



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Dennis P. Whalen
Executive Deputy Commissioner

PUBLIC

January 20, 1999

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Jude Brearton Mulvey, Esq.
NYS Department of Health
Corning Tower – 25th Floor
Empire State Plaza
Albany, NY 12237

Henry W. Hemsley, M.D.
6370 County Road
Norwich, NY 13815

Irwin Birnbaum, Esq.
Merchants Bank Building
220 South Warren Street
Syracuse, NY 13202

RE: In the Matter of Henry W. Hemsley, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 99-13) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays penalties **other than suspension or revocation** until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by **certified mail**, upon the Administrative Review Board **and** the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,

A handwritten signature in cursive script that reads "Tyrone Butler".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:mla
Enclosure

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

**IN THE MATTER
OF
HENRY HEMSLEY, M.D.**

COPY

DETERMINATION

AND

ORDER

ORDER # 99-13

A Notice of Violation of Probation, dated October 15, 1998, was served upon the Respondent, **HENRY HEMSLEY, M.D.** **ARSENIO G. AGOPOVICH, M.D.**, Chairperson, **CHARLES J. VACANTI, M.D.**, and **NANCY J. MACINTYRE, R.N. Ph.D.**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Sections 230(10)(e) of the Public Health Law. **CHRISTINE C. TRASKOS, ESQ., ADMINISTRATIVE LAW JUDGE**, served as Administrative Officer for the Hearing Committee. The Department of Health appeared by **JUDE BREARTON MULVEY, ESQ.**, Assistant Counsel. The Respondent appeared by **IRWIN BIRNBAUM, ESQ.** Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

Witness for Department
of Health:

Sheila J. Bradwell

Witness for Respondent:

Timothy Hayes, Ph.D

Henry Hemsley, M.D.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(19). The statute provides for a hearing where a licensee is charged with a violation of probation.

In the instant case, Respondent entered into a Consent Order with the Office of Professional Medical Conduct in which he admitted that he had been convicted of committing simple assault in the second degree in Pennsylvania. Under the provisions of § 6530 of the New York State Education Law, this act would have constituted a crime under the laws of New York State. As a result, Respondent's license to practice medicine was suspended for three years, with said suspension stayed and Respondent placed on probation. The terms of probation included the monitoring of Respondent by a sobriety monitor, who had to be approved by the Director of the Office of Professional Medical Conduct.

By letter dated September 21, 1998, the Director of the Office of Professional Medical Conduct determined that Respondent was in violation of the terms of probation in that it was alleged that Respondent was continuing to practice medicine without a sobriety monitor.

A copy of the Notice of Violation of Probation is attached to this Determination and Order in Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers in parenthesis refer to transcript page numbers or exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. Start

1. By Consent Agreement and Order # BPMC 97-325, dated December 11, 1997, Respondent admitted that he had been convicted of simple assault in the second degree in Pennsylvania in 1995. Pursuant to the Pennsylvania conviction, Respondent's New York license to practice medicine was suspended for three (3) years, with said suspension stayed. Respondent was placed on probation under the terms and conditions set forth in Exhibit "B" of the Order. This Order became effective on December 31, 1997.

(Pet. Ex. 3 and 4)

2. Paragraph 12 of the terms of probation required that Respondent shall be monitored by a qualified health care professional (sobriety monitor) during the period of probation. The sobriety monitor is to be selected by Respondent and approved in writing by the Director of the Office of Professional Medical Conduct (OPMC). Respondent is to be subject to random, unannounced, observed screens of blood and/or urine for the presence of drugs/alcohol at the direction of the sobriety monitor who will report to OPMC immediately if a test is refused by Respondent or if a test is positive for any unauthorized substance. This monitoring will be on a random, seven-day a week, twenty-four hour a day basis. The sobriety monitor is to submit a report, once every three months, certifying Respondent's compliance with the terms of probation. The reports will include the results of all body fluid tests for drugs/alcohol performed during that quarter, with copies of any toxicology reports. All urine must be forensically valid. (Pet. Ex.2)

3. After repeated written correspondence and telephone conversations with Respondent,

OPMC, by letter dated September 21, 1998, advised Respondent that he was in violation of the terms and conditions of his probation for failure to secure a sobriety monitor.

