



STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

Mark R. Chassin, M.D. M.P.P., M.P.H.
Commissioner

Paula Wilson
Executive Deputy Commissioner

February 17, 1994

Thomas G. Smith, Esq.
Harter, Secrest & Emery
700 Midtown Tower
Rochester, New York 14604

Cindy Fascia, Esq.
Associate Counsel
NYS Department of Health
Division of Legal Affairs
Empire State Plaza
Corning Tower, Room 2429
Albany, New York 12237

Henry Herrera, M.D.
115 Countess Drive
West Henrietta, New York 14586

RE: In the Matter of Henry Herrera, M.D.

Dear Mr. Smith, Dr. Herrera, and Ms. Fascia:

Enclosed please find the Determination and Order (No. 93-185) 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.

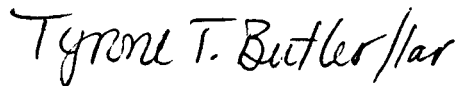
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

Office of Professional Medical Conduct
New York State Department of Health
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, Director
Bureau of Adjudication

TTB:lar
Enclosure

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

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IN THE MATTER	:	<u>ADMINISTRATIVE</u>
	:	<u>REVIEW BOARD</u>
OF	:	<u>DETERMINATION</u>
	:	<u>AND ORDER</u>
HENRY HERRERA, M.D.	:	<u>ARB NO. 93-185</u>

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The Administrative Review Board for Professional Medical Conduct (Review Board), consisting of ROBERT M. BRIBER, MARYCLAIRE B. SHERWIN, WINSTON S. PRICE, M.D. EDWARD C. SINNOTT, M.D.¹ and WILLIAM A. STEWART, M.D. held deliberations on January 11, 1994 to review the Professional Medical Conduct Hearing Committee's (Committee) November 10, 1993 Determination dismissing charges that Dr. Henry Herrera was guilty of professional misconduct. The Office of Professional Medical Conduct (Petitioner) requested the review through a Notice which the Review Board received on November 23, 1993. James F. Horan served as Administrative Officer to the Review Board. Cindy M. Fascia, Esq. submitted a brief for the Petitioner on December 23, 1993 and a response brief which the Board received on January 3, 1994. Thomas G. Smith, Esq. submitted a brief for Dr. Herrera on December 23, 1993 and requested to submit a response to the Petitioner's Reply Brief on January 10, 1993. The Review Board did not consider the Respondent's January 10, 1993 submission, because the time for filing reply briefs had passed, Public Health Law Section 230-c does not permit the

¹. Dr. Sinnott participated in the deliberations by telephone conference.

submission of responses to reply briefs, and, the submission was received the day before the Review Board met and could not be forwarded to the Board Members prior to the deliberation day.

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 Office of Professional Medical Conduct charged the Respondent with gross negligence, gross incompetence, moral unfitness in the practice of medicine and failing to maintain adequate records. The charges arose from the Respondent's relationship with a patient, Patient A, both during and after the time in which the Respondent treated Patient A.

The Hearing Committee found that the Respondent, a psychiatrist, had treated Patient A from August 1989 to May 1991. that the Patient A had developed personal feelings toward the

Respondent (transference), and that the Respondent had developed personal feelings toward Patient A (countertransference), while the Respondent was treating Patient A. The Committee found further that the Respondent and Patient A's relationship became sexual in nature in June 1990, after the Respondent had ceased treating Patient A. The Committee found that the Respondent had mismanaged Patient A's transference and his own countertransference (FF 15, p. 10); that the Respondent had engaged in an intimate personal relationship with Patient A despite factors which placed Patient A at an increased risk of harm (FF 19, p. 12); and that the Respondent was aware, before he started the intimate relationship with Patient A, that literature recommended that Patient A be referred elsewhere and that literature described cases in which patients had suffered harm from such relationships (FF 21, p. 12). The Committee found that the Respondent relied solely on his own personal belief that the well-documented and known risk for such harm would not be a risk for Patient A (FF 21, pp. 12-13).

The Committee concluded that the Respondent was not guilty of gross incompetence because the Respondent did not demonstrate a total and flagrant lack of necessary knowledge or ability. The Committee found that the Respondent did not evidence moral unfitness in the practice of medicine because his intimate relationship with Patient A did not begin until after the Respondent has ceased to treat Patient A. The Committee found that the Respondent was not guilty of failing to maintain adequate

records because the Respondent's records accurately reflected the Respondent's treatment and evaluation of Patient A. The Committee found that, although the Respondent was negligent in the treatment of Patient A, the Respondent was not grossly negligent, because the evidence did not demonstrate a consciousness on the Respondent's part of the impending dangerous consequences if he persisted in his relationship with Patient A. The Committee found that although the Respondent was aware that the psychiatric literature did not condone his actions, the Respondent believed that Patient A would not be harmed by the relationship. The Committee determined that the Respondent's belief negated the consciousness of impending dangerous consequences.

REQUESTS FOR REVIEW

The Petitioner has asked the Review Board to overturn the Committee's Determination that the Respondent was not guilty of gross negligence. The Petitioner argues that the Hearing Committee's Administrative Officer advised the Committee incorrectly that consciousness is a necessary element of gross negligence. The Petitioner states that the proper definition of gross negligence is a single act of negligence of egregious proportions or multiple acts of negligence that cumulatively amount to egregious conduct. The Petitioner contends that the Committee's findings of fact would be consistent with a determination that the Respondent was guilty of gross negligence. The Petitioner asks that the Review Board find that the Respondent was guilty of gross negligence and revoke the Respondent's license.

to practice medicine in New York State.

