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OFFICE OF PROFESSIONAL
MEDICAL CONDUCT

THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, N.Y. 12234

OFFICE OF PROFESSIONAL DISCIPLINE
ONE PARK AVENUE, NEW YORK, NEW YORK 10016-5802

Noel L. Smith, Physician
325 Broadway - Second Floor
New York, N.Y. 10007

Re: License No. 137664

Dear Dr. Smith:

Enclosed please find Commissioner's Order No. 11657. This Order goes into effect five (5) days after the date of this letter.

If the penalty imposed by the Order in your case is a revocation or a surrender of your license, you must deliver your license and registration to this Department within ten (10) days after the date of this letter. Your penalty goes into effect five (5) days after the date of this letter even if you fail to meet the time requirement of delivering your license and registration to this Department.

If the penalty imposed by the Order in your case is a revocation or a surrender of your license, you may, pursuant to Rule 24.7 (b) of the Rules of the Board of Regents, a copy of which is attached, apply for restoration of your license after one year has elapsed from the effective date of the Order and the penalty; but said application is not granted automatically.

Very truly yours,

DANIEL J. KELLEHER
Director of Investigations

By: 

GUSTAVE MARTINE
Supervisor

DJK/GM/er

CERTIFIED MAIL - RRR

cc: Howard Rukeyser, Esq.
22 W. First Street
Mt. Vernon, N.Y. 10550

REPORT OF THE
REGENTS REVIEW COMMITTEE

NOEL L. SMITH

CALENDAR NO. 11657



The University of the State of New York

IN THE MATTER
of the
Disciplinary Proceeding
against
NOEL L. SMITH

No. 11657

who is currently licensed to practice
as a physician in the State of New York.

REPORT OF THE REGENTS REVIEW COMMITTEE

NOEL L. SMITH, hereinafter referred to as respondent, was licensed to practice as a physician in the State of New York by the New York State Education Department.

This disciplinary proceeding was properly commenced and on December 8, 1989, January 26, 1990, February 16, 1990, March 14, 1990, March 30, 1990, May 1, 1990, June 26, 1990, July 10, 1990 and July 26, 1990 a hearing was held before a hearing committee of the State Board for Professional Medical Conduct.

The hearing committee rendered a report of its findings, conclusions, and recommendation, a copy of which, including the amended statement of charges, respondent's answer and respondent's amended answer and excluding the appendix of patient names, is annexed hereto, made a part hereof, and marked as Exhibit "A".

The hearing committee concluded that respondent was guilty of

NOEL L. SMITH (11657)

the first specification to the extent indicated in its report, and not guilty of the second and third specifications and recommended that respondent receive a Censure and Reprimand.

The Commissioner of Health recommended to the Board of Regents that the findings of fact and conclusions of the hearing committee be modified, as set forth in the written recommendation of the Commissioner and further recommended that the penalty recommended by the hearing committee be modified and that respondent's license to practice be suspended for three years and that the suspension be stayed, provided that during that period (a) respondent not perform surgery without the prior approval of another surgeon, approved in advance by the Office of Professional Medical Conduct and (b) respondent's surgical practice be monitored by a surgeon approved in advance by the Office of Professional Medical Conduct. The monitoring physician should be responsible for providing quarterly reports to the Office of Professional Medical Conduct on the adequacy of respondent's practice. A copy of the recommendation of the Commissioner of Health is annexed hereto, made a part hereof, and marked as Exhibit "B".

On February 27, 1991 respondent appeared before us in person and was represented by his attorney, Howard Rukeyser, Esq. who presented oral argument on behalf of respondent. Terrence Sheehan, Esq., presented oral argument on behalf of the Department of Health.

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Petitioner's written recommendation as to the measure of discipline to be imposed, should respondent be found guilty, was the same as stated in the recommendation of the Commissioner of Health.

Respondent's written recommendation as to the measure of discipline to be imposed, should respondent be found guilty, was a Reprimand or, in the alternative, respondent agreed to function in a hospital approved by New York State which guarantees that proper supervision will be provided, stating that this would therefore make any further Office of Professional Medical Conduct participation unnecessary.

We have considered the record as transferred by the Commissioner of Health in this matter, as well as the written brief submitted by respondent to this Committee and the parties' submissions forwarded after our meeting. Our review has also included the transcript of the October 6, 1989 prehearing conference which we rule is part of the record in this case. In this regard, we note that, while the hearing committee may be insulated from certain conferences and/or rulings, when appropriate, neither the Administrative Officer nor the parties have the power to insulate such conferences and/or rulings from review by the Regents Review Committee, and subsequently, by the Board of Regents. See Gross v. Ambach, 71 N.Y.2d 859, 527 N.Y.S.2d 745 (1988).

We also note that the Commissioner of Health did not review

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the October 6, 1989 transcript. The Commissioner of Health, who reviewed the record which reflects the existence of the additional transcript, could have chosen, as we did, to request a copy of the transcript. In this regard, despite being given the opportunity to do so, neither party addressed this issue of the Commissioner of Health not having reviewed said transcript. Accordingly, although we need not pass upon this issue, we do not view said absence of review of this transcript, to which the Commissioner of Health had access, to indicate a failure by the Commissioner of Health to fulfill his statutory duties with regard to this disciplinary matter. Cf., DiMarsico v. Ambach, 424 N.Y.S.2d 107, reargument denied 425 N.Y.S.2d 1029, on remand 425 N.Y.S.2d 894.

In addition to the misconduct cited by the hearing committee, the Commissioner of Health recommended that respondent be found guilty of improperly positioning the gastric band regarding Patient A, failing to adequately close a gastric perforation and improperly controlling bleeders with pressure regarding Patient B, and performing a cholecystectomy which was not medically indicated regarding Patient C. We disagree with the recommendation of the Commissioner of Health with respect thereto, since we find the hearing committee's findings and conclusions, which the Commissioner of Health took issue with, to be appropriately based on the record herein.

