

**DOH** STATE OF NEW YORK  
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Barbara A. DeBuono, M.D., M.P.H.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*

March 12, 1998

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Michele Y. Tong, Esq.  
NYS Department of Health  
5 Penn Plaza - Sixth Floor  
New York, New York 10001

Daniel Despen, R.P.A.  
6 Gerard Avenue  
Malverne, New York 11565

Paula Schwartz Frome, Esq.  
Franklin Avenue Office Center  
1325 Franklin Avenue  
Suite 225  
Garden City, New York 11530

**RE: In the Matter of Daniel Despen, R.P.A.**

Dear Ms. Tong, Mr. Despen and Ms. Frome:

Enclosed please find the Determination and Order (No.97-303) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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  
Hedley Park Place  
433 River Street-Fourth Floor  
Troy, New York 12180

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/nm". The signature is written in a cursive style with a large initial 'T' and 'B'.

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:nm

Enclosure

**STATE OF NEW YORK : DEPARTMENT OF HEALTH (Petitioner)**

**In The Matter Of**

**Daniel Despen, R.P.A. (Respondent)**

**Administrative Review  
Board (ARB)  
Determination and  
Order 97 - 303**

**Proceeding to review a Determination by a Hearing Committee (Committee)  
from Board for Professional Medical Conduct (BPMC)**

**COPY**

**Before Board Members : Briber, Stewart, Sinnott, Price & Shapiro.  
Administrative Law Judge James F. Horan served as the Board's Administrative Officer.**

**For the Respondent: Paula Schwartz Frome, Esq.  
For the Petitioner: Michele Y. Tong, Esq.**

After a hearing into charges that the Respondent committed professional misconduct, due to a Federal Criminal Conviction for Medicaid and Mail Fraud, a BPMC Committee sustained the charges and revoked the Respondent's license to practice as a Physician Assistant (License). The Committee's penalty became effective when the Respondent received the Determination in December, 1997. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney Supp. 1998), the Respondent asks the ARB to overturn the Committee's Determination and impose a less severe penalty. After considering the hearing record and the parties' briefs, the ARB finds the Committee's reasons for revoking the Respondent's License unsupported by the record and we find the penalty grossly disproportionate to the Respondent's misconduct. The ARB overturns the Committee's penalty, we vote to suspend the Respondent's License and we limit the suspension to the time the Respondent has been unable to practice, from the effective date under the Committee's December, 1997 Determination to the present.

**COMMITTEE DETERMINATION ON CHARGES**

The Petitioner filed charges with BPMC alleging that the Respondent violated N. Y. Educ. Law § 6530(9)(a)(ii) (McKinney Supp. 1998), that defines professional misconduct to include acts that result in a criminal conviction under Federal Law. An expedited hearing ensued pursuant to N.Y. Pub. Health Law § 230(10)(p)(McKinney Supp. 1998), before a BPMC Committee, who then rendered the Determination which the ARB now reviews. In such an expedited hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The Committee sustained the charge, upon determining that the Respondent entered a guilty plea in the United States District Court, for the Southern District of New York, to one count of conspiracy to commit Medicaid Fraud and Mail Fraud. The District Court sentenced the Respondent to three years on probation and to three hundred hours Community Service. After considering the evidence concerning the criminal conviction and testimony by the Respondent at the hearing, the Committee voted to revoke his License. The Committee found no dedication to the caring arts by the Respondent and found him disinterested in any attempt to improve his professional knowledge or clinical capacity. The Committee found no "saving grace" in the Respondent and determined that the Respondent lacked both ethical stature and professional usefulness. The Committee found further that the Respondent knew his former employer submitted inaccurate billings in the Respondent's name, but the Respondent neither reported the wrong doing nor left his employment. The Committee concluded that the Respondent had shrugged off his professional responsibility in participating in the theft that resulted in the Respondent's conviction.

#### **REVIEW HISTORY AND ISSUES**

The Committee rendered their Determination on December 12, 1997. The Respondent then commenced this proceeding on December 29, 1997, when the ARB received the Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's reply brief. The record closed when the ARB received the Petitioner's reply on February 5, 1998.

The Respondent alleges that the Committee imposed an overly harsh penalty, that they arrived at improperly. The Respondent raises three issues on review:

- The Committee made inaccurate factual findings that the Respondent failed to leave the practice facility (practice) or report wrongdoing and that the Respondent had no desire to improve his knowledge.
- The Committee acted improperly and illegally in making findings involving the Respondent's professional competence, when no charges in the case involved the

Respondent's competence.

- The Committee erred in giving no weight to the Respondent's voluntary and complete cooperation with prosecutors.

The Respondent urges the Board to reduce the Committee's penalty and suggests that a short license suspension would provide an appropriate sanction.

In reply, the Petitioner asks the ARB to impose an appropriate penalty. The Petitioner notes that the Respondent provided substantial assistance to the Federal government in investigating and prosecuting other persons who committed Federal offenses and that a Special Agent from the Federal Bureau of Investigation contacted Petitioner's Counsel to put in a good word for the Respondent.

### **REVIEW BOARD DETERMINATION**

All ARB Members participated in this case. Dr. Price participated in the February 27, 1998 Deliberations by telephone. The ARB renders this Determination after considering the record and the parties' briefs. We overturn the Committee's revocation penalty and we vote to suspend the Respondent's License. We limit the suspension to the time the Respondent has been unable to practice since the Committee's penalty became effective.

