.