Specifically, we agree with the hearing committee that the

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record does not establish, by a preponderance of the evidence, that the portion of Patient A's stomach was tissue-paper thin (finding of fact number 9). The hearing committee was free to choose between the testimony of Dr. Jacobson and the other evidence in the record, as to the condition of Patient A's stomach and, in our view, properly weighed the evidence in the record, in this regard. We note that Dr. Jacobson's observation was made at the time of re-exploration, two days later, and Dr. Nay's testimony assumed the fact, as stated by Dr. Jacobson, that the portion of the stomach was tissue-paper thin.

With regard to Patient B, while we agree with the Commissioner that the Department did, as a matter of fact, present evidence that the method chosen by respondent to close the perforation was inappropriate and, to that extent, we do not accept the last sentence of finding of fact number 14 of the hearing committee report which states to the contrary, we, nevertheless, agree with the hearing committee that the record does not establish, by a preponderance of the evidence, that respondent is guilty of any misconduct based on the exercise of his judgment in choosing the method for dealing with this problem. Similarly, while there is expert testimony that the bleeders should have been ligated, in our opinion, the record fails to establish, by a preponderance of the evidence, that by choosing to control the bleeders with pressure, respondent committed misconduct (finding of fact number 15).

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We also agree with the hearing committee that the record establishes, by a preponderance of the evidence, that the cholecystectomy was medically indicated for Patient C (finding of fact number 23).

Finally, the Commissioner of Health stated that, while he would not disturb the committee's conclusion of not guilty with regard to the second specification (we assume that the Commissioner intended to refer to the third specification, not the second), he does not agree with the committee's statement that expert testimony is always necessary to establish mental impairment or disability. Regardless of whether the hearing committee's statement means that expert testimony is always necessary in all such cases, it is not necessary to reach that question at this time inasmuch as both the hearing committee and Commissioner of Health concluded that the third specification had not been proven. In our opinion, however, this question is properly assessed on a case by case basis, depending on the nature of the alleged impairment or disability, the symptoms that might interfere with professional practice, and the evidence presented.

We unanimously recommend the following to the Board of Regents:

1. The findings of fact of the hearing committee be accepted, except the last sentence in fact finding numbered 14 not be accepted;

2. The recommendation of the Commissioner of Health as to the hearing committee's findings of fact be accepted, except that the modification of fact findings numbered 9, 15 and 23 not be accepted and the modification of fact finding numbered 14 be accepted only to the extent of deleting the last sentence;
3. The conclusions of the hearing committee as to guilt be accepted, except that its conclusion set forth in the second sentence of the third paragraph of page 21 of the hearing committee report that begins, "However, in light of", be accepted within the context of petitioner not having met its burden of proving, by a preponderance of the evidence, the third specification by expert testimony or otherwise;
4. The recommendation of the Commissioner of Health as to the hearing committee's conclusions as to guilt be accepted, except his recommendation to sustain the first specification based on Paragraph A.3, Paragraphs B.1 and B.2 and Paragraph C.2 not be accepted;
5. Respondent be found guilty of the first specification, by a preponderance of the evidence, to extent indicated by the hearing committee;
6. The recommendation of the hearing committee as to the measure of discipline be accepted;

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7. The recommendation of the Commissioner of Health as to the measure of discipline, a conditionally stayed suspension which is not authorized, not be accepted; and
8. Respondent receive a Censure and Reprimand upon the first specification of the charges of which respondent has been found guilty as aforesaid.

Respectfully submitted,

J. EDWARD MEYER

JOHN T. MCKENNAN

NANCY A. RUCKER


Chairperson

Dated: *May 9, 1991*

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

-----X
IN THE MATTER :

OF :

NOEL L. SMITH, M.D. :

REPORT OF

THE HEARING

COMMITTEE

TO: The Honorable David Axelrod, M.D.
Commissioner of Health, State of New York

John H. Morton, M.D., Chairperson, Carolyn Snipe, and John A. D'Anna, Jr., M.D., duly designated members of the State Board for Professional Medical Conduct, appointed by the Commissioner of Health of the State of New York pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Section 230(10)(3) of the Public Health Law. Debra L. Smith, Esq. served as the Administrative Officer for the Hearing Committee.

After consideration of the entire record, the Hearing Committee submits this report.

SUMMARY OF PROCEEDINGS

Service of Notice of Hearing and
Statement of Charges on Respondent:

July 7, 1989

Answer to Statement of Charges:

September 29, 1989
(Pleading 2)

Amended Answer to Statement of Charges:

October 4, 1989
(Pleading 3)

EXHIBIT "A"

Amendment to Statement of Charges:

Department's motion to amend Statement of Charges made and granted

February 16, 1990
(T: 236-239)

Department's Amended Statement of Charges (Pleading 4) received

March 14, 1990
(T: 510)

Prehearing conference:

Adjournment of July 27, 1989 prehearing conference (Respondent retained attorney)

July 24, 1989

Prehearing conference held

October 6, 1989

Hearing dates:

December 8, 1989
1990: January 26,
February 16,
March 14, March 30,
May 1, June 26,
July 10, July 26

Deliberations:

September 11, 1990

Adjournments/Continuance:

Respondent's request for adjournment of August 4, 1989 hearing date (Respondent's attorney, just retained, needed additional time to prepare) made and granted

July 24, 1989

Department's request for adjournment of October 13, 1989 hearing date (Department's attorney ill) made and granted

October 11, 1989

Continuance of December 8, 1989 hearing date (Hearing Committee member unavailable)

December 8, 1989 (T: 3-9)

Adjournment of June 19, 1990
hearing date (Hearing Committee
member unavailable)

March 15, 1990

Place of hearing:

Offices of New York
State Department of
Health
8 East 40th Street
Third Floor
New York, NY

Department of Health appeared by:

Terrence Sheehan, Esq.
8 East 40th Street
Third Floor
New York, NY 10016

Respondent appeared by:

Robert E. Sapir, Esq.
Cooper, Sapir &
Cohen, P.C.
306 Fulton Avenue
Hempstead, NY 11550
(until December 4,
1989)

Howard Rukeyser, Esq.
Chemical Bank Building
22 West First Street
Mt. Vernon, NY 10550
(after December 4,
1989)

Witnesses for Department of Health:

Howard R. Nay, M.D.
Dr. Harry S. Soroff
Dr. Myron Jacobson
David Cohen
Agnes Lucarelli

Witnesses for Respondent:

Noel L. Smith, M.D.
(Respondent)
Frances Woods
Dr. Padmanabhan
Siddharth
Dr. Serge Dos
Robert M. Cristal, Ph.D.

