



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Richard F. Daines, M.D.
Commissioner

Wendy E. Saunders
Chief of Staff

February 17, 2009

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Elliott S. Cohen, M.D.

Redacted Address

Samuel C. Young, Esq.
Costello, Cooney, et al
205 South Salina Street
Syracuse, New York 13202

Richard J. Zahnleuter, Esq.
NYS Department of Health
Bureau of Professional Medical Conduct
Corning Tower, Room 2509
Empire State Plaza
New York, New York 12237

RE: In the Matter of Elliott S. Cohen, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 08-154) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

Redacted Signature

(James F. Horan, Acting Director
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Elliot S. Cohen, M.D. (Respondent)

Administrative Review Board (ARB)

A proceeding to review a Determination by a
Committee (Committee) from the Board for
Professional Medical Conduct (BPMC)

Determination and Order No. 08-154

COPY

Before ARB Members Lynch, Pellman, Wagle and Wilson¹
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Richard J. Zahnleuter, Esq.
For the Respondent: Samuel C. Young, Esq.

Following a hearing, a BPMC Committee determined that the Respondent committed professional misconduct by prescribing medications over the internet to persons the Respondent never examined. The Committee voted to censure and reprimand the Respondent and to fine him \$10,000.00. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2009), both parties ask the ARB to nullify or modify the Committee's findings on the charges and the Petitioner asks the ARB to revoke the Respondent's limited license to practice medicine in New York State. After reviewing the record below and parties' review submissions, the ARB votes 4-0 to sustain the Committee's Determination on the charges, but to increase the fine against the Respondent from \$10,000.00 to \$30,000.00. The ARB votes 3-1 to overturn the Committee Determination to censure and reprimand the Respondent. The ARB majority votes to suspend the Respondent from practice for three years and to stay all but three months of the suspension.

¹ ARB Member Richard Milone, M.D. did not participate in this case. The ARB proceeded to consider the case with a four-member quorum, Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated New York Education Law (EL) §§ 6530(2-4), 6530(16), 6530(28) & 6530(32) (McKinney 2009) by committing professional misconduct under the following specifications:

- practicing the profession beyond the scope of licensure;
- practicing the profession with negligence on more than one occasion;
- practicing the profession with gross negligence;
- failing to comply with substantial provisions of state law or regulations governing the practice of medicine;
- failing to make available documents which the Department of Health requested; and,
- failing to maintain accurate patient records.

The charges related to the Respondent's practice in prescribing medications over the internet.

The Committee found that the Respondent practiced medicine in New York State under a license that limited the Respondent to practice in the medically underserved area in Watertown. In addition to practicing obstetrics/gynecology in Watertown during 2005-2007, the Respondent also prescribed certain non-controlled medications, for a fee, to customers of Business Services II, Inc., a pharmacy company. The Respondent signed a contract with Business Services II to review patient profiles/questionnaires and requests for prescription renewals and to issue prescriptions for patients who required the requested drugs. The Respondent admitted that he reviewed questionnaires in the Watertown area during lag time in the hospital and office and the Respondent also admitted that he reviewed 50,000 questionnaires in two years and earned \$100,000.00 for his work. The Respondent prescribed medications including Tramadol, Viagra, Floricet, Soma, Cialis, Levitra, Amoxicillin, Ultracet and Flexiril. In addition to reviewing profiles for other persons, the Respondent reviewed profiles for the eighteen persons (A-R) at issue in the Petitioner's Statement of Charges [Appendix to the Hearing Committee's Determination]. None of the Patients A-R lived in the Watertown area, although three of the eighteen lived elsewhere in New York State [Patients D, I and N].

The Committee determined that the Respondent deviated from accepted care standards in issuing prescriptions to online patients because the Respondent failed to have a sufficient physician-patient relationship with the patients, to take a history and perform examinations, to formulate a reasonable diagnosis, to give alternative treatment modalities, to follow-up and to maintain appropriate documentation. The Committee determined further that the Respondent failed to comply with statutory and regulatory prescriptions requirements that appear at PHL § 21 and Title 10 (Health) of New York Codes, Rules and Regulations § 910.2(a). The Committee held that the Respondent practiced with negligence on more than one occasion, practiced beyond the scope of licensure, violated substantial provisions of state law and regulation that govern the practice of medicine and failed to maintain accurate patient records. The Committee dismissed specifications that the charged practice with gross negligence and failure to make documents available to the Department of Health. The Committee voted to censure and reprimand the Respondent and to fine the Respondent \$10,000.00. The Committee rejected license revocation as a penalty upon concluding that the Respondent's conduct failed to amount to gross negligence, no patient harm occurred, the Respondent has no prior misconduct history, the Respondent ceased the internet practice upon learning that the practice violated his limited license and the Respondent expressed regret for his involvement in the activity. The Committee also found that the Respondent provided highest quality service to the Watertown area.

