



STATE OF NEW YORK  
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

Antonia C. Novello, M.D., M.P.H.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*

April 13, 2000

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Asher Fensterheim, P.C.  
565 Taxter Road  
Elmsford, New York 10523

Leslie Eisenberg, Esq.  
NYS Department of Health  
5 Penn Plaza – Sixth Floor  
New York, New York 10001

Perry Orens, M.D.

Redacted Address

**RE: In the Matter of Perry Orens, M.D.**

Dear Parties:


Enclosed please find the Determination and Order (No. 99-285) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

 Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:nm

Enclosure

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

COPY

In the Matter of

Perry Orens, MD. (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. 99-285

Before ARB Members Grossman, Lynch, Shapiro, Price and Briber  
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner):

Leslie Eisenberg, Esq.

For the Respondent:

Asher Fensterheim, Esq.

After a hearing below, a BPMC Committee determined that the Respondent provided sub-standard medical care and committed fraud in treating six patients. The Committee voted to revoke the Respondent's License to practice medicine in New York State (License). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 1999-2000), the Respondent asks the ARB to nullify or modify the Committee Determination, argues that the evidence failed to support the Committee findings or the penalty and alleges that certain errors below denied him due process. Upon reviewing the record and the submissions by the parties, the ARB sustains the Committee's Determination on the charges, but we amend the Determination to sustain additional charges that the Respondent practiced with gross and repeated incompetence. The ARB rejects the Respondent's procedural challenges and we affirm the Determination revoking the Respondent's License.

### Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530(2-6), (32) & (35) (McKinney Supp. 1999-2000) 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,
- failing to maintain accurate records, and,
- ordering excessive tests or treatments unwarranted by the patient's condition.

The charges concerned the Respondent's care for ten Patients, A through J. To expedite the hearing into the charges, the Committee considered the charges relating to only six of those Patients, A through C and H through J. The record refers to the Patients by initials to protect patient privacy. A hearing on the charges ensued before the Committee that rendered the Determination now on review.

In the cases at issue, the Respondent diagnosed the Patients as suffering from Lyme Disease, subjected the Patients to multiple tests (serologies) for Lyme Disease and placed the Patients on intravenous (parenteral) therapy. The Committee found that the Respondent:

- failed to find or document objective abnormalities to support a diagnosis for Lyme or any other disease,
- failed to document central nervous system infection that would justify treating the Patients with intravenous therapy,

- subjected the Patients to the multiple serologies searching for a positive result for Lyme Disease and immediately subjected the Patients to parenteral therapy rather than oral medications,
- failed to monitor the Patients appropriately by ignoring potentially serious adverse drug events and by failing to do anything about abnormal laboratory tests,
- failed to determine appropriately the conditions the Patients did suffer and treat the Patients for those conditions, and,
- subjected the Patients to unnecessary, lengthy, expensive and risky treatment.

The Committee concluded that the Respondent victimized a vulnerable patient population, by treating the Patients for long periods and by treating the Patients for conditions that they may or may not have suffered.

The Committee concluded that the Respondent's conduct constituted practicing fraudulently, practicing with gross negligence and negligence on more than one occasion, subjecting Patients to unnecessary treatments or tests and failing to maintain accurate records. The Committee dismissed charges that the Respondent practiced with gross or repeated incompetence. The Committee concluded that the Respondent knew what to do, but acted carelessly and with such a bias to Lyme Disease that the Respondent disregarded other diagnoses. The Committee also concluded that the Respondent manipulated insurance companies for his own interest and made referrals to a home health care company in which he owned an interest. In making their findings and conclusions, the Committee credited the testimony by the Petitioner's expert Dr. Dattwyler. The Committee found little useful testimony from the Respondent's witnesses, Drs. Donta, who gave no testimony about the care for the Patients at issue in this case, and Dr. Tilton, who was not a medical expert. The Committee found the

Respondent lacking in credibility as a witness. The Committee noted that the Respondent offered inconsistent rationalizations and justifications for his actions, refused to acknowledge his poor record keeping and claimed that he acted as a consulting physician in these cases, but failed to identify the referring physicians.

The Committee voted 2-1 to revoke the Respondent's License. The Committee majority stated that the Respondent ordered excessive tests for his own financial gain. The majority found that such fraudulent conduct standing alone provided a sufficient ground on which to revoke the Respondent's License. The majority also stated that they found a lack of documentation so pervasive in these cases to show carelessness, inattention and inaccuracy. In addition, the majority found a pattern of abysmal patient care, no mitigating factors and no insight by the Respondent into the defects in his conduct. The other Committee member favored a two to three year actual suspension, followed by a lengthy probation under a practice monitor.

