



STATE OF NEW YORK DEPARTMENT OF HEALTH

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

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

May 9, 1995

RECEIVED
MAY 10 1995
OFFICE OF PROFESSIONAL
MEDICAL CONDUCT

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David Smith, Esq.
NYS Department of Health
5 Penn Plaza - Sixth Floor
New York, New York 10001

Nathan L. Dembin, Esq.
225 Broadway, Suite 1905
New York, New York 10007

Marshall Hubsher, M.D.
1025 Northern Boulevard
Roslyn, New York 11576

RE: In the Matter of Marshall Hubsher, M.D.

EFFECTIVE DATE: 05/16/95

Dear Mr. Smith, Mr. Dembin and Dr. Hubsher :

Enclosed please find the Determination and Order (No.95-12) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 cursive script that reads "Tyrone T. Butler".

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

MARSHALL HUBSHER, M.D.

**ADMINISTRATIVE
REVIEW BOARD
DECISION AND
ORDER NUMBER
ARB NO. 95-12**

The Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of **ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D.** and **WILLIAM A. STEWART, M.D.**¹ held deliberations on April 4, 1995 to review the Hearing Committee on Professional Medical Conduct's (Hearing Committee) January 20, 1995 Determination finding Dr. Marshall Hubsher (Respondent) guilty of professional misconduct. Both the Office of Professional Medical Conduct (Petitioner) and the Respondent requested the Review through Notices which the Board received on February 6 and February 8, 1995. James F. Horan served as Administrative Officer to the Review Board. David W. Smith, Esq. filed a brief for the Petitioner, which the Review Board received on March 14, 1995 and a reply brief, which the Review Board received on March 23, 1995. Nathan L. Dembin, Esq. filed a brief for the Respondent, which the Review Board received on March 16, 1995 and a reply brief, which the review Board received on March 23, 1995.

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:

¹Dr. Sinnott participated in the deliberations through a telephone conference.

- 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 practicing medicine while his license was suspended, failing to maintain adequate records and practicing the profession fraudulently. The charges involved treatment to four patients, A through D, and the alleged rendering of diagnoses and telephoning of prescriptions for additional patients. It was undisputed that the Respondent's license to practice medicine was suspended from April 27, 1988 to October 26, 1989.

The Committee found that the Respondent provided medical treatment to a number of patients during the time his license was suspended, for whom he rendered diagnoses and prescribed medicine. The Committee found that during his suspension, the Respondent telephoned prescriptions to pharmacies and knowingly and intentionally disguised that he was the prescriber by falsely indicating that his brother, Dr. Merritt Hubsher, had issued the prescriptions.

The Committee concluded further that providing treatment to patients required that the Respondent maintain records for that treatment. The Committee found that the Respondent had failed to maintain such records.

The Committee found further that the Respondent had practiced fraudulently by failing to inform Patient A, and another patient AH, that the Respondent's license was suspended while he was treating them, and that he intentionally and knowingly concealed this fact in order to mislead the patients that he could practice psychiatry and could prescribe medications for their disorders.

The Committee voted to revoke the Respondent's license to practice medicine in New York State. The Committee found that the Respondent had demonstrated an unwillingness to work within the framework of his suspension and that the Respondent knowingly misled his patients, pharmacies and insurance carriers. The Committee also found that the Respondent perjured himself during the hearing. The Committee determined that the serious nature of the charges and the cumulative nature of the medical misconduct warranted the revocation of the Respondent's license to practice medicine in New York State.

REQUESTS FOR REVIEW

The Petitioner urges the Review Board to sustain the Hearing Committee's Determination that the Respondent was guilty of misconduct and to sustain the Determination to revoke the Respondent's license to practice medicine in New York State. The Petitioner requests, in addition, that the Review Board impose a civil penalty against the Respondent. The Petitioner argues that the Hearing Committee found that the Respondent had perjured himself at the hearing and that this perjury was in addition to the lies that the Respondent perpetrated to hide the fact that he was practicing without a license. The Petitioner contends that the fine in addition to the revocation, will send a message that the State Board will not tolerate perjury and will deal harshly with deliberate misconduct.

The Respondent challenges the Hearing Committee's findings and asks that the Review Board modify the Hearing Committee's inappropriate and draconian sanction. The Respondent contends that even if the Board agrees with the Committee's Determination, the acts are not of such a magnitude to require the ultimate sanction.

