



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

November 10, 1999

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Robert Bogan, Esq.
New York State Department of Health
433 River Street – 4th Floor
Hedley Park Place
Troy, New York 12180

Bruce D. Lamb, Esq.
Burton & Lamb
201 East Kennedy Boulevard
Tenth Floor
Tampa, Florida 33602

Lee Davis, Esq.
New York State Department of Health
Empire State Plaza
Corning Tower – Room 2504
Albany, New York 12237

Phillip F. Waterman II, M.D.
904 Robala Drive
Cape Coral, Florida 33919

Phillip F. Waterman II, M.D.
650 Del Prado Avenue
Fort Myers, Florida 33919

RE: In the Matter of Phillip F. Waterman II, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 99-279) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:mla

Enclosure

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

COPY

IN THE MATTER
OF
PHILLIP F. WATERMAN, II, M.D.

DETERMINATION

AND

ORDER

ORDER # 99-279

A Notice of Referral Proceedings and Statement of Charges, both dated September 27, 1999 were served upon the Respondent, **PHILLIP F. WATERMAN, II, M.D.**

ANDREW MERRITT, M.D., Chairperson, **MARGERY SMITH, M.D.** and **SR. MARY THERESA MURPHY**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **MICHAEL P. McDERMOTT, ESQ.**, Administrative Law Judge, served as the Administrative Officer.

A hearing was held on October 27, 1999 at the Offices of the New York State Department of Health, Hedley Park Place, 433 River Street, Troy, New York. The Department appeared by **HENRY M. GREENBERG, ESQ.**, General Counsel, by **ROBERT BOGAN, ESQ.** and **LEE DAVIS, ESQ.**, of Counsel. The Respondent appeared in person and was represented by Burton & Lamb, 201 East Kennedy Boulevard, Tenth Floor, Tampa, Florida 33602 by **BRUCE D. LAMB, ESQ.**, of Counsel.

Evidence was received and transcripts of these proceedings were made.

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

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing where a licensee is charged solely with a violation of Education Law Section 6530(9). In such case, a licensee is charged with misconduct based upon a prior criminal conviction in New York or another jurisdiction, or upon a prior administrative adjudication regarding conduct which would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, the Respondent is charged with professional misconduct pursuant to Education Law Section 6530(9)(b) and (d). A copy of the Notice of Referral Proceeding and Statement of Charges is attached to this Determination and Order as 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. All Hearing Committee findings were unanimous unless otherwise stated.

- 1) PHILLIP F. WATERMAN, II, M.D., the Respondent, was authorized to practice medicine in New York State on June 17, 1975, by the issuance of license number 123973 by the New York State Education Department. (Pet's. Ex. 3)
- 2) On March 31, 1999, the state of Florida, Board of Medicine, (hereinafter "Florida Board"), filed a Final Order, (hereinafter "Florida Order"), that issued the Respondent a Letter of Concern; ordered him to spend three (3) days with a Perinatologist, observing technique and treatment of fetus and maternal patient in early gestational stages; required him to complete 20 hours of CME in prenatal risks and fined him Six Thousand Dollars (\$6,000.00). (Pet's. Ex. 4)
- 3) The "Florida Order" was based on a Consent Agreement entered into between the Respondent and the Florida Department of Health wherein the Respondent "neither admits nor denies the allegations of fact contained in the Administrative Complaint" which was attached to the ORDER. (Pet's. Ex. 4)

LEGAL ISSUE

Question: Can the New York State Office of Professional Medical Conduct take action against the Respondent based on the Florida action where the Respondent "neither admits nor denies the allegations of fact."

Answer: Yes

Discussion: The essential facts of this case have already been noted.