#### **Review History and Issues**

The Committee rendered their Determination on November 18, 1999. This proceeding commenced on December 2, 1999, 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 response brief. The ARB granted an extension in the time for filing briefs, from December 29, 1999 to February 29, 2000, due to a change in the Respondent's Counsel. The ARB found that the extension presented no danger to the public health because the Respondent would remain out of practice during the review period under the Committee's revocation order. The record closed when the ARB received the Petitioner's response brief on March 8, 2000.

The Respondent's brief asks the ARB to annul or modify the Committee's Determination. The Respondent raised six points for review.

- I. Other than the evidence concerning inadequate records, the competent proof at the hearing failed to support the Findings of Fact. The Petitioner's expert, Dr. Dattwayler, based his testimony on the Respondent's inadequate records and never examined the Patients at issue. Also, the Petitioner failed to offer any evidence to refute the Respondent's testimony.
- II. The Committee imposed an overly harsh penalty for inadequate record keeping.
- III. The illegally constituted Committee, that contained a Physician Assistant rather than a lay person, denied the Respondent due process.
- IV-VI. The Charges, Findings of Fact and Conclusions of Law denied the Respondent due process, because all three used the phrasing "and/or", that created uncertainty about the Charges, Findings and Conclusions.

In response to the Respondent's brief, the Petitioner contends that the due process challenges at Points III-VI provide no grounds upon which the ARB may grant relief. As to the Respondent's arguments at Points I-II, the Petitioner argued that the evidence supported the Determination on the charges and on the penalty. The Petitioner also challenged the portions in the Respondent's brief that discussed the Lyme Disease Controversy, because that material appeared nowhere in the hearing record. The Petitioner's response brief asked the ARB's Administrative Officer to withhold that portion from the Respondent's brief from the ARB.

### Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent committed professional misconduct by practicing medicine fraudulently, practicing medicine with gross and repeated negligence, ordering unwarranted tests and treatments and failing to maintain accurate records. We overturn the Committee and sustain the charges that the Respondent practiced with gross incompetence and incompetence on more than one occasion. We reject the procedural challenges that the Respondent raised and we find that the credible evidence supported all the charges that the Petitioner alleged. We affirm the Committee's Determination revoking the Respondent's License. As to the Petitioner's challenge to the Respondent's brief, the ARB's Administrative Officer submitted the Respondent's entire brief to the ARB, but cautioned the ARB that we could consider on review only that evidence which the Committee considered in reaching the Determination on review.

**Procedural Challenges:** The Respondent's Point III challenged the Committee's composition, because the Committee included a Physician Assistant. We hold that Physician Assistant's presence on the Committee represented no due process violation. Under N. Y. Pub. Health Law § 230(6)(McKinney Supp. 1999-2000), two physicians and a lay person comprise a BPMC Hearing Committee. The Respondent challenges a Physician Assistant's status as a lay person on the Committee. Both BPMC and the ARB consider lay person to mean someone other than a physician who holds a license under N. Y. Educ. Law Article 131 (McKinney Supp. 1999-2000). A Physician Assistant holds a license under a separate Education Law Article 131-B. Due to that separate license, a Physician Assistant sits as a lay person on a BPMC Hearing Committee.

The Respondent's Points IV-VI challenged the Charges, Findings of Fact and Conclusions of Law that used the phrase "and/or". We hold that the phrase caused no due process denial to the Respondent and caused the Respondent no prejudice in preparing a defense to the



Charges or to the Committee's Determination. The phrase "and/or" appeared concerning Charges, Findings and Conclusions that the Respondent failed to perform and/or record examinations or diagnosed inappropriately and/or failed to evaluate Patients. The Charges, Findings or Conclusions meant that the Respondent would have committed misconduct by either failing to examine, by failing to record or by failing to do both. We conclude from the Respondent's defense at the hearing and his challenge to the Committee's Determination that the Respondent understood the Charges, Findings and Conclusions. The Respondent's brief to the ARB admits that the Respondent maintained inadequate records, but contests the Committee's Findings and Conclusions that the Respondent failed to do appropriate evaluations or tests. The brief demonstrates that the Respondent understood that the Charges, Findings and Conclusions involved both the failure to record and the failure to test or evaluate.

**Credible Evidence on the Charges:** The Respondent challenged the findings that the Committee based on testimony by Dr. Dattwyler, because Dr. Dattwyler never examined the Patients at issue and because Dr. Dattwyler relied on the Respondent's sub-standard records to make his judgements. The ARB notes that expert witnesses for both parties in BPMC proceedings rely upon patient records rather than patient examinations in providing expert opinions on the care at issue in a case. We hold that, if the record fails to document an evaluation or test, then a subsequent treating physician or an expert witness reviewing the record may conclude that the test or evaluation never occurred. The Respondent's records gave Dr. Dattwyler sufficient grounds for Dr. Dattwyler to render his opinion that the Respondent rendered sub-standard care.