Key rulings by Administrative Officer:

Ruling on Respondent's first
affirmative defense (collateral
estoppel)

October 6, 1989 (T: 22)

Ruling on Respondent's second
affirmative defense (laches,
unreasonable delay)

October 6, 1989 (T: 22)

Department's motion to recuse
Administrative Officer made
and denied

January 26, 1990
(T: 47-48)

Respondent's motion to dismiss certain
charges (at conclusion of Department's
case) made and denied

March 30, 1990
(T: 631-632)

Respondent's Exhibit G not
returned to Administrative Officer
by Respondent's attorney and,
therefore, deemed withdrawn
as of

September 11, 1990

SUMMARY OF CHARGES

In the Amended Statement of Charges (Pleading 4 - copy attached), the Respondent, Noel L. Smith, M.D., was charged with professional misconduct pursuant to Education Law §6509. The specific charges were practicing the profession with negligence on more than one occasion (Education Law §6509(2)) (First Specification); practicing the profession with incompetence on more than one occasion (Education Law §6509(2)) (Second Specification); and practicing the profession while ability to practice impaired by mental disability (Education Law §6509(3)) (Third Specification).

In the Respondent's Answer (Pleading 2 - copy attached) and Amended Answer (Pleading 3 - copy attached), each material allegation of the Statement of Charges was denied and two affirmative defenses were asserted.

FINDINGS OF FACT

Numbers in parentheses 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. The Hearing Committee unanimously reached each of the following findings of fact.

1. Noel L. Smith, M.D., the Respondent, was authorized to practice medicine in the State of New York on March 20, 1979 by the issuance of license number 137664 by the New York State Education Department. The Respondent was registered with the New York State Education Department to practice medicine for the period January 1, 1986 through December 31, 1988. (Uncontested)

Patient A

2. Between November 17, 1985 and December 15, 1985, the Respondent treated Patient A for obesity at University Hospital, State University of New York, Stony Brook, New York 11794 (University Hospital). (Ex. 1)

3. On November 18, 1985 the Respondent performed a gastric banding on Patient A. (Ex. 1)

4. Before this operation Robert M. Cristal, Ph. D. did a psychological evaluation of this patient. (T: 1295-1305)

5. From September 19, 1985 until [REDACTED] admission to the hospital for the operation, Patient A was seen in the outpatient clinic. There was medical evaluation of Patient A and alternatives to the operation were explored. (Ex. 2)

6. As director of this obesity clinic, the Respondent did a nutritional assessment of Patient A before the operation. (T: 635; Ex. 2)

7. The record does not establish, by a preponderance of the evidence, that this gastric banding performed by the Respondent on Patient A was not medically indicated. (Record as whole concerning Patient A)

8. During the course of this operation, the Respondent placed the gastric band around a portion of the patient's stomach which was thin. (T: 155-158; Ex. 1 - p. 19)

9. The record does not establish, by a preponderance of the evidence, that the portion of the stomach was tissue-paper thin. The record does not establish, by a preponderance of the evidence, that the Respondent improperly positioned the gastric band. (Record as whole concerning Patient A)

10. The record does not establish, by a preponderance of the evidence, that during the course of the operation the Respondent improperly punctured Patient A's stomach. During the operation this complication (stomach puncture) was searched for and was not found. (Record as whole concerning Patient A; T: 1158)

11. In the post-operative period, Patient A had persistent episodes of tachycardia and hypotension. A Gastrographin study was done and it showed that there was a leak in the patient's gastric pouch. The Respondent knew about these findings. These complications made exploratory surgery necessary. The Respondent failed to appreciate the seriousness of Patient A's

condition and the need for exploratory surgery. The Respondent instead decided to deal with these complications non-operatively. Dr. Myron Jacobson then had to arrange for the patient's second operation. (T: 255, 309-312, 466-469; Ex. 1)

12. On November 20, 1985 a second operation was performed on Patient A. During that operation, a perforation in the patient's gastric pouch was located. The Respondent removed the gastric band and put large drains in the area. The Respondent's action was an acceptable method of treatment. (T: 1185-1186; Ex. 1 - pp. 6-7)

Patient B

13. Between March 7, 1986 and March 10, 1986, the Respondent treated Patient B for gastrointestinal bleeding at University Hospital. Effective March 10, 1986, the Respondent was ordered to go on annual leave for one month. After March 10, 1986 there were no notations in Patient B's medical record to indicate that the Respondent was still providing care to the patient. (T: 674-679, 1244; Ex. 3)

14. On March 9, 1986 the Respondent operated on Patient B for gastrointestinal bleeding. During the operation the Respondent located a gastric perforation. The Respondent considered various methods in deciding how to close the

perforation. No evidence was presented that the method chosen was inappropriate. (T: 1233-1235; Ex. 3; record as whole concerning Patient B)

15. During the operation, bleeding was controlled with pressure. In the patient's post-operative course, there was no further bleeding. (Ex. 3).

