

 STATE OF NEW YORK  
DEPARTMENT OF HEALTH

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

Richard F. Daines, M.D.  
Commissioner

*Public*

October 30, 2007

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Kevin P. Donovan, Esq.  
NYS Department of Health  
ESP-Corning Tower-Room 2512  
Albany, New York 12237

Henry J. Dobies, M.D.  
173 East Orvis Street  
Massena, New York 13662

James D. Lantier, Esq.  
Smith, Sovik, Kendrick & Sugnet, P.C.  
250 South Clinton Street – Suite 600  
Syracuse, New York 13202-1252

**RE: In the Matter of Henry J. Dobies, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 07-94) 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.

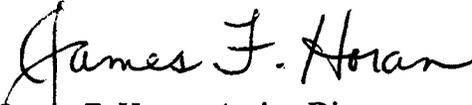
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

  
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

Henry J. Dobies, 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. 07-94

COPY

Before ARB Members Grossman, Wilson, Pellman and Wagle<sup>1</sup>  
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner):

Kevin P. Donovan, Esq.

For the Respondent:

James D. Lantier, Esq.

Following a hearing below, a BPMC Committee determined that the Respondent engaged in repeated and serious misconduct in treating eight patients. The Committee voted to revoke the Respondent's license to practice medicine in New York State (License) and to fine the Respondent \$20,000.00. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2007), the Respondent asks the ARB to modify that Determination by overturning a number of the misconduct specifications that the Committee sustained and by reducing the sanction substantially. After reviewing the record below and the review submissions by the parties, the ARB quorum votes 4-0 to affirm the Committee's Determination on the charges and the penalty.

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<sup>1</sup> ARB Member Therese Lynch recused herself from participating in this case, so the ARB considered the case with a four member quorum.

### Committee Determination on the Charges

The Committee conducted a hearing into charges alleging that the Respondent violated New York Education Law (EL) §§ 6530(2-6), 6530(20) & 6530(26)(McKinney Supp. 2007) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross negligence,
- practicing medicine with incompetence on more than one occasion,
- practicing medicine with gross incompetence,
- engaging in conduct that evidences moral unfitness, and,
- failing to maintain accurate patient records.

The charges involved the care that the Respondent provided to eight persons (Patients A-H). The record refers to the Patients by initials to protect patient privacy.

The Committee sustained charges that the Respondent practiced with negligence on more than one occasion and failed to maintain accurate records for all Patients A-H. The Committee found further that the Respondent practiced with incompetence on more than one occasion in treating the Patients B-H. The Committee stated that the record established that the Respondent failed to diagnose and treat a wide range of medical conditions over a period of years and the Committee concluded that the Respondent provided only superficial care, due to a neglect of fundamentals or a lack of basic medical knowledge. The Committee sustained the charges that the Respondent practiced medicine fraudulently and engaged in conduct that evidenced moral unfitness in practicing medicine, due to the Committee's determination that the Respondent reported fraudulently or inappropriately that the Respondent performed a complete pre-surgical physical examination of Patient A, including a rectal examination, when the Respondent did not perform such an examination. The Committee also sustained charges that the Respondent practiced with gross negligence in treating Patients A and D and practiced with gross incompetence in treating Patients E and F.

In making their findings, the Committee credited testimony by the Petitioner's expert witness, Laurence Plum, M.D. The Committee found Dr. Plum testified in a direct and forthright manner and held no stake in the outcome in the proceeding. The Respondent testified on his own behalf and the Respondent also presented testimony by John Burnett, M.D., who shared office space with the Respondent and who saw the Respondent's patients when the Respondent was unavailable. The Committee found the testimony by Dr. Burnett credible, but found that Dr. Burnett's testimony actually strengthened the Petitioner's case. The Committee found the Respondent's testimony unreliable.

The Committee voted to revoke the Respondent's License and to fine the Respondent \$20,000.00. The Committee concluded that the Respondent demonstrated no remorse or insight into his misconduct and shifted the responsibility for all errors to others. The Committee found the Respondent an inappropriate candidate for retraining and noted that the Respondent has faced disciplinary action on two prior occasions.

#### Review History and Issues

The Committee rendered their Determination on April 27, 2007. This proceeding commenced on May 18, 2007, when the ARB received the Respondent's 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 reply brief on June 30, 2007.

The Respondent argues that License revocation and the fine constitute an overly harsh penalty and asks that the ARB reduce both sanctions substantially. The Respondent concedes that he failed to maintain accurate records. The Respondent argues that the Committee's findings on the more serious charges (fraud, moral unfitness, gross negligence and gross incompetence) would support drastic penalties, but the Respondent argues that the record fails to support the Committee's findings on any of those charges.

In reply, the Petitioner contends that the Respondent is merely raising defenses, which the Committee rejected, and relying on the Respondent's version of events, which the Committee found unreliable.