The Respondent also argued that the Petitioner failed to present rebuttal testimony following the Respondent's testimony, thereby leaving the Respondent's testimony unchallenged. We disagree. The Respondent's records challenged the Respondent's testimony. Further, the Respondent's testimony held no special status in the hearing. The Committee could accept or

reject the testimony, as they could any other evidence. The Committee found the Respondent's testimony non-credible and could, therefore, disregard that testimony, without any rebuttal by the Petitioner.

**Incompetence Charges:** In reviewing this case, the ARB concluded that the Committee made a Determination inconsistent with their Findings and Conclusions, by dismissing the Charges that the Respondent practiced with gross and repeated incompetence. The Committee may have concluded that the Respondent possessed sufficient skill and knowledge to practice medicine safely and effectively, but the Committee made several Findings that demonstrated the opposite. The ARB may substitute our judgement for the Committee's in making a Determination on a penalty or on the charges, Matter of Bogdan v. Med. Conduct Bd., 195 AD 2d 86, 606 NYS 2d 381 (Third Dept. 1993); Matter of Spartalis v. State Bd. for Prof. Med. Conduct, 205 AD 2d 940, 613 NYS 2d 759 (Third Dept. 1994), and we may choose to substitute our judgement on our own motion, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). We elect to substitute our judgement in this case, concerning the incompetence charges.

The Committee made findings that the Respondent:

- failed to follow-up appropriately when Patient A developed an adverse reaction to therapy [Finding of Fact (FF) 19],
- treated Patient B, who suffered a liver condition, with a drug contraindicated for people with liver conditions [FF 33],
- failed to examine Patient B and document findings concerning the Patient's double vision and failed to refer the Patient to an ophthalmologist [FF 37],
- failed to follow-up when Patient H experienced an adverse reaction to administered therapy [FF 68], and,
- treated Patient I inappropriately with antibiotics and switched the Patient to a drug in a similar class following an adverse reaction [FF 82-83].

These findings demonstrate the Respondent's incompetence concerning drug interactions and the Respondent's ignorance about the limitations of testing. We conclude that such conduct by the Respondent demonstrated incompetence on more than one occasion and gross incompetence in treating Patients A, B, H and I.

**Penalty:** The Respondent provided grossly sub-standard care to six Patients. The Respondent took advantage of a vulnerable group of people and placed those people at risk. The Respondent also subjected those Patients to unnecessary tests for the Respondent's unjust enrichment. The ARB holds that either the Respondent's fraudulent conduct or the sub-standard care that he provided would have provided ample grounds on which to revoke the Respondent's License. We hold that these findings together demonstrate that the Respondent poses a danger to his patients and that the Respondent has betrayed the trust that patients place in the medical profession. The ARB affirms 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 practiced medicine fraudulently, that the Respondent practiced medicine with gross negligence and negligence on more than one occasion, that the Respondent ordered tests or treatments unwarranted by patients' conditions and that the Respondent failed to maintain adequate records.
  
2. The ARB **OVERTURNS** the Committee's Determination dismissing the incompetence charges.
  
3. The ARB **SUSTAINS** the charges that the Respondent practiced medicine with gross incompetence and with incompetence on more than one occasion.
  
4. The ARB **AFFIRMS** the Committee's Determination to revoke the Respondent's License to practice medicine in New York State.

**Robert M. Briber**  
**Sumner Shapiro**  
**Winston S. Price, M.D.**  
**Stanley L. Grossman, M.D.**  
**Therese G. Lynch, M.D.**

**In the Matter of Perry Orens, M.D.**

Robert M. Briber, an ARB Member, concurs in the Determination and Order in the Matter of Dr. Orens.

Dated: April 11, 2000



Redacted Signature

Robert M. Briber

**In the Matter of Perry Orens, M.D.**

Sumner Shapiro, an ARB Member concurs in the  
Determination and Order in the Matter of Dr. Orens.

**Dated:** April 6, 2000

Redacted Signature

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Sumner Shapiro

**In the Matter of Perry Orens, M.D.**

**Winston S. Price, M.D.**, an ARB Member concurs in the Determination and Order in the Matter of Dr. Orens.

Dated: 4/12/, 2000

Redacted Signature

**Winston S. Price, M.D.**

**In the Matter of Perry Orens, M.D.**

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

Dated: April 9, 2000

Redacted Signature

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**Stanley L Grossman, M.D.**



In the Matter of Perry Orens, M.D.

Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Orens.

Dated: April 8, 2000

Redacted Signature

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**Therese G. Lynch, M.D.**