(Pet. Ex. 1, and 7,8,12 and 15)

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

The facts in this case are largely undisputed. The terms of probation required Respondent to secure a health care professional to act as a sobriety monitor. The choice of sobriety monitor was subject to the approval of the Office of Professional Medical Conduct.

At the hearing, Respondent testified that after meeting with Sheila Bradwell, his initial understanding was that the sobriety monitor had to be a physician. (T.117) He further stated that he had made several attempts to secure a physician as a sobriety monitor, but they were all turned down by OPMC.(T. 122) Respondent testified that it is this day of hearing, that he first realized that the sobriety monitor was not required to be a physician, but a qualified health care professional. (T. 123) Respondent believes that he will quickly be able to secure a monitoring service that is connected with the VA hospital where he receives other medical services. (T. 124) Respondent's witness, Timothy Hayes, Ph.D., a clinical psychologist at the Syracuse VA hospital, presently serves as Respondent's therapy monitor. (T.88, 100) Dr. Hayes testified that Respondent suffers from Post Traumatic Stress Disorder related to his war experiences in Viet Nam. (T. 89)

The Hearing Committee finds that the terms of the Consent Order are clear and concise and that all follow-up correspondence by OPMC discussed terms and conditions that were

consistent with the original Order. The Hearing Committee concluded that it was incumbent upon Respondent to vigorously pursue a sobriety monitor to fully comply with the terms of his probation. They find that contacting only 4 monitors in a year's time was not an adequate attempt. A physician under a disciplinary order to select a sobriety monitor does not have the option to slacken his search for a monitor when his initial candidates either withdraw or are disqualified by OPMC. Finally, the Hearing Committee notes that Respondent appears to be in compliance with the other provisions of his probation and that there is no evidence of patient harm as a result of his non-compliance with this condition of his probation.

Under the totality of the circumstances, the Hearing Committee concluded that Respondent failed to diligently pursue his obligation to secure a sobriety monitor as required by the Consent Order and is thus out of compliance with the conditions of his probation.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that Respondent's license to practice medicine as a physician in New York State should be suspended outright for a period of not less than thirty (30) days, and then the suspension shall be stayed pending approval of a sobriety monitor by OPMC. The Hearing Committee believes that the evidence in the record is insufficient to support the Department's request for the revocation of Respondent's license.

The Hearing Committee further expects that OPMC will act in an expeditious manner in approving or disapproving Respondent's choice of a sobriety monitor. Once in compliance with the monitoring requirement, Respondent's suspension will be stayed and he will be placed on probation for three (3) years. The Hearing Committee re-adopts the original terms and conditions of probation as contained in Exhibit B of the BPMC Order No. 97-325. The complete terms of the original probation are contained in Appendix II which is attached to this Determination and Order and incorporated herein. This determination was reached upon due

consideration of the full spectrum of penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand and the imposition of monetary penalties.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The determination by the Director of the Office of Professional Medical Conduct that Respondent is in violation of the terms of probation imposed by BPMC Order No. 97-325 as set forth in Department's Exhibit #1 is **SUSTAINED**;

2. Respondent's license to practice medicine as a physician in New York State be and hereby shall be **SUSPENDED for a period of no less than thirty (30) days** commencing on the effective date of this Determination and Order.

3. After the completion of an outright suspension for a period of no less than thirty (30) days **and** upon timely approval by OPMC of a sobriety monitor, the suspension shall be **STAYED** and Respondent shall be placed on probation for a period of three (3) years. The complete terms of probation are re-adopted from Exhibit B of BPMC Order No. 97-325 and contained in Appendix II, which is attached to this Determination and Order and incorporated herein.