Section 6530(a)(d) of the State Education Law provides:

§ 6530. Definitions of professional misconduct. Each of the following is professional misconduct, and any licensee found guilty of such misconduct under the procedures prescribed in section two hundred thirty of the public health law shall be subject to penalties as prescribed in section two hundred thirty-a of the public health law except that the charges may be dismissed in the interest of justice:

9(d) Having his or her license to practice medicine revoked, suspended or having other disciplinary action taken, or having his or her application for a license refused, revoked or suspended or having voluntarily or otherwise surrendered his or her license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation, suspension, or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or the surrender of the license would, if committed in New York State, constitute professional misconduct under the laws of New York State;

In the case Hatfield v. Department of Health of The State of New York, 245 AD2d 703 (Third Dept 1997), the Illinois disciplinary authority made findings against the Respondent and suspended his license indefinitely. The Respondent then brought suit in county circuit court. That court reversed the disciplinary order and sent the case back to the administrative body. Illinois appealed this ruling. While the appeal was pending, the physician and Illinois ended their dispute by entering into a disciplinary consent order. In that consent order, the Respondent specifically denied the allegations against him and agreed to a penalty of 2 ½ year license suspension, effective from the date of the initial suspension. Based on the Illinois consent order, this Board suspended the Respondent's license in New York for one year, stayed the suspension, and placed him on probation. The Respondent brought suit in the Third Department claiming that New York could not discipline him based on the Illinois consent agreement.

The Third Department upheld this Board's disciplinary action even though it was based on the allegations in the Illinois complaint. The court accepted this Board's disciplinary action based on allegations in the complaint, reasoning:

Therefore, petitioner having waived an adjudication on the merits of the complaint by entering into a stipulation of settlement, which raised the inference that the allegations against him had some validity, we find that the ARB's determination was not arbitrary or capricious, affected by error of law or abuse of discretion (emphasis added)

As shown by this language, proof of the conduct underlying the sister-state discipline may be established by the charges or allegations pending at the time a consent order is entered into, even if the allegations are not admitted. As the court noted, entering into the consent agreement raises the inference that the allegations have some validity.

Conclusion

In the Consent Agreement at hand, the "Stipulated Facts:" notes

"Respondent neither admits nor denies the allegations of fact contained in the Administrative Complaint."

The Stipulated Conclusions of Law notes:

"Respondent admits that the facts set forth in the Administrative Complaint, if proven, would constitute violations of Chapter 458, Florida Statutes, as alleged in the Administrative Complaint;"
and

"Respondent admits that the stipulated disposition in this case is fair, appropriate and acceptable to Respondent."

Thus, as in Hatfield, by entering into a stipulation of settlement, the inference is raised that the allegations against the Respondent have validity and can be the subject of a disciplinary action by New York.

AMENDMENTS TO THE STATEMENT OF CHARGES

During the hearing on October 27, 1999, the Petitioner withdrew the FIRST SPECIFICATION in the Statement of Charges.

The Petitioner also acknowledged that the conduct resulting in the Florida Board's disciplinary action against the Respondent would NOT constitute misconduct under the Laws of New York State pursuant to:

New York Education Law §6530(5) (incompetence on more than one occasion);

New York Education Law §6530(6) (gross incompetence);

New York Education Law §6530(26) (performing professional services which have not been authorized)

HEARING COMMITTEE CONCLUSIONS

The Hearing Committee concludes that the evidence in this case does not support charges of Negligence on More Than One Occasion and/or gross negligence.

However, the evidence does support a conclusion that the conduct resulting in the Florida Board's disciplinary action against the Respondent would constitute misconduct under the laws of New York State, pursuant to:

New York Education Law §6530(32) (failing to maintain an accurate record).

VOTE OF THE HEARING COMMITTEE

SPECIFICATIONS

FIRST SPECIFICATION

Respondent violated New York Education §6530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York State, constitute professional misconduct under the laws of New York State.

VOTE: WITHDRAWN by Petitioner on October 27, 1999

SECOND SPECIFICATION

Respondent violated New York State Education Law §6530(9)(d) by having had disciplinary action taken against him by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the disciplinary action would, if committed in New York State, constitute professional misconduct under the laws of New York State.

VOTE: SUSTAINED (3-0)

HEARING COMMITTEE DETERMINATION

The Respondent testified at the hearing in an open, honest and forthright manner. He was a very credible witness.