The ARB agrees with the Respondent's counsel that the Committee acted improperly by considering issues beyond those in the Statement of Charges. The Petitioner charged that the Respondent committed professional misconduct due to his Federal Criminal Conviction only. Although the Charges make no allegations concerning the Respondent's professional competence [Petitioner's Exhibit 1], the Committee stated, at page 3 in their Determination, that the Respondent lacked dedication to the caring arts, interest in improving his knowledge or clinical capacity and usefulness as a Physician's Assistant. These conclusions indicate clearly that the Committee based their Determination in part on their assessment about the Respondent's clinical competency. A Committee violates due process by imposing a penalty for conduct, when the Respondent has had no opportunity to offer a defense on that issue, Matter of Dhabuwala v. State Bd. for Prof. Med. Conduct, 229 AD2d 752, 645 NYS2d 600 (1996). Neither the charges nor the Committee's questions

to the Respondent at the hearing provided the Respondent with notice that any issue existed in the proceeding about his professional competency.

The only issue at the hearing, to form a basis for a penalty, involved the Respondent's criminal conviction, that resulted from his work at a practice that submitted fraudulent billings to the Medicaid Program, some for services that the Respondent performed. The Respondent continued to work at the practice for eight months and failed to go to the authorities immediately during that time to inform them about the fraudulent activities in the practice. The ARB finds that the Respondent's participation in the fraudulent scheme, even for the limited time period, amounts to serious misconduct, but we conclude that revocation constitutes an excessively harsh penalty for the minor role the Respondent played in the fraudulent activities. The principals in the practice submitted false billings under the Respondent's name for services the Respondent never performed. The Respondent took no part in planning the scheme and he received no share in any profits from the fraudulent activities. The Respondent did leave the practice before learning about any investigation into the practice and the Respondent did eventually cooperate with prosecutors.

The ARB finds that the Committee ignored or misinterpreted mitigating factors in considering a penalty in this case. Contrary to the Committee's conclusions, the Respondent did eventually leave the practice due to the fraudulent activity and his cooperation provided substantial assistance to the Federal Government's investigation and prosecution concerning activities at the clinic [Respondent Exhibit A]. Also contrary to the Committee's conclusions, the Respondent showed dedication to the caring arts and attempted to improve his knowledge and clinical capacity. After approximately six years working in New York as a Physician Assistant, the Respondent travelled to Santo Domingo to attend Medical School [Respondent's Brief, Attachment 2]. Again, contrary to the Committee's conclusions, the facts in the case do demonstrate "saving graces" in the Respondent's favor. The Respondent worked at other jobs, in addition to Physician Assistant, to support his family. He returned to school to advance himself. The Respondent has no other misconduct on his record. The issues in the case have no bearing on the Respondent's professional competence. Finally, the Respondent served the United States in Viet Nam and received an honorable discharge from the Army.

The ARB concludes that an actual suspension in the Respondent's practice will provide a sufficient penalty for the Respondent's misconduct. We note that the Committee's revocation penalty became effective against the Respondent immediately upon service, pursuant to N. Y. Pub. Health Law § 230-c (4)(a)(McKinney Supp. 1998). Under the penalty, therefore, the Respondent has been unable to practice since December, 1997. The ARB concludes that the Respondent's time away from practice since the Committee's Order became effective has provided a sufficient actual suspension. We vote unanimously to suspend the Respondent's License retroactive to the date the Committee's Order became effective and to end the suspension immediately.

### **ORDER**

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

1. The ARB **SUSTAINS** the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB **OVERTURNS** the Committee's Determination revoking the Respondent's License.
3. The ARB **SUSPENDS** the Respondent's License retroactive to the time in December, 1997 when the Committee's Order became effective.
4. The ARB **TERMINATES** the Respondent's suspension immediately.

**Robert M. Briber**

**Sumner Shapiro**

**Winston S. Price, M.D.**

**Edward C. Sinnott, M.D.**

**William A. Stewart, M.D.**

**In The Matter Of Daniel Despen, R.P.A.**

**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 Mr. Despen.**

**Dated : 5 Mar., 1998**

*William A Stewart*

**William A. Stewart, M.D.**



**In The Matter Of Daniel Despen, R.P.A.**

**SUMNER SHAPIRO, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Mr. Despen.**

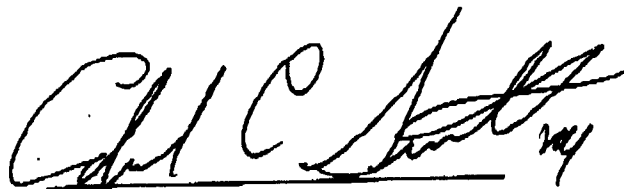
**DATED: Delmar, New York  
March 5, 1998**

  
**SUMNER SHAPIRO**

**In The Matter Of Daniel Despen, R.P.A.**

**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 Mr. Despen.**

**Dated : March 7, 1997**

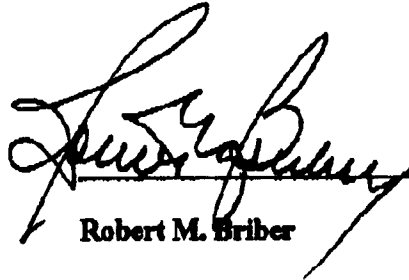
A handwritten signature in black ink, appearing to read 'Ed C. Sinnott', written over a horizontal line. The signature is cursive and includes a date '1997' at the end.

**Edward C. Sinnott, M.D.**

**In The Matter Of Daniel Despen, R.P.A.**

**Robert M. Briber, a member of the Administrative Review Board for Professional Medical  
Conduct, concurs in the Determination and Order in the Matter of Mr. Despen.**

**Dated : March 9, 1998**



**Robert M. Briber**