Review History and Issues

The Committee rendered their Determination on August 19, 2008. This proceeding commenced on August 28 and September 2, 2008, when the ARB received the Petitioner's and then Respondent's Notices requesting Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and reply brief and the Respondent's brief and reply brief. The record closed when the ARB received the Respondent's reply brief on October 22, 2008.

The Petitioner requested that the ARB overturn the Committee and find that the Respondent's conduct amounted to practicing medicine with gross negligence. The Petitioner requested further that the ARB overturn the censure and reprimand that the Committee ordered and that the ARB revoke the Respondent's license. Finally, the Petitioner asked that the ARB increase the fine against the Respondent.

The Respondent argues that the Committee erred in finding that the Respondent prescribed to internet customers. The Respondent contends that customer questionnaires were not prescriptions and that no New York Law prohibits or regulates writing or reviewing prescriptions over the internet. The Respondent also alleges error by the Committee's Administrative Officer for receiving into evidence the Petitioner's Hearing Exhibits 6A, 7 and 8 and for refusing to accept into evidence the results of a polygraph test on the Respondent. In the alternative, the Respondent argues that the Committee imposed a correct and appropriate penalty.

ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL §230-a permits. The ARB may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3rd Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health,

222 A.D.2d 750, 634 N.Y.S.2d 856 (3rd Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

Determination

The ARB has considered the record and the parties' briefs. The ARB declines to remand to the Committee for a further hearing with the polygraph result in evidence. The ARB affirms the Committee's Determination on the charges. The ARB overturns the censure and reprimand. The ARB suspends the Respondent's license for three years and stays all but three months of the

suspension. The ARB modifies the fine that the Committee imposed by increasing the fine amount from \$ 10,000.00 to \$ 30,000.00.

The Respondent challenged rulings by the Committee's Administrative Officer to admit certain Petitioner exhibits and to exclude a polygraph that the Respondent offered into evidence. Under PHL § 230-c(4)(b), the ARB may remand a case to the Committee for reconsideration or further proceedings. The ARB treated the Respondent's challenge as a request for remand so the Committee can consider the polygraph result and reconsider the record without the Petitioner's Exhibits 6A, 7 and 8. The ARB declines to remand this case. The Respondent alleged that the Committee's Administrative Officer erred by admitting those exhibits into evidence because the Petitioner failed to set forth the evidentiary foundation necessary under New York Civil Practice Law and Rules (CPLR) § 4518(a) (McKinney 2009). The ARB finds no error. Hearings before BPMC do not proceed under the CPLR procedures, but rather under the less rigorous procedural rules from New York Administrative Procedure Act (SAPA) Articles 3-5 (McKinney 2009).

Under SAPA 306(2):

"All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made part of the record..."

An exception to these less rigorous procedural rules applies to the admission of polygraph results. In Harris v. Novello 276 A.D.2d 848 (3rd Dept. 2000), the Appellate Division of New York Supreme Court upheld a decision of an Administrative Officer to exclude a polygraph result from admission before a BPCM Committee. The ARB sees no error by the Administrative Officer in excluding the polygraph result.

Both parties requested that the ARB modify conclusions by the Committee on the charges. The Respondent challenged the Committee's findings concerning prescribing and the Respondent argued that he reviewed questionnaires rather than issued prescriptions. The ARB

finds the Respondent's argument unconvincing. The Respondent signed a contract with Business Services II in which the Respondent agreed to review patient profiles and issue prescriptions [Hearing Committee Finding of Fact 18, Hearing Exhibit 21]. The internet pharmacies that dispensed the medications at issue in this case did so pursuant to prescriptions by the Appellant. The ARB affirms the Committee's findings concerning prescribing by the Respondent. The Respondent also challenged the Committee's findings on the ground that no New York law addresses internet prescribing. The Respondent points to no New York law, however, that exempts physicians from following accepted care standards for practice in instances in which the physician prescribes over the internet. The Committee found that the Respondent's conduct failed to follow accepted care standards by failing to take histories, perform examinations, formulate diagnoses or offer alternatives to treatment or different treatment modalities. The Committee determined that such failures amounted to negligence on more than one occasion. The ARB affirms the Committee's Determination. The Petitioner asked the ARB to overturn the Committee and hold that the Respondent's conduct also amounted to practicing with gross negligence. The ARB rejects that request. The Committee found repeated instances in which the Respondent failed to follow accepted care standards, but the Committee made no finding that the Respondent's failure rose to the level of egregious conduct necessary to find gross negligence. The ARB agrees with the Committee.

