



# 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

April 10, 2008

## **CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

John William Smith, M.D.  
Redacted Address

Wilfred T. Friedman, Esq.  
The Bar Building  
36 West 44<sup>th</sup> Street – Suite 1205  
New York, New York 10036

Jean Bresler, Esq.  
NYS Department of Health  
145 Huguenot Street  
New Rochelle, New York 10801

Roy Nemerson, Esq.  
NYS Department of Health  
90 Church Street – 4<sup>th</sup> Floor  
New York, New York 10007-2919

**RE: In the Matter of John William Smith, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 07-248) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

John William Smith, M.D. (Respondent)

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

Administrative Review Board (ARB)

Determination and Order No. 07-248

COPY

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

For the Department of Health (Petitioner):  
For the Respondent:

Jean Bresler, Esq.  
Wilfred T. Friedman, Esq.

After a hearing below, a BPMC Committee determined that the Respondent committed willful patient abuse, practiced medicine fraudulently and engaged in conduct that evidenced moral unfitness in his conduct toward two patients. The Committee voted to suspend the Respondent's license to practice medicine in New York State (License), to order that the Respondent undergo training, to limit the Respondent's License and to place the Respondent on probation for five years. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney Supp. 2008), the parties ask the ARB to nullify or modify that Determination. After reviewing the hearing record and the parties' review submissions, the ARB affirms the Committee's findings on the charges. The ARB overturns the penalty that the Committee imposed and the ARB votes to revoke the Respondent's License.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(2), 6530(20) & 6530(31) (McKinney Supp. 2008) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently;
- engaging in conduct that evidences moral unfitness; and,
- willfully harassing, abusing or intimidating a patient, either physically or mentally.

The charges concerned the Respondent's conduct toward two patients (Patients A and B). The charges refer to the Patients by initials to protect patient privacy. The Respondent denied the charges (Hearing Committee Determination Appendix 2). Following a five-day hearing, the Committee rendered the Determination now on review.

The Committee determined that the Respondent treated Patient A for a lip laceration, repair and scar management. The Committee found that on February 17, 2005, the Respondent touched the Patient's breasts and rubbed the Patient's nipples for no legitimate medical purpose and under the guise of performing a legitimate medical examination. The Committee found further that the Respondent treated Patient B in February 2002 for the removal of the Patient's gall bladder. The Committee found that the Respondent made a comment to the Patient about taking the medication Prozac:

*" if you keep taking Prozac, you won't be "horny" anymore and your husband is going to leave you"*

The Committee also found that on the evening of February 18, 2002, with the Patient confined in her hospital bed, the Respondent entered the Patient's room, sat on the Patient's bed and stated that he had to see the Patient's nipples. The Committee concluded that no medical purpose existed for the Respondent to make the comments to Patient B or to request to see the Patient's nipples. The Committee sustained the charges that the Respondent's conduct toward Patients A and B amounted to practicing fraudulently, willful patient abuse and engaging in conduct in the practice of medicine that evidences moral unfitness.

In reaching their findings and conclusions concerning Patient A, the Committee relied upon the Respondent's records for the Patient and on the Respondent own words in discussing the events at issue in a taped conversation with Patient A (Tape Recording). As for the findings and conclusions on Patient B, the Committee relied on the testimony by Patient B and the Committee rejected the Respondent's testimony to the contrary.

The Committee voted to suspend the Respondent's License from the date of the Determination until July 1, 2008. In addition, the Committee ordered the Respondent to attend a program dealing with sexual behavior and a training course on preventing sexual harassment. The Committee placed the Respondent on probation for five years under the terms that appear as Appendix 3 to the Committee's Determination and the Committee limited the Respondent's License to require a chaperone be present during all the Respondent's interactions with patients. The Committee indicated that they considered revoking the Respondent's License, but concluded that the License suspension would jolt the Respondent to amend his conduct. The Committee indicated also that the program, training, chaperone and probation will result in altering the Respondent's behavior.

#### Review History and Issues

The Committee rendered their Determination on November 8, 2007. This proceeding commenced on November 15 & November 20, 2007, when the ARB received the Petitioner's and then the Respondent's Notices requesting Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and reply brief and the Petitioner's brief and reply brief. The record closed when the ARB received the Petitioner's reply brief on February 28, 2008.