16. During this operation the Respondent also performed a common bile duct exploration, cholangiogram, choledochoscopy and a Roux-en-y cholecystojejunostomy. This operation was six hours long. These additional procedures were not medically indicated at that time, that is, at the time of an operation for an acute upper gastrointestinal hemorrhage. (T: 56-57, 1238-1243; Ex. 3)

17. After the operation, Patient B had symptoms of on-going sepsis. (Ex. 3)

Patient C

18. Between March 9, 1986 and March 10, 1986 the Respondent treated Patient C for obesity at University Hospital. (Ex. 5)

19. On March 10, 1986 the Respondent performed a gastric banding on Patient C. (Ex. 5)

20. In April 1985 Dr. Cristal saw the patient and did a pre-operative psychological evaluation. (T: 1306; Ex. 6)

21. Before the operation, Patient C had multiple visits to the obesity clinic. (T: 1306; Ex. 6)

22. As director of the obesity clinic, the Respondent did a nutritional assessment of Patient C before the operation. (T: 635; Ex. 6 - pp. 20-21)

23. During this operation, the Respondent performed a cholecystectomy. This cholecystectomy was medically indicated because the patient was morbidly obese. (T: 213-214; Exs. 5, V)

24. If Patient C's portal vein was nicked during this operation, the Respondent did not do it. (T: 343, 423)

Additional Findings

25. During 1986 and 1987 the Respondent had episodes of inappropriate behavior with the staffs of University Hospital and Northport Veterans Administration Hospital, Northport, New York. (See Findings of Fact 27, 32, 33, 34, 35)

26. In March 1986 Dr. Harry Soroff contacted the Respondent's mother to convey concerns that the Respondent's secretary had expressed to Dr. Soroff about the Respondent's emotional health. The record does not establish, by a preponderance of the evidence, that the Respondent later accused Dr. Soroff of having made sexual advances to the Respondent's mother over the telephone. When he testified, Dr. Soroff only

vaguely recalled this later conversation with the Respondent. (T: 347; record as whole)

27. The Respondent accused Dr. Soroff of trying to attract the Respondent sexually by standing around in his shorts in the hospital locker room. (T: 475-477)

28. In March 1986 Dr. Soroff invited the Respondent to ride with him to a meeting at a restaurant. The record does not establish, by a preponderance of the evidence, that the Respondent accused Dr. Soroff of wanting to ride alone with the Respondent for sexual reasons. (T: 668-669; record as whole)

29. In 1981 the Respondent gave a lecture on astrology. The Respondent has never made a decision concerning an operation based on astrology. The record does not establish, by a preponderance of the evidence, that the Respondent expressed the following opinion on numerous occasions to various attending surgeons and surgical residents: operations should be scheduled in accordance with the principles of astrology. Clarence Dennis, M.D. did not testify in this matter. (T: 351, 684; record as whole)

30. The record does not establish, by a preponderance of the evidence, that on or about March 26, 1986 the Respondent told Linda Brochhausen, a secretary at University Hospital, that many of the Jewish physicians at University Hospital were ganging

up on the Respondent. Dr. Soroff could not recall that the Respondent made this statement. Linda Brochhausen did not testify in this matter. (T: 355; record as whole)

31. On April 3 and 4, 1986 the Respondent spent some time sitting across the desk from Agnes Merkle, his secretary at that time. The record does not establish, by a preponderance of the evidence, that the Respondent spent practically the entire day sitting across from Ms. Merkle, that he was staring into her eyes or that he was following her every movement. Agnes Lucarelli (formerly Agnes Merkle) could not confirm that this behavior occurred. (T: 627-629; record as whole)

32. On or about March 5, 1986 Agnes Merkle attended a communication workshop at Northport Veterans Administration Hospital. The Respondent had nominated Ms. Merkle to attend this workshop. During the workshop, the Respondent entered the room. In front of the other workshop participants, the Respondent admonished Ms. Merkle. As a result, she cried and had to leave the room. (T: 593-594, 695-699, 781-784)

33. On or about December 1, 1987 the Respondent stated to David Cohen, a senior investigator with the New York State Office of Professional Medical Conduct, that as of February 1986 Ms. Merkle had turned the Respondent's office into a "red light district". The Respondent further stated that Ms. Merkle may have

had sexual relations with members of the house staff, including "group interactions". (T: 520-521, 690-693)

34. In 1986 and early 1987 the Respondent exhibited inappropriate behavior toward Ms. Merkle including following her in their work place, including the bathroom; calling her on numerous occasions at work; and making contact at her home, including calling her on numerous occasions and ringing her doorbell. The Respondent did not stop after Ms. Merkle asked him to stop. As a result she went to the authorities. The Respondent stopped after he received a letter dated January 7, 1987 from the Suffolk County District Attorney's Office. (T: 601-602, 619, 621-622; Ex. 19)

35. In March 1986 the Respondent refused a request by his employer, the Northport Veterans Administration Hospital, that he undergo a psychiatric examination. The record does not establish, by a preponderance of the evidence, that as a result of this refusal, the Respondent's privileges were suspended on March 7, 1986. (T: 362, 736-738; record as whole)

36. No evidence was presented that at night during the summer of 1986, the Respondent removed printouts of financial data from the desk of Rose Cherlin of University Hospital. (Record as whole)

37. No evidence was presented that in January 1987 in Dr. Dennis' absence, the Respondent entered Dr. Dennis' office and looked through his desk. (Record as whole)

CONCLUSIONS

The Hearing Committee first determined whether the factual allegations set forth in the Amended Statement of Charges were sustained and then determined whether any sustained factual allegation constituted professional misconduct as charged. The Hearing Committee unanimously reached each of the following conclusions.

- I. Practicing with negligence on more than one occasion, practicing with incompetence on more than one occasion (First and Second Specifications)

Negligence was defined as a failure to exercise the care that would be exercised by a reasonably prudent physician under the circumstances. Incompetence was defined as a lack of the skill or knowledge necessary to practice medicine.