The ARB does find validity in the Petitioner's argument for an increase in the fine that the Committee imposed. The Respondent admitted that he performed reviews on 50,000 profiles in two years and admitted to earning \$100,000.00 for his work. The Respondent also failed to practice according to accepted standards and practiced beyond the scope of his limited license. The Respondent's conduct also involved at least three persons who live in New York State, but

outside the Watertown area (Patients D, I and N). The ARB votes 4-0 to fine the Respondent \$10,000.00 for each New York patient to which the Respondent provided prescriptions, for a total fine of \$30,000.00.

The ARB votes 3-1 to overturn the Committee's censure and reprimand order. The majority votes to suspend the Respondent's license for three years and to stay all but three months of the suspension. The member in dissent would affirm the censure and reprimand. The majority questioned the Respondent's judgment for becoming involved in the internet arrangement and questioned what the Respondent thought he was doing in prescribing medications to patients he had never seen, or taken a history for or examined. The majority also found as disturbing the number of prescriptions involved. The majority concluded that the Respondent's conduct warranted actual time on suspension as a sanction. The majority rejected revocation as a penalty and also limited the actual suspension to three months, due to many mitigating factors that appear in the record and which the Committee considered in making their penalty assessment. The majority found that the record revealed a clear split between the Respondent's OB/GYN practice in Watertown and the Respondent's internet practice. The Committee found that the Respondent provided the highest quality of OB/GYN services in an under served area of New York. The Committee also found no patient harm in this case. The ARB majority saw no need to place the Respondent on probation during the period of the stayed suspension, because the Respondent has ceased the internet practice and because no questions arose over the OB/GYN care that the Respondent provides. The member in the minority accepted the testimony by the Respondent's expert and by the Respondent that the documents in question were not legal prescriptions and that the online pharmacy should not have issued any drugs on the presentation of these documents.

ORDER

NOW, with this Determination as our basis, the ARB renders the following ORDER:

1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB votes 4-0 to modify the fine the Committee imposed against the Respondent and the ARB votes 3-1 to overturn the Committee's Determination to censure and reprimand the Respondent.
3. The ARB suspends the Respondent's License for three years and stays thirty-three months of the suspension.
4. The ARB fines the Respondent \$30,000.00

Thea Graves Pellman
Datta G. Wagle, M.D.
Linda Prescott Wilson
Therese G. Lynch, M.D.

In the Matter of Elliot S. Cohen, M.D.

Linda Prescott Wilson, an ARB Member affirms that she took part in this case and that this Determination and Order constitutes the decision by the ARB majority in the Matter of Dr. Cohen.

Dated: *8 February 2008*

Redacted Signature

Linda Prescott Wilson

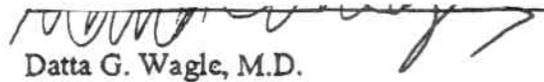
In the Matter of Elliot S. Cohen, M.D.

Datta G. Wagle, M.D., an ARB Member, affirms that he took part in this case and that this Determination and Order constitutes the decision by the ARB majority in the Matter of Dr.

Cohen.

Dated: 2/12, 2009

Redacted Signature



Datta G. Wagle, M.D.

In the Matter of Elliot S. Cohen, M.D.

Thea Graves Pellman, an ARB Member, affirms that she took part in this case and that this Determination and Order constitutes the decision by the ARB majority in the Matter of Dr. Cohen.

Dated: Feb 9, 2008

Redacted Signature

Thea Graves Pellman

In the Matter of Elliot S. Cohen, M.D.

Therese G. Lynch, M.D., an ARB Member, affirms that she took part in this case and that this Determination and Order constitutes the decision by the ARB majority in the Matter of Dr. Cohen.

Dated: February 7, 2009

Redacted Signature

A horizontal line representing a redacted signature, with a small flourish at the end.

Therese G. Lynch, M.D.