The Petitioner argues that the penalty the Committee imposed fails to protect the public and that the penalty was inconsistent with the Committee's finding that the Respondent engaged in abusive conduct toward the Patients. The Petitioner asks that the ARB overturn the Committee and revoke the Respondent's License.

The Respondent asks that the ARB overturn the Committee due to a statement by the Petitioner's counsel during the hearing, the decision to admit the Tape Recording, the failure of Patient A to appear at the hearing so the Respondent could cross-examine the Patient and the

refusal by the Committee's Administrative Officer to admit collateral evidence on Patient A's credibility.

### 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 findings that the Respondent engaged in willful abuse against Patients A and B, that the Respondent's conduct amounted to fraud in practicing medicine and that the Respondent's conduct evidenced moral unfitness in the practice of medicine. We overturn the Committee and revoke the Respondent's License.

The Committee based their findings concerning the Respondent's conduct toward Patient A on the Respondent's words on the Tape Recording and the Respondent's own records and the Committee rejected the Respondent's explanation at the hearing for his conduct. The ARB finds that the Respondent's statements on the Tape Recording and his records provide sufficient credible evidence to prove the charges relating to Patient A. The ARB finds that the testimony by Patient B proved the charges concerning that Patient. The Respondent received an ample opportunity to raise doubts about Patients A and B and the Respondent received an ample opportunity to explain his actions toward Patient A and to deny the charges concerning Patient B. The Committee found the Respondent lacked credibility. The ARB defers to the Committee as

the fact finder in their judgments on credibility. The ARB holds further that the Committee's findings support their conclusions that the Respondent practiced fraudulently, that he willfully abused Patients A and B and that he engaged in conduct that evidenced moral unfitness.

The ARB sees no grounds to overturn the Committee's Determination due to the statements by the Petitioner's counsel at the beginning of the hearing. The Petitioner's counsel alleged at the beginning of the hearing that the Respondent touched Patient A's vagina. At the time, the Statement of Charges included an allegation to that effect. The Petitioner withdrew that allegation during the hearing and the Committee made no reference to that allegation in their Determination.

The ARB overturns the Committee and revokes the Respondent's License. The ARB finds the Committee's Determination on penalty inconsistent with the Committee's findings concerning the conduct toward Patients A and B and with the Committee's findings about the Respondent's opportunistic and manipulative nature. Improper sexual contact by a physician toward patients violates the fundamental trust in a doctor and revocation constitutes the appropriate penalty for such violation, Finelli v. Chassin, 206 A.D.2d 717; 614 N.Y.S.2d 634 (3<sup>rd</sup> Dept. 1994). The Respondent's conduct demonstrates his unfitness to practice medicine in New York State.



**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 overturns the Committee's Determination to suspend and then limit the Respondent's License, to order the Respondent to attend a program and a training course and to place the Respondent on probation.
3. The ARB revokes the Respondent's License.

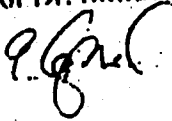
Thea Graves Pellman  
Datta G. Wagle, M.D.  
Stanley L. Grossman, M.D.  
Linda Prescott Wilson  
Therese G. Lynch, M.D.

In the Matter of John William Smith, M.D.

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

Matter of Dr. Smith.

Dated:



. 2008

Redacted Signature

Linda Prescott Wilson

In the Matter of John William Smith, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Smith.

Dated: April 4, 2008

Redacted Signature

Thea Graves Pellman

In the Matter of John William Smith, M.D.

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

Matter of Dr. Smith.

Dated: 4/5/2008

Redacted Signature

Datta G. Wagle, M.D.

In the Matter of John William Smith, M.D.

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

Dated: April 6, 2008

~~Redacted Signature~~

Stanley L Grossman, M.D.

In the Matter of John William Smith, M.D.

Therese G. Lynch, M.D., an AKB Member concurs in the Determination and Order in the

Matter of Dr. Smith

Dated: April 5, 2008

Redacted Signature  
~~Therese G. Lynch, M.D.~~