Patient A

The factual allegation set forth in paragraph A of the Amended Statement of Charges should be sustained (Finding of Fact 2).

The first sentence of the factual allegation set forth in paragraph A.1 of the charges should be sustained (Finding of Fact 3). The second sentence of that factual allegation should not be sustained (Findings of Fact 4-6). As this second sentence is the gravamen of this factual allegation, this factual allegation should not be sustained.

The factual allegation set forth in paragraph A.2 of the charges should not be sustained (Findings of Fact 3, 5, 7).

The factual allegation set forth in paragraph A.3 of the charges should not be sustained (Findings of Fact 8, 9). Although the Respondent did position the gastric band around a thin portion of Patient A's stomach, the Department did not prove, by a preponderance of the evidence, that the portion was tissue-paper thin or that the positioning was improper (Findings of Fact 8, 9).

The factual allegation set forth in paragraph A.4 of the charges should not be sustained (Finding of Fact 10).

The factual allegation set forth in paragraph A.5 of the charges should be sustained (Finding of Fact 11). This failure by the Respondent to appreciate the seriousness of Patient A's condition and the need for exploratory surgery constitutes negligence. It does not constitute incompetence.

The first sentence of the factual allegation set forth in paragraph A.6 of the charges should be sustained with one

exception (Finding of Fact 12). That exception is the date of the second operation which was November 20, 1985, rather than November 19, 1985 (Finding of Fact 12). The second sentence of that factual allegation should not be sustained (Finding of Fact 12). As this second sentence is the gravamen of this factual allegation, this factual allegation should not be sustained.

Patient B

The factual allegation set forth in paragraph B of the charges should be sustained for the period of time from March 7, 1986 to March 10, 1986 (Finding of Fact 13). It should not be sustained for the period of time after March 10, 1986 to April 14, 1986 (Finding of Fact 13).

The first sentence of the factual allegation set forth in paragraph B.1 should be sustained (Finding of Fact 14). The second sentence of that factual allegation should be sustained in part and not sustained in part (Finding of Fact 14). The Respondent located a gastric perforation (Finding of Fact 14). No evidence was presented that the Respondent failed to adequately close the perforation (Finding of Fact 14). As the Department did not meet its burden of proof concerning this gravamen of this factual allegation, this factual allegation should not be sustained.

The factual allegation set forth in paragraph B.2 of the charges should not be sustained (Finding of Fact 15).

The factual allegation set forth in paragraph B.3 of the charges should be sustained (Finding of Fact 16). Although these additional procedures were medically indicated, they were not medically indicated during an emergency operation for gastrointestinal bleeding (Finding of Fact 16). It must also be noted that this entire operation was six hours long (Finding of Fact 16). The Respondent's action in performing these additional procedures at that time constitutes negligence. It does not constitute incompetence.

The first sentence of the factual allegation set forth in paragraph B.4 of the charges should be sustained (Finding of Fact 17). The second sentence of that factual allegation should not be sustained since the Respondent was not providing care and was not responsible for providing care to Patient B at that time (Finding of Fact 13). As this second sentence is the gravamen of this factual allegation, this factual allegation should not be sustained.

Patient C

The factual allegation set forth in paragraph C of the charges should be sustained for the period of time from March 9,

1986 to March 10, 1986 (Finding of Fact 18). It should not be sustained for the period of time after March 10, 1986 to March 26, 1986 (Finding of Fact 13).

The first sentence of the factual allegation set forth in paragraph C.1 of the charges should be sustained (Finding of Fact 19). The second sentence of that factual allegation should not be sustained (Findings of Fact 20-22). As this second sentence is the gravamen of this factual allegation, this factual allegation should not be sustained.

The factual allegation set forth in paragraph C.2 of the charges should not be sustained (Finding of Fact 23).

The factual allegation set forth in paragraph C.3 should not be sustained (Finding of Fact 23). Because the cholecystectomy was medically indicated, the patient was not unnecessarily placed at risk for an infection (Finding of Fact 23).

The factual allegation set forth in paragraph C.4 of the charges should not be sustained (Finding of Fact 24).

Summary

As set forth above, the charge of practicing the profession with negligence should be sustained once concerning Patient A and once concerning Patient B. Because the sustained

charges constitute practicing the profession with negligence on more than one occasion, the First Specification should be sustained to the extent set forth above.

As no charge of practicing the profession with incompetence should be sustained, the Second Specification should not be sustained.

II. Practicing while ability to practice impaired by mental disability (Third Specification)

The factual allegation set forth in paragraph D of the charges should be sustained to the extent that there were episodes of inappropriate behavior and to the extent set forth below (Finding of Fact 25).

The first sentence of the factual allegation set forth in paragraph D.1 of the charges should be sustained (Finding of Fact 26). The second sentence of that factual allegation should not be sustained (Finding of Fact 26). As this second sentence is the gravamen of this factual allegation, this factual allegation should not be sustained.

The factual allegation set forth in paragraph D.2 of the charges should be sustained (Finding of Fact 27).

The first sentence of the factual allegation set forth in paragraph D.3 of the charges should be sustained with one exception (Finding of Fact 28). That exception is the location

of the meeting which was a restaurant, rather than Nassau Hospital. The second sentence of that factual allegation should not be sustained (Finding of Fact 28). As this second sentence is the gravamen of this factual allegation, this factual allegation should not be sustained.

The factual allegation set forth in paragraph D.4 of the charges should not be sustained (Finding of Fact 29).

The factual allegation set forth in Paragraph D.5 of the charges should not be sustained (Finding of Fact 30).

The factual allegation set forth in paragraph D.6 of the charges should not be sustained (Finding of Fact 31).

The factual allegation set forth in paragraph D.7 of the charges should be sustained (Finding of Fact 32).

The factual allegation set forth in paragraph D.8 of the charges should be sustained (Finding of Fact 33).