The Respondent argues that there were errors and inconsistencies in the Hearing Committee's findings and that the Hearing Committee's findings were not supported by the record. The Respondent contends that the Petitioner did not offer a single prescription into evidence that would indicate that the Respondent wrote the prescription. The Respondent also contends that the Respondent informed insurance companies and patients that the Respondent was under suspension and that the Respondent had received clearance from the Education Department, from his monitor and

from insurance carriers to practice psychotherapy while the Respondent was suspended from practicing psychiatry.

The Respondent argues that revocation is an excessive penalty. The Respondent argues that he successfully completed the period of suspension, supervised by the Education Department and that the Education Department determined that the Respondent had complied with the terms of his penalty.

The Respondent argues that he is a well skilled, competent and compassionate psychiatrist and that there was no charge that he had harmed any of his patients. The Respondent contends that the mitigating factors in the case call accordingly for a lesser sanction than revocation. The Respondent contends that a more reasonable penalty would be a period of probation, with clear and distinct terms. The Respondent notes that the chief witness for the Petitioner was the Respondent's brother, Dr. Merritt Hubsher, who was himself under investigation, but who received only an administrative warning.

REVIEW BOARD DETERMINATION

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

The Review Board votes to sustain the Hearing Committee's Determination that the Respondent had practiced medicine while suspended, had failed to maintain adequate records and had practiced medicine fraudulently.

The Hearing Committee's Determination is consistent with the Committee's impressive array of findings and their findings are supported by the record in this case. The Committee as the finder of fact observed the Respondent and the other witnesses in this case and they determined which witnesses were credible. The Review Board will not overturn or revise any of the Committee's findings.

Based upon the Committee's findings, the Review Board sustains the Hearing Committee's Determination revoking the Respondent's license to practice medicine in the State of New York. The penalty is consistent with the Committee's findings concerning the Respondent's fraudulent practice

during his suspension and the penalty is appropriate due to the serious nature of the charges and the cumulative nature of the Respondent's misconduct.

The Respondent was placed on suspension following prior misconduct. Rather than abide by the suspension order, the Respondent knowingly and deliberately schemed to continue in practice during the suspension period. The Respondent knowingly and willfully misled his patients, pharmacies and insurance companies. The Review Board finds that there is no appropriate penalty other than revocation. The Respondent has demonstrated that he can not or will not abide by a less restrictive penalty. Further, in violating his previous suspension, the Respondent made fraudulent representations to patients which violated the public's trust in the medical profession.

ORDER

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

1. The Review Board **SUSTAINS** the Hearing Committee on Professional Medical Conduct's Determination finding Dr. Marshall Hubsher guilty of professional misconduct.

2. The Review Board **SUSTAINS** the Hearing Committee's Determination revoking 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.

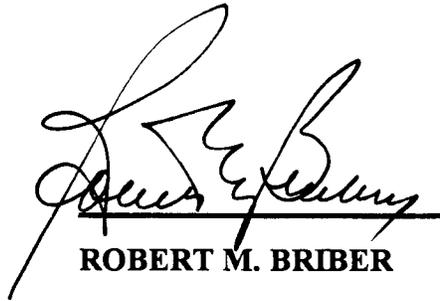
WILLIAM A. STEWART, M.D.

IN THE MATTER OF MARSHALL HUBSHER, 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. Hubsher.

DATED: Albany, New York

4/20, 1995



ROBERT M. BRIBER

IN THE MATTER OF MARSHALL HUBSHER, 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. Hubsher.

DATED: Delmar, New York

April 21, 1995


SUMNER SHAPIRO

IN THE MATTER OF MARSHALL HUBSHER, 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. Hubsher.

DATED: Brooklyn, New York

4/25, 1995



A handwritten signature in cursive script, appearing to read 'W. S. Price', is written over a horizontal line.

WINSTON S. PRICE, M.D.

IN THE MATTER OF MARSHALL HUBSHER, 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. Hubsher.

DATED: Roslyn, New York

April 19, 1995

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

EDWARD C. SINNOTT, M.D.

IN THE MATTER OF MARSHALL HUBSHER, 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. Hubsher.

DATED: Syracuse, New York

8 May, 1995

William A. Stewart

WILLIAM A. STEWART, M.D.