DATED: Troy, New York

Jan. 19, 1999


ARSENIO G. AGOPOVICH, M.D., Chairperson
CHARLES J. VACANTI, M.D.
NANCY J. MACINTYRE, R.N., Ph.D.

TO: Jude Brearton Mulvey, Esq.
Assistant Counsel
NYS Department of Health
Corning Tower- 25th Floor
Empire State Plaza
Albany, New York 12237

Irwin Birnbaum, Esq.
Merchants Bank Building
220 South Warren Street
Syracuse, NY 13202

Henry W. Hemsley, M.D.
6370 County Road
Norwich, New York 13815

APPENDIX ONE



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 of Health

Dennis P. Whalen
Executive Deputy Commissioner

September 21, 1998

CONFIDENTIAL - RETURN RECEIPT REQUESTED

Henry W. Hemsley, M.D.
6370 County Road 32
Norwich, New York 13815

RECEIVED
NYS DEPT. OF HEALTH

SEP 23 1998

RE: Matter of Henry Hemsley
BPMC Order No. 97-325
Violation of Probation

DIVISION OF LEGAL AFFAIRS

Dear Dr. Hemsley:

As Director of the Office of Professional Medical Conduct (OPMC), I have conducted an investigation and determined you may have violated the terms of probation imposed upon you by BPMC Order Number 97-325, a copy of which is enclosed. I hereby give you notice of the facts forming the basis of the alleged violation of probation:

Between approximately December 1997 and the present, in violation of Terms of Probation 1, 3, 12, 13 and 16, you have:

1. Failed to timely respond to a certified letter dated January 2, 1998 and/or to submit for approval the identity of the proposed sobriety monitor;
2. Failed to timely respond to a certified letter dated April 15, 1998 and/or to submit for approval the identity of the proposed sobriety monitor;
3. Failed to timely respond to a certified letter dated June 23, 1998 from OPMC and/or to submit for approval the identity of the required sobriety monitor;
4. Practiced medicine without an approved sobriety monitor;
5. Failed to submit to random, unannounced, supervised tests of blood and/or urine for the presence of drugs;



6. Failed to submit to random, unannounced supervised tests of blood and/or urine for the presence of alcohol.

You have a right to a hearing and may be represented by counsel. As your license may be revoked as a result of the violation of probation proceeding, I urge you to consult an attorney immediately. If, within twenty (20) days of the date of this letter, you dispute any of the facts forming the basis of the alleged violation of probation, you will be afforded a hearing before a committee on professional conduct. The committee will hear evidence and make findings of fact, conclusions of law and a determination. That hearing will be held on: **October 6, 1998** at

New York State Department of Health
Bureau of Adjudication
Hedley Park Place, 5th Floor
433 River Street
Troy, New York 12180

If you do not dispute the facts forming the basis of the alleged violation of probation within 20 days of this letter, I will submit the matter to a committee on professional medical conduct for its review and determination. In determining the appropriate penalty, the committee will consider both the violation of probation and the prior adjudication of misconduct.

Please direct all future correspondence and communication regarding these allegations of probation violation to Jude Brearton Mulvey, Assistant Counsel, Division of Legal Affairs, Bureau of Professional Medical Conduct, Coming Tower Building, Room 2509, Empire State Plaza, Albany, New York, 12237-0032, (518) 473-4282.

Sincerely yours,



Anne F. Saile
Director

Office of Professional Medical Conduct

AFS/JBM/mak

cc: Irwin Birnbaum, Esq.

Jude Brearton Mulvey, Esq.