The factual allegation set forth in paragraph D.9 of the charges should be sustained to the extent set forth in Finding of Fact 34 and should not be sustained to the extent set forth in the same finding of fact (Finding of Fact 34).

The factual allegation set forth in paragraph D.10 of the charges should be sustained in part (first sentence of factual allegation) and should not be sustained in part (second sentence of factual allegation) (Finding of Fact 35).

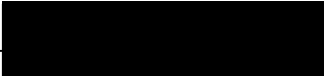
RECOMMENDATIONS

As set forth above and to the extent set forth above, the Hearing Committee recommends that the First Specification (practicing the profession with negligence on more than one occasion) be sustained. As set forth above, the Hearing Committee recommends that the other specifications (Second as to practicing the profession with incompetence on more than one occasion and Third as to practicing the profession while ability to practice impaired by mental disability) not be sustained.

In light of the nature of the sustained charge and the Respondent's 10 year experience in obesity surgery, and after consideration of the possible sanctions, the Hearing Committee unanimously recommends that the Respondent receive a censure and reprimand.

DATED: Rochester, New York
October 5, 1990

Respectfully submitted,


John H. Morton, M.D., Chairperson
Carolyn Snipe
John A. D'Anna, Jr., M.D.

The factual allegation set forth in paragraph D.11 of the charges should not be sustained (Finding of Fact 36).

The factual allegation set forth in paragraph D.12 of the charges should not be sustained (Finding of Fact 37).

As set forth above and to the extent that these factual allegations should be sustained, the Respondent has had episodes of inappropriate behavior. However, in light of the fact that the Department produced no expert witness to testify that the Respondent's ability to practice medicine was impaired by mental disability and, therefore, did not meet its burden of proof, the Third Specification should not be sustained.

It must be noted that the Respondent presented evidence concerning a defense of retaliation or whistleblowing. In light of the one sustained specification (First Specification) and its underlying sustained factual allegations, there was no reason for the Hearing Committee to make any determination concerning the validity of this defense. Therefore, the Hearing Committee has not made any findings of fact or conclusions concerning this defense.

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

-----X AMENDED
IN THE MATTER : STATEMENT
OF : OF
NOEL L. SMITH, M.D. : CHARGES
-----X

NOEL L. SMITH, M.D., the Respondent, was authorized to practice medicine in New York State on March 20, 1979 by the issuance of license number 137664 by the New York State Education Department. The Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1986 through December 31, 1988.

FACTUAL ALLEGATIONS

- A. Between on or about November 17, 1985 and on or about December 15, 1985, Respondent treated Patient A (whose name together with other patient names appears in the attached Appendix) for obesity at University Hospital, State University of New York, Stony Brook, N.Y., 11794 (University Hospital).
1. On or about November 18, 1985, Respondent performed a gastric banding on Patient A. Prior

to the operation, Respondent failed to perform or obtain a complete pre-operative evaluation of the appropriateness of the procedure for this patient, including psychological and nutritional assessments.

2. The gastric banding performed by Respondent on or about November 18, 1985 was not medically indicated.
3. During the course of the operation Respondent improperly positioned the gastric band around a portion of the stomach which was tissue-paper thin.
4. During the course of the operation Respondent improperly punctured Patient A's stomach.
5. After the operation complications developed necessitating exploratory surgery. Respondent failed to appreciate the seriousness of Patient A's condition and the need for exploratory surgery.
6. In a second operation performed on or about November 19, 1985, a perforation in the

patient's gastric pouch was located. Respondent improperly failed to attempt to close the perforation.

B. Between on or about March 7, 1986 and on or about April 14, 1986, Respondent treated Patient B for GI bleeding at University Hospital.

1. On or about March 9, 1986, Respondent operated on Patient B for gastrointestinal bleeding. Respondent located a gastric perforation but failed to adequately close it.
2. During the course of the operation, bleeders, which should have been ligated, were improperly controlled with pressure.
3. In the course of this six hour operation Respondent also performed a common bile duct exploration, cholangiogram, choledochoscopy and a Roux-en-y cholecystojejunostomy, all of which procedures were not medically indicated.
4. Following the operation, Patient B had symptoms of on-going sepsis. Respondent failed to

diagnose the cause of the sepsis in a timely manner.

C. Between on or about March 9, 1986 and on or about March 26, 1986, Respondent treated Patient C for obesity at University Hospital.

1. On or about March 10, 1986 Respondent performed a gastric banding on Patient C. Prior to the operation Respondent failed to perform or obtain a complete pre-operative evaluation of the appropriateness of this procedure for this patient, including psychological and nutritional assessments.
2. During the course of the procedure, Respondent performed a cholecystectomy which was not medically indicated.
3. The performance of a cholecystectomy unnecessarily risked an infection of the wound by enteric organisms which, in fact, did result.
4. During the course of this procedure, Respondent improperly "nicked" the portal vein of Patient C.

D. During 1986 and 1987, Respondent behaved inappropriately in his interaction with the staffs of University Hospital and Northport Veterans Administration Hospital, Northport, N.Y.

1. In March, 1986, Dr. Harry Soroff contacted Respondent's mother to convey concerns Respondent's secretary had expressed to Dr. Soroff about Respondent's emotional health. Respondent later accused Dr. Soroff of having made sexual advances to Respondent's mother over the telephone.
2. Respondent accused Dr. Soroff of trying to attract Respondent sexually by standing around in his shorts in the hospital locker room.
3. In March, 1986, Dr. Soroff invited Respondent to ride with him to a meeting at Nassau Hospital. Respondent accused Dr. Soroff of wanting to ride alone with Respondent for sexual reasons.
4. In 1985, Respondent was scheduled to give a medical lecture at a research conference held at University Hospital. Instead of a medical lecture, Respondent's presentation consisted of

an hour-long discourse on astrology. During the course of the lecture Respondent advised that operations should be scheduled in accordance with the principles of astrology. Respondent has expressed this opinion on numerous other occasions to various attending surgeons and surgical residents. In or about 1985 or 1986, Respondent advised Clarence Dennis, M.D., Assistant Chief of Research at Northport Veterans Administration Hospital, to delay on operation because the astrological signs were wrong. When Dr. Dennis went ahead with the operation and complications developed, Respondent admonished Dr. Dennis for not following his advice.

