



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

Karen Schimke
Executive Deputy Commissioner

March 27, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Marshall Mandell, M.D.
6721 Oakmont Way
Bradenton, Florida 34202

Jean Bresler, Esq.
N.Y.S. Dept. of Health
5 Penn Plaza - Sixth Floor
New York, New York

Effective Date: 04/03/95

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

Dear Dr. Mandell and Ms. Bresler :

Enclosed please find the Determination and Order (No.94-263) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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:

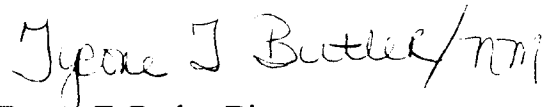
Office of Professional Medical Conduct
New York State Department of Health
Empire State Plaza
Corning Tower, Room 438
Albany, New York 12237

RECEIVED
MAR 27 1995
OFFICE OF PROFESSIONAL
MEDICAL CONDUCT

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,

Handwritten signature of Tyrone T. Butler in cursive script.

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 MANDELL, M.D.**

**ADMINISTRATIVE
REVIEW BOARD
DECISION AND
ORDER NUMBER
ARB NO. 94-263**

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 February 17, 1995 and March 10, 1995 to review the Hearing Committee on Professional Medical Conduct's (Hearing Committee) December 13, 1994 Determination finding Dr. Marshall Mandell (Respondent) guilty of professional misconduct. The Office of Professional Medical Conduct (Petitioner) requested the Review through a Notice which the Board received on December 27, 1994. James F. Horan served as Administrative Officer to the Review Board. Jean Bresler, Esq. filed a brief for the Petitioner which the Board received on January 18, 1995. The Respondent filed a brief which the Board received on February 20, 1995. The Respondent filed an additional submission, which the Board received on March 14, 1995, after the deliberations in this case. The Review Board did not consider the additional submission.

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 February 17th deliberations by telephone conference.
Dr. Stewart participated in the March 10th deliberations by 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 brought this case pursuant to Public Health Law Section 230(10)(p) and Education Law Section 6530(9)(a)(i), which provide an expedited hearing in cases in which professional misconduct charges against a Respondent are based upon prior criminal conviction in New York or another jurisdiction or upon a prior administrative adjudication which would amount to misconduct if committed in New York State. The expedited hearing determines the nature and severity of the penalty which the Hearing Committee will impose based upon the criminal conviction or prior administrative adjudication.

The Hearing Committee in this case found that the Petitioner had met its burden of proof in establishing that the State of Connecticut's Medical Examining Board (Connecticut Board) took disciplinary action against the Respondent upon finding that the Respondent could not practice medicine with reasonable skill or safety due to illegal, incompetent or negligent conduct.

The Connecticut Board found that the Respondent had informed patients that allergies are the underlying cause of multiple sclerosis, conducted allergy testing without scientific justification, conducted potentially dangerous allergy testing without a licensed physician present, failed to inform patients of the experimental nature of his testing and treatment, failed to perform appropriate physical examinations, failed to adequately review prior medical records and failed to keep adequate medical records for three patients who sought treatment for symptoms related to multiple sclerosis. Additionally, the Connecticut Board found that the Respondent advised patient that allergies are the

underlying cause of chronic Epstein-Barr Virus. In addition, for this patient, Respondent performed allergy testing without scientific justification, failed to inform the Patient of the experimental nature of the testing and treatment, failed to perform appropriate physical examinations, failed to adequately review her medical history and performed provocative allergy testing without a physician present.

As a result, the Connecticut Board placed the Respondent on probation for three years which included among other requirements that he make certain disclosures to his patients, that he be monitored, that he refrain from making certain assertions to his patients and that he insure that a licensed physician remain at his office premises while allergy testing is being performed on patients.

The Hearing Committee concluded that the Respondent's actions in Connecticut would constitute misconduct in New York. The Committee voted to suspend the Respondent's New York license for three years, but stayed the suspension and placed the Respondent on probation. The terms of probation appear as Appendix II in the Hearing Committee's Determination. The terms of probation include monitoring and record review, and require that any patient testing must take place in the presence of the Respondent or another licensed physician. The Hearing Committee concluded, based upon hearing testimony by a witness who appeared on the Respondent's behalf, that the Respondent would be seeing patients occasionally in New York. The Hearing Committee stated that if the Respondent was to practice in New York, that the probationary conditions would provide safeguards against future misconduct.

REQUESTS FOR REVIEW

The Petitioner has asked the Review Board to overrule the Hearing Committee's Penalty because the penalty is inappropriate in light of the Hearing Committee's findings concerning the Respondent's misconduct in Connecticut. The Petitioner alleges that the Committee's penalty would be inadequate because monitoring by review of records cannot protect the Respondent's patients from the dissemination of misleading information, by the Respondent, concerning the role of allergy and as a cause of multiple sclerosis and Epstein-Barr virus. In addition, the Petitioner asserts that there was not a scintilla of evidence, submitted by the Respondent, to suggest that he recognized the

inappropriateness of the treatment rendered to patients which gave rise to the Connecticut action, the potential danger of his allergy testing, or that he intended to modify the information he gave to his patients in the future. Under these circumstances, the Petitioner argues that the only appropriate penalty is the revocation of the Respondent's New York State medical license.