The Respondent asks the Review Board to sustain the Hearing Committee's Determination that the Respondent was not guilty of any of the charges. The Respondent contends that the Petitioner failed to prove its case before the Hearing Committee and the Respondent alleges that the Hearing Committee applied the proper legal definition of gross negligence.

REVIEW BOARD DETERMINATION

The Review Board has considered the entire record below and the briefs which counsel have submitted. The Board did not consider the Respondent's response to the Petitioner's reply brief.

The Review Board votes to sustain the Hearing Committee's Determination finding the Respondent not guilty of moral unfitness, gross incompetence and failure to maintain adequate records. The Committee's Determination on those charges is consistent with the Committee's findings of fact and conclusions.

The Review Board by four votes to one overturns the Hearing Committee's Determination that the Respondent was not guilty of gross negligence. The Committee's Determination is not consistent with the Committee's numerous findings of fact that establish that the Respondent was guilty of egregious or conspicuously bad conduct in his relationship with Patient A. The Committee found that the Respondent had mismanaged Patient A's transference and the Respondent's countertransference; that the

Respondent had engaged in an intimate relationship with Patient A despite factors which increased the risk of harm to Patient A; that the Respondent was aware that professional literature recommended that Patient A be referred elsewhere; was aware that the literature described cases in which former patients had suffered harm from such relationships; and, that the Respondent had relied solely on his own personal belief that the well documented and known risk for such harm would not be a risk for Patient A.

In reaching our Determination that the Hearing Committee's Findings of Fact were consistent with a Determination that the Respondent was guilty of gross negligence in this case, the Review Board did not consider consciousness as an element of gross negligence, because consciousness is not an element in the definition of gross negligence in professional misconduct cases as that definition has been established recently by the courts, Rupp v. Ambach, 74 NY2d 318(1989); Spero v. Board of Regents, 153 A.D.2d 763, 551 N.Y.S.2d 352 (Third Dept. 1990).

The Review Board votes four to one to censure and reprimand Dr. Herrera for his misconduct in this case. The Review Board finds that there are mitigating factors in this case that obviate the need for a more severe penalty. There were no findings by the Committee that the Respondent exploited Patient A. [REDACTED]

[REDACTED]. Though the Respondent has been married previously, there was no evidence that the Respondent's prior

spouses had been the Respondent's patients previous to their personal relationships. There was no evidence that the Respondent had been guilty of misconduct toward other patients. There was no evidence that Patient A had suffered actual harm as a result of her relationship with the Respondent. Finally, the evidence from the hearing established that the Respondent and Patient A did not commence a sexual relationship until after the Respondent had terminated his treatment of Patient A.

The Review Board feels that both the Hearing Committee and the Review Board were at a disadvantage because there was no testimony at the hearing from Patient A. We agree with some of the experts who testified at the hearing who suggested that the Office of Professional Medical Conduct should have conducted an interview with Patient A as part of the Office's investigation in this case.

ORDER

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

1. The Review Board sustains the Hearing Committee's November 10, 1993 Determination finding Dr. Henry Herrera not guilty of gross incompetence, moral unfitness and failing to maintain adequate records.

2. The Review Board overturns the Hearing Committee's Determination finding the Respondent not guilty of gross negligence, because that Determination is not consistent with the Hearing Committee's Findings of Fact. The Review Board finds the Respondent guilty of gross negligence.

3. The Review Board votes to censure and reprimand the Respondent.

ROBERT M. BRIBER

MARYCLAIRE B. SHERWIN

WINSTON S. PRICE

EDWARD C. SINNOTT

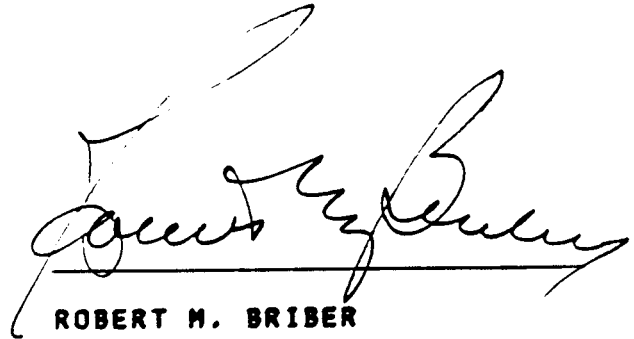
WILLIAM A. STEWART

IN THE MATTER OF HENRY HERRERA, 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. Herrera.

DATED: Albany, New York

2/4 , 1994



ROBERT M. BRIBER

IN THE MATTER OF HENRY HERRERA, M.D.

MARYCLAIRE B. SHERWIN, a member of the Administrative Review Board for Professional Medical Conduct, affirms that this Determination and Order reflects the Determination of the majority of the members of the Administrative Review Board in the case of Dr. Herrera.

DATED: Malone, New York

February 4, 1994

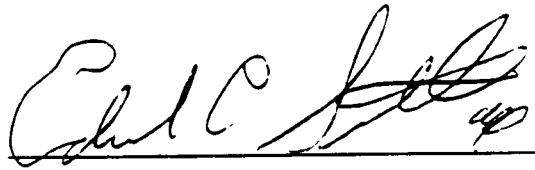
Maryclaire B. Sherwin
MARYCLAIRE B. SHERWIN

IN THE MATTER OF HENRY HERRERA, 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. Herrera.

DATED:

February 7, 1994

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

EDWARD C. SINNOTT, M.D.