#### 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 (3<sup>rd</sup> 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 (3<sup>rd</sup> Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3<sup>rd</sup> 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 (3<sup>rd</sup> 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 affirms the Committee's Determination that the Respondent failed to maintain accurate records for Patients A-H. The Respondent conceded that his records failed to comply with acceptable practice standards. The ARB affirms the Committee's Determination that the Respondent practiced with negligence on more than one occasion in treating Patients A-H and with incompetence on more than one occasion in treating Patients B-H. Neither party challenged the Committee's findings on those charges. The ARB affirms the Committee Determination that the Respondent practiced with fraud and engaged in conduct that evidenced moral unfitness for making misrepresentations concerning a pre-operative evaluation concerning Patient A and the ARB affirms the Committee's determination that the Respondent practiced with gross negligence in treating Patients A and D and gross incompetence in treating Patients E and F. The ARB affirms the Committee's Determination to revoke the Respondent's License and to fine the Respondent \$20,000.00.

Fraud and Moral Unfitness: The fraud and the moral unfitness charges both related to the pre-operative history and physical that the Respondent performed on Patient A on August 13, 2007. The Committee found that the Respondent falsely certified to a surgeon that the Respondent had performed a history and physical on Patient A and that the Patient was in good health and able to survive surgery without complications. The Committee found that rather than performing the examination, the Respondent merely filled out the form [Committee Findings of Fact (FF) 37-40]. The Respondent admitted that he wrote "negative" on the form concerning a rectal examination, without performing the examination [Hearing Transcript pages 441-442]. The Committee concluded that the Respondent made the misrepresentation to cover up his failure to assess Patient A's complaints and the Committee concluded that the Respondent's conduct amounted to both practicing fraudulently and to engaging in conduct that evidences moral unfitness. The Respondent argued that he lacked the intent to deceive and that the Committee failed to distinguish the basis for the moral unfitness and fraud findings.

The ARB affirms the Committee's determination on both the charges. The Committee's FF 37-40 and the Committee's conclusions at pages 46-48 and 52-53 in their Determination provide the basis for the Committee's conclusion as to both fraud and moral unfitness. In making a determination on fraud, a Committee may infer intent from the facts and may reject a licensee's claims to the contrary, Choudry v. Sobol, 170 A.D.2d 893, 566 N.Y.S.2d 723 (3<sup>rd</sup> Dept. 1991); Brestin v. Commissioner of Health, 116 A.D.2d 357, 501 N.Y.S.2d 923 (3<sup>rd</sup> Dept. 1986). The Respondent in effect is asking the ARB to accept the Respondent's explanations, which the Committee rejected. The ARB defers to the Committee, as the fact finder, in the Committee's determination on credibility.

Gross Negligence: The Committee determined that the Respondent's care for Patients A and D amounted to egregious departures from the accepted standards of medical practice.

In treating Patient A, the Respondent failed to address the Respondent's symptoms of back pain and rectal bleeding over a one-year period. The Respondent claimed that he attempted to address the rectal bleeding, but that the Patient refused repeated requests by the Respondent that the Patient submit to a rectal examination. The Committee rejected that testimony. The Committee found that the Respondent's records contained no mention of a plan to assess the rectal bleeding. The Committee also rejected the suggestion that the Patient was uncooperative with attempts to assess whether the bleeding was a symptom of cancer. The Committee found that the Patient made multiple visits to the Respondent's office to follow up on a minor laceration. The Committee also noted that in November 2003, Patient A saw Dr. Burnett, when Dr. Burnett was covering for the Respondent. On that occasion, the Patient agreed to a rectal examination and complied with a referral for a colonoscopy. That test revealed a malignant tumor occupying approximately 70% of the Patient's rectum. The ARB holds that the evidence the Committee found credible proved that the Respondent failed to address the Patient's complaints and that the failure to address the Patient's complaints amounted to gross negligence.

The Committee found the Respondent practiced with gross negligence in treating Patient D, because the Respondent prescribed controlled substances for the Patient and advised the Patient that she could share the controlled substances with her family. The Respondent conceded that he told Patient D that she could share the controlled substances with her daughter only, the mother of a recent suicide victim, rather than other family members. The Committee found that the Respondent's conduct amounted to gross negligence, even if the Respondent restricted the Patient to sharing the controlled substances with only one family member. The Committee found

the Respondent's conduct egregious for telling a patient to share potentially dangerous, lethal and addictive drugs with anyone, without an evaluation of that other person concerning other medications and allergies. The ARB agrees and we find the Respondent's conduct amounted to gross negligence.

Gross Incompetence: The Committee found the Respondent committed gross incompetence in treating Patients E and F.