5. On or about March 26, 1986, Respondent told Linda Brochausen, a secretary at University Hospital, that many of the Jewish physicians at University Hospital were ganging up on Respondent.
6. On or about April 3, 1986, and April 4, 1986, Respondent spent practically the entire day sitting across the desk from his then

secretary, Ms. Agnes Merkle, staring into her eyes and following her every movement.

7. On or about March 5, 1986, Ms. Agnes Merkle was in attendance at a communication workshop at Northport, a workshop for which Respondent has nominated Ms. Merkle to attend. During the workshop Respondent entered the room and, in front of the other participants, admonished Ms. Merkle such that she cried and had to leave the room.
8. On or about December 1, 1987, Respondent stated to David Cohen, a Senior Investigator with the New York State Office of Professional Medical Conduct, that as of February, 1986, Ms. Merkle had turned Respondent's office into a "red light district". He further stated that Ms. Merkle may have had sexual relations with members of the house staff, including "group interactions".
9. In 1986 and 1987, Respondent exhibited inappropriate behavior toward Ms. Merkle including following her everywhere, including the bathroom; following her home and during

lunch; waiting in his car outside Ms. Merkle's house until she left for work and then following her to work; calling her on numerous occasions at work and at home and ringing her door bell. This behavior continued despite requests to desist by Ms. Merkle and by the Suffolk County District Attorney's Office.

10. In or about March, 1986, Respondent refused a request by his employer, the Northport Veterans Administration Hospital, that he undergo a psychiatric examination. As a result of his refusal, his privileges were suspended on March 7, 1986.
11. During the summer of 1986, at night, Respondent removed printouts of financial data from the desk of Ms. Rose Cherlin of University Hospital.
12. In January 1987, Respondent entered Dr. Dennis' office, in Dr. Dennis' absence, and looked through his desk.

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

Practicing with negligence on more than one occasion.

Respondent is charged with practicing the profession with negligence on more than one occasion under N.Y. Educ. Law Section 6509(2) (McKinney 1985), in that Petitioner charges Respondent with having committed at least two of the following:

1. The facts in paragraphs A and A.1
- A.6, B and B.1 - B.4 and C
and/or C.1 - C.4.

SECOND SPECIFICATION

Practicing with incompetence on more than one occasion.

Respondent is charged with practicing the profession with incompetence on more than one occasion under N.Y. Educ. Law Section 6509(2) (McKinney 1985) in that Petitioner charges Respondent with having committed at least two of the following:

2. The facts in paragraphs A and A.1
- A.6, B and B.1 - B.4 and C
and/or C.1 - C.3.

THIRD SPECIFICATION

Practicing while Impaired

Respondent is charged with practicing the profession while the ability to practice is impaired by mental disability, under N.Y. Educ. Law Section 6509(3) (McKinney 1985), in that Petitioner charges:

3. The facts in paragraphs D and D.1
- D.12.

DATED: New York, New York
March 12, 1990

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

IN THE MATTER

OF

ANSWER

NOEL SMITH, M.D.
-----X

Respondent, NOEL L. SMITH, M.D., by his attorneys,
COOPER, SAPIR & COHEN, P.C., answering the charges herein:

(1) Generally denies each and every material
allegation made in the charges.

AS AND FOR A COMPLETE AFFIRMATIVE DEFENSE

(2) This proceeding herein is barred on the grounds
of collateral estoppel.

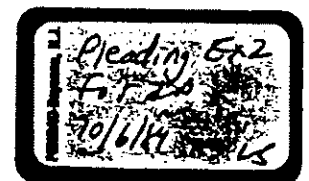
WHEREFORE, it is respectfully requested that the
charges herein be dismissed.

Dated: Hempstead, New York
September 29, 1989

Yours, etc.,

COOPER, SAPIR & COHEN, P.C.
Attorneys for NOEL SMITH, M.D.
306 Fulton Avenue
Hempstead, New York 11550
(516) 538-8300

TO:
TERRENCE SHEEHAN
Associate Counsel
Bureau of Professional
Medical Conduct
State of New York
Department of Health
8 East 40 Street
New York, New York 10016



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

IN THE MATTER

OF

AMENDED ANSWER

NOEL SMITH, M.D.
-----X

Respondent, NOEL L. SMITH, M.D., by his attorneys,
COOPER, SAPIR & COHEN, P.C., as and for his amended answer to
the charges:

(1) Generally denies each and every material
allegation made in the charges.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

(2) This proceeding herein is barred on the grounds
of collateral estoppel.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

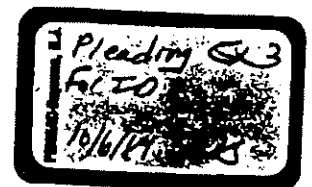
(3) This proceeding is barred by laches.

WHEREFORE, it is respectfully requested that the charges
herein be dismissed.

Dated: Hempstead, New York
October 4, 1989

Yours, etc.,
COOPER, SAPIR & COHEN, P.C.
Attorneys for Respondent
306 Fulton Avenue
Hempstead, New York 11550
(516) 538-8300

TO:
TERRENCE SHEEHAN, ESQ.
Associate Counsel
Bureau of Professional
Medical Conduct
State of New York
Department of Health
8 East 40 Street
New York, New York 10



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

-----X
IN THE MATTER :

OF :

NOEL L. SMITH, M.D. :

COMMISSIONER'S

RECOMMENDATION
-----X

TO: Board of Regents
New York State Education Department
State Education Building
Albany, New York

A hearing in the above-entitled proceeding was held on December 8, 1989, January 26, 1990, February 16, 1990, March 14, 1990, March 30, 1990, May 1, 1990, June 26, 1990, July 10, 1990 and July 26, 1990. Respondent, Noel L. Smith, M.D. appeared by Robert E. Sapir, Esq. (until December 4, 1989) and Howard Rukeyser, Esq. (after December 4, 1989). The evidence in support of the charges against the Respondent was presented by Terrence Sheehan, Esq.