APPENDIX II

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EXHIBIT B

TERMS OF PROBATION

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession;
2. Respondent shall submit written notification to the New York State Department of Health (NYSDOH), addressed to the Director, Office of Professional Medical Conduct (OPMC), New York State Department of Health, Hedley Park Place, 4th Floor, 433 River Street, Troy, New York 12180-2299; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action;
3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
4. Respondent shall maintain current registration of his license during the period of probation. Within 90 days of the date of this New York Order, Respondent shall provide proof of current registration to the Director of OPMC at the address set forth above.
5. Respondent's professional performance may be reviewed by the Director of OPMC or her designees. Said reviews shall occur on a quarterly basis. Reviews may include, but shall not be limited to, reviews of office records and/or hospital records, interviews with and/or periodic visits with Respondent and his staff, at Respondent's office and/or OPMC's offices.
6. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. In cases of prescribing, dispensing, or administering of controlled substances, the medical record shall contain all information required by state rules and regulations regarding controlled substances.
7. Respondent's period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in or intends to cease the active

practice of medicine in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director of OPMC again, in writing, prior to any change in his status. Upon Respondent's resumption of the practice of medicine in New York State, the period of probation shall resume and Respondent shall satisfy and fulfill any terms of probation which were not fulfilled.

8. The Respondent will remain drug/alcohol free.
9. The Respondent is prohibited from prescribing controlled substances for himself or family members.
10. The Respondent must notify all treating physicians of his history of drug use and psychiatric treatment.
11. The Respondent must advise the Office of Professional Medical Conduct of any controlled or mood-altering substance given or prescribed by his treating physicians.
12. The Respondent will be monitored by a qualified health care professional (sobriety monitor) selected by Respondent, and approved by the Director of the Office of Professional Medical Conduct.
 - a. The sobriety monitor will not be a close personal friend or relative of the Respondent. The sobriety monitor will supervise Respondent's compliance with the terms set forth in the Order.
 - b. The sobriety monitor's responsibilities include assessment of self-help and/or group therapy attendance and 12 step progress, evaluation of compliance with the terms or conditions in the order, and ordering urines for drug/alcohol assay.
 - c. Respondent shall submit the name of a proposed successor within seven (7) days of learning that the approved monitor is no longer willing or able to serve.
 - d. Respondent will ensure that the sobriety monitor is familiar with Respondent's history of drug use, and with all terms of probation.
 - e. The Respondent will meet with the sobriety monitor on a regular basis.
 - f. The Respondent will report for a urine drug screen within four (4) hours of being contacted by the monitor.
 - g. The Respondent will submit to random, unannounced, observed screens of blood and/or urine for the presence of drugs/alcohol at the direction of the sobriety monitor who will report to the Office of Professional

Medical Conduct immediately if a test is refused by Respondent or if a test is positive for any unauthorized substance. This monitoring will be on a random, seven-day a week, twenty-four hour a day basis.

- h. The Respondent will authorize the sobriety monitor to immediately report to the Office of Professional Medical Conduct any deviation from compliance with the terms of probation.
 - i. The Respondent will authorize the sobriety monitor to submit to the Office of Professional Medical Conduct quarterly reports certifying Respondent's compliance with the terms of probation. Respondent's failure to comply with any of the terms must be immediately reported to the Office of Professional Medical Conduct. The reports will include the results of all body fluid test for drugs/alcohol performed during that quarter, with copies of any toxicology reports. All urines must be forensically valid.
13. Respondent will be supervised in his medical practice by a qualified health care professional (practice supervisor) selected by the Respondent and approved by the Director of the Office of Professional Medical Conduct.
- a. Respondent will ensure that the practice supervisor is familiar with Respondent's history and with the terms of probation.
 - b. Respondent will ensure that the practice supervisor is in a position to regularly observe and assess Respondent's medical practice.
 - c. The practice supervisor will direct Respondent's submission to random, unannounced, supervised tests of blood and/or urine for the presence of drugs and will immediately report to the Office of Professional Medical Conduct if a test is refused by Respondent, or a test is positive for any unauthorized substance.
 - d. The Respondent will authorize the practice supervisor to submit to the Office of Professional Medical Conduct quarterly reports regarding the quality of Respondent's medical practice, and Respondent's compliance or failure to comply with any term of probation.
 - e. The practice supervisor shall review Respondent's practice regarding the prescribing, administering, dispensing, inventorying, and wasting of controlled substances.
 - f. Respondent will authorize the practice supervisor to report to the Office of Professional Medical