In the case of Patient E, the Committee found that the Respondent failed to perform a breast biopsy or refer the Patient after the Respondent discovered nodes in the axilla and hardness in one breast. The Respondent argued that the failure does not rise to the level of gross incompetence, because the Respondent intended to refer the Patient for a biopsy and thought that he had made such a referral. The record made no mention of such a referral, however, and the Patient's record contains no pathology report. The ARB affirms the Committee's finding that the Respondent made no referral and the ARB agrees with the Committee that the Respondent's failure to rule out a malignancy in the Patient amounted to gross incompetence.

In treating Patient F, the Committee found from the record that the Respondent placed the Patient on the medications Monopril and Lotensin simultaneously to treat hypertension. The Committee found that those medications are in the same class and act in a similar fashion. The Committee also found that the Respondent prescribed the Patient the drug Diovan at the same time and that Diovan has a similar effect to Monopril and Lotensin. The Committee found that the Respondent's management of the Patient's hypertension raised serious concerns about the Respondent's understanding of the medications he was prescribing. The Respondent argued that his conduct did not rise to the level of gross incompetence, because he thought he was prescribing the medications to be taken consecutively. Once again, the Committee rejected the

Respondent's explanation. The Respondent's record for the Patient indicated on three separate occasions that the Patient was on both Monopril and Lotensin [FF 60-61]. The ARB again defers to the Committee as fact finder in their conclusions on the Respondent's credibility. The ARB agrees that the simultaneous prescriptions for these medications amounted to gross negligence.

Fine: Under PHL § 230-a(7), a Committee or the ARB may assess a \$10,000.00 fine against a licensee on each sustained specification of misconduct, unless the sustained specifications arise from the same factual incident, Matter of Colvin v. Chassin, 214 A.D.2d 854, 625 N.Y.S.2d 351 (3<sup>rd</sup> Dept. 1995). The Committee assessed \$20,000.00 in fines against the Respondent. The Respondent argued that the assessment of such a large fine, in conjunction with license revocation, constituted a harsh penalty. The ARB affirms the penalty in full. The Respondent's fraudulent conduct warranted a \$10,000.00 fine. We find as appropriate a further \$10,000.00 fine for the gross negligence and gross incompetence in treating Patients A, D, E and F.

Revocation: The record demonstrates that the Respondent acted with neglect and ignorance in treating a number of patients over an extended period of time. The Respondent failed to address symptoms of possible cancer in Patients A and E. The Respondent showed a lack of skill or knowledge to practice medicine safely in prescribing medications on repeated occasions. The Respondent prescribed Amoxicillin, a type of Penicillin, for Patient C, even though the Patient's chart documented an allergy to penicillin [FF 88]. The Respondent prescribed controlled substances for Patient D, and indicated the Patient could share the drugs with family members, even though the Respondent failed to assess the family members for allergies or inquire as to other medications the family members were taking. The Respondent also prescribed multiple medications to Patients A and F that worked in similar fashions. The

Respondent showed no remorse or insight into his misconduct and the Respondent has undergone sanctions for misconduct on two prior occasions.

The ARB concludes that the Respondent's continued practice of medicine would pose a danger to his patients. The ARB can see no means to protect the public other than removing the Respondent from practice. Probation on a prior occasion failed to impress on the Respondent a need to correct his practice. The Committee has also determined that the Respondent makes an inappropriate candidate for retraining. The ARB votes unanimously to affirm the Committee's Determination to revoke the Respondent's License.

ORDER

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

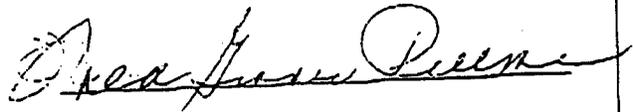
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to revoke the Respondent's License.
3. The ARB affirms the Committee's Determination to fine the Respondent \$20,000.00.

Thea Graves Pellman  
Datta G. Wagle, M.D.  
Stanley L. Grossman, M.D.  
Linda Prescott Wilson

In the Matter of Henry J. Dobies, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the  
Matter of Dr. Dobies.

Dated: Oct 29, 2007



Thea Graves Pellman

In the Matter of Henry J. Dobies, M.D.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Dobies.

Dated: 10/16/ 2007



Datta G. Wagle, M.D.

In the Matter of Henry J. Dobies, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Dobies.

Dated: October 18, 2007

Stanley L. Grossman M.D.

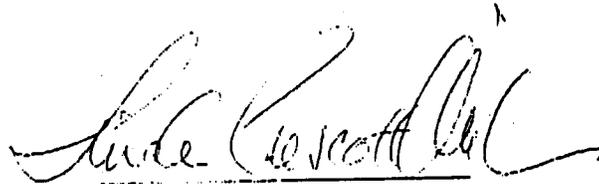
Stanley L. Grossman, M.D.

In the Matter of Henry J. Dobies, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Dobies.

Dated: 17 October, 2007

A handwritten signature in cursive script, appearing to read "Linda Prescott Wilson", written over a horizontal line.

Linda Prescott Wilson