The Respondent's reply brief sought to reargue the issues which the Connecticut Board decided in their action. The Respondent submitted selected pages from the Connecticut hearing transcript and a copy of the Connecticut Statement of Charges, which included the Respondent's handwritten comments.

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 was guilty of misconduct. That Determination is consistent with the Committee's Determination that the Connecticut Board had found that the Respondent could not practice with reasonable skill or safety due to illegal, incompetent or negligent conduct. Neither the Review Board nor the Hearing Committee have the authority to reopen the Connecticut Board's finding or determination on the Respondent's Connecticut misconduct. The issue before both the Hearing Committee and the Review Board is whether the Respondent's Connecticut misconduct constituted misconduct in New York and what is the appropriate penalty in New York for the misconduct. The Hearing Committee determined that the Respondent's Connecticut conduct would constitute misconduct in New York, and the Review Board agrees.

The Review Board determined unanimously to modify the Hearing Committee's Determination on penalty, but the Board split on how to modify the penalty. After a great deal of discussion over the course of two separate deliberations, the Board voted 4-1 to suspend the Respondent's license to practice medicine in New York State, until such time as the Respondent can demonstrate to the satisfaction of the Director of the Office of Professional Medical Conduct that the Respondent has

complied fully with the Connecticut probation terms and that the Respondent's license is in good standing in Connecticut and any other state where the Respondent has a license. The dissenting member of the Review Board would revoke the Respondent's license to practice medicine in New York State.

The Review Board discussed over our two sessions the proper penalty to protect the public in the event that the Respondent returned to New York to practice medicine, or to teach, as the evidence at the hearing indicated the Respondent planned to do. The Review Board had a difficult time determining what nature of protection was necessary, since the Respondent submitted no information concerning the scope of any intended practice in New York and because the only testimony on the Respondent's behalf came from a physician who had been a patient of the Respondent sixteen years ago. The Review Board was also concerned about whether the Respondent had complied with the standards which Connecticut set for the Respondent's probation.

The Review Board determined that the Respondent should not be allowed to return to practice in New York until such time as he has fulfilled the provisions of the Connecticut probation and demonstrated that he will actually conduct his practice within the guidelines which Connecticut established to protect the public. The Review Board also feels that the Respondent should demonstrate that his license is in good standing in other states. These conditions will assure that the Respondent can not abandon the probation in Connecticut and move to another state, where he could follow the same pattern of practice which resulted in the Connecticut disciplinary proceeding.

ORDER

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

1. The Review Board **SUSTAINS** the Hearing Committee's December 13, 1994 Determination finding the Respondent guilty of professional misconduct.

2. The Review Board votes 5-0 to **OVERRULE** the Hearing Committee's Penalty.

3. The Review Board votes 4-1 to **SUSPEND** the Respondent's license to practice medicine in New York until such time as the Respondent proves to the satisfaction of the Director of the Office of Professional Medical Conduct that the Respondent has satisfied the Respondent's probation in the State of Connecticut and the Respondent's license is in good standing in Connecticut and any other state where the Respondent maintains a license.

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

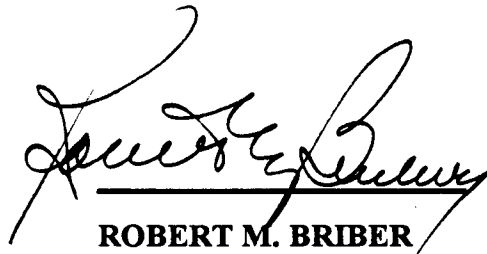
WILLIAM A. STEWART, M.D.

IN THE MATTER OF MARSHALL MANDELL, 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. Mandell.

DATED: Albany, New York

March 22, 1995



ROBERT M. BRIBER

IN THE MATTER OF MARSHALL MANDELL, 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. Mandell.

DATED: Delmar, New York

March 18, 1995



SUMNER SHAPIRO

IN THE MATTER OF MARSHALL MANDELL, 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. Mandell.

DATED: Brooklyn, New York

_____, 1995

A handwritten signature in cursive script, appearing to read "Winston S. Price", is written over a solid horizontal line.

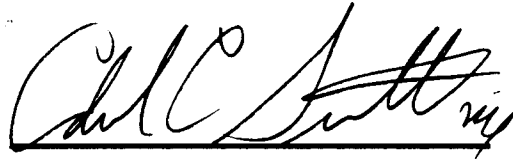
WINSTON S. PRICE, M.D.

IN THE MATTER OF MARSHALL MANDELL, 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. Mandell.

DATED: Roslyn, New York

March 21, 1995

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

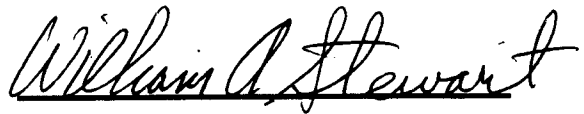
EDWARD C. SINNOTT, M.D.

IN THE MATTER OF MARSHALL MANDELL, M.D.

WILLIAM A. STEWART, M.D., a member of the Administrative Review Board for Professional Medical Conduct, offering that the attached Determination and Order reflects the decision of the majority of the Review Board in the Matter of Dr. Mandell.

DATED: Syracuse, New York

17 Mar, 1995

A handwritten signature in cursive script that reads "William A. Stewart". The signature is written in black ink and is positioned above the printed name.

WILLIAM A. STEWART, M.D.