NOW, on reading and filing the transcript of the hearing, the exhibits and other evidence, and the findings, conclusions and recommendation of the Committee,

I hereby make the following recommendation to the Board of Regents:

- A. The Findings of Fact of the Committee should be accepted except as follows:

Patient A

The Committee's Finding of Fact #9 should be modified to reflect that Dr. Jacobson found on exploration that Respondent had placed the gastric band around a tissue paper thin aspect of the

stomach. (Tr. 475). As both Dr. Jacobson (Tr. 474-75) and Dr. Nay (Tr. 256) testified, this was not acceptable practice.

Patient B

The last sentence of the Committee's Finding of Fact #14 should be deleted and, in lieu thereof, I find, based on Dr. Nay's testimony (Tr. 52), that it was inappropriate to patch the gastric perforation identified by Respondent.

The Committee's Finding of Fact #15 should also be amended by the addition of an additional finding, again based on Dr. Nay's testimony (Tr. 52-53), that the bleeders should have been ligated.

Patient C

The second sentence of the Committee's Finding of Fact #23 should be deleted. In lieu thereof, I find that the cholecystectomy Respondent performed on Patient C was not medically indicated because, prior to surgery, Patient C had a normal sonogram and, at surgery, no stones were found in the gallbladder (Tr. 125).

- B. The Conclusions of the Committee should be accepted except that I would sustain Factual Allegations A.3, B.1, B.2 and C.2. Therefore, I would also sustain the First Specification based on Paragraph A.3, Paragraphs B.1 and B.2 and Paragraph C.2. While I would not disturb the Committee's Conclusion with regard to the Second Specification, I do not agree with the Committee's statement that expert testimony is always necessary to establish mental impairment or disability.
- C. In lieu of the Recommendation of the Committee, I recommend that Respondent's license be suspended for three years and that that suspension be stayed provided that during that period (a) Respondent not perform surgery without the prior approval of another surgeon, approved in advance by the Office of Professional Medical Conduct (OPMC) and (b) Respondent's surgical practice be monitored by a surgeon approved in advance by OPMC. The monitoring physician should be responsible for providing quarterly reports to OPMC on the adequacy of Respondent's practice.

D. The Board of Regents should issue an order adopting and incorporating the Findings of Fact and Conclusions and further adopting as its determination the Recommendation described above.

The entire record of the within proceeding is transmitted with this Recommendation.

DATED: Albany New York

Donner 30 1990



DAVID AXELROD, M.D., Commissioner
New York State Department of Health

ORDER OF THE COMMISSIONER OF
EDUCATION OF THE STATE OF NEW YORK

NOEL L. SMITH

CALENDAR NO. 11657



The University of the State of New York

IN THE MATTER

OF

NOEL L. SMITH
(Physician)

DUPLICATE
ORIGINAL
VOTE AND ORDER
NO. 11657

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 11657, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED (May 24, 1991): That, in the matter of NOEL L. SMITH, respondent, the third sentence of the third paragraph of page 3 of the Regents Review Committee report is modified and deemed accepted as follows: "Whether or not the hearing committee was purportedly being insulated from the October 6, 1989 prehearing conference, neither the Administrative Officer nor the parties have the power to insulate such conferences and/or rulings from review by the Regents Review Committee, and subsequently, by the Board of Regents. See Gross v. Ambach, 71 N.Y.2d 859, 572 N.Y.S.2d 745 (1988)"; that the recommendation of the Regents Review Committee be accepted as follows:

1. The findings of fact of the hearing committee be accepted, except the last sentence in fact finding numbered 14 not be accepted;
2. The recommendation of the Commissioner of Health as to the hearing committee's findings of fact be accepted, except that the modification of fact findings numbered 9, 15 and 23 not be accepted and the modification of fact

finding numbered 14 be accepted only to the extent of deleting the last sentence;

3. The conclusions of the hearing committee as to guilt be accepted, except that its conclusion set forth in the second sentence of the third paragraph of page 21 of the hearing committee report that begins, "However, in light of", be accepted within the context of petitioner not having met its burden of proving, by a preponderance of the evidence, the third specification by expert testimony or otherwise;
4. The recommendation of the Commissioner of Health as to the hearing committee's conclusions as to guilt be accepted, except his recommendation to sustain the first specification based on Paragraph A.3, Paragraphs B.1 and B.2 and Paragraph C.2 not be accepted;
5. Respondent is guilty of the first specification, by a preponderance of the evidence, to extent indicated by the hearing committee;
6. The recommendation of the hearing committee as to the measure of discipline be accepted;
7. The recommendation of the Commissioner of Health as to the measure of discipline, a conditionally stayed suspension which is not authorized, not be accepted; and
8. Respondent receive a Censure and Reprimand upon the first specification of the charges of which respondent has been found guilty as aforesaid;

and that the Commissioner of Education be empowered to execute, for and on behalf of the Board of Regents, all orders necessary to carry out the terms of this vote;

and it is

ORDERED: That, pursuant to the above vote of the Board of

NOEL L. SMITH (11657)

Regents, said vote and the provisions thereof are hereby adopted and **SO ORDERED**, and it is further

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

IN WITNESS WHEREOF, I, Thomas Sobol,
Commissioner of Education of the State of
New York, for and on behalf of the State
Education Department and the Board of
Regents, do hereunto set my hand and affix
the seal of the State Education Department,
at the City of Albany, this 31st day of
May, 1991.


Commissioner of Education