The Record in this case indicates:

1. Although the Florida Board's Final Order was dated, March 3, 1999, the conduct which resulted in the Board's disciplinary action against the Respondent occurred in 1992 and involved a single case.
2. The Respondent gave up the practice of obstetrics in 1994 and has since limited his medical practice to gynecology.
3. The Respondent has complied with the educational provisions of the Florida Board's Final Order and has indicated that the monetary fine imposed by the ORDER will be paid within the time limits set by the ORDER.
4. With the exception of the instant charge, which involved only a single case, the Respondent's medical career has been without blemish.

Based on the foregoing, the Hearing Committee determines that, in the interest of justice, no action should be taken against the Respondent's New York State medical license.

ORDER

IT IS HEREBY ORDERED THAT:

1. No action should be taken against the Respondent's New York State medical license.
2. This **ORDER** shall be effective upon service on the Respondent or the Respondent's attorney by personal service or by certified or registered mail.

DATED: Marcellus, New York

11/8/ 1999


ANDREW MERRITT, M.D.
Chairperson

MARGERY SMITH, M.D.
SR. MARY THERESA MURPHY

APPENDIX I

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

**IN THE MATTER
OF
PHILLIP F. WATERMAN II, M.D.**

NOTICE
OF
REFERRAL
PROCEEDING

TO: PHILLIP F. WATERMAN II, M.D.
904 Robalo Drive
Cape Coral, FL 33919

PHILLIP F. WATERMAN II, M.D.
650 Del Prado Ave.
Ft. Myers, FL 33919

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law Section 230(10)(p) and N.Y. State Admin. Proc. Act Sections 301-307 and 401. The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 29th day of October, 1999 at 10:00 in the forenoon of that day at the Hedley Park Place, 5th Floor, 433 River Street, Troy, New York 12180.

At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the proceeding will be made and the witnesses at the proceeding will be sworn and examined.

You may appear in person at the proceeding and may be represented by counsel. You may produce evidence or sworn testimony on your behalf. Such evidence or sworn testimony shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence

State. The Committee also may limit the number of witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify.

If you intend to present sworn testimony, the number of witnesses and an estimate of the time necessary for their direct examination must be submitted to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 5th Floor, 433 River Street, Troy, New York 12180, ATTENTION: HON. TYRONE BUTLER, DIRECTOR, BUREAU OF ADJUDICATION, (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, on or before October 19, 1999.

Pursuant to the provisions of N.Y. Public Health Law §230(10)(p), you shall file a written answer to each of the Charges and Allegations in the Statement of Charges no later than ten days prior to the hearing. Any Charge or Allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such an answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. You may file a brief and affidavits with the Committee. Six copies of all such papers you wish to submit must be filed with the Bureau of Adjudication at the address indicated above on or before October 19, 1999, and a copy of all papers must be served on the same date on the Department of Health attorney indicated below. Pursuant to Section 301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person.

The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to the Bureau of Adjudication, at the address indicated above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five days prior to the scheduled date of the proceeding. Adjournment requests are not routinely granted. Claims of court

engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation. Failure to obtain an attorney within a reasonable period of time prior to the proceeding will not be grounds for an adjournment.

The Committee will make a written report of its findings, conclusions as to guilt, and a determination. Such determination may be reviewed by the administrative review board for professional medical conduct.

SINCE THESE PROCEEDINGS MAY RESULT IN A
DETERMINATION THAT SUSPENDS OR REVOKES YOUR
LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE
AND/OR IMPOSES A FINE FOR EACH OFFENSE CHARGED.
YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT
YOU IN THIS MATTER.

DATED: Albany, New York
September 27, 1999



PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional
Medical Conduct

Inquiries should be addressed to:

Robert Bogan
Assistant Counsel
Office of Professional Medical Conduct
433 River Street
Suite 303
Troy, NY 12180
(518)402-0820

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

**IN THE MATTER
OF
PHILLIP F. WATERMAN, II, M.D.**

STATEMENT
OF
CHARGES

PHILLIP F. WATERMAN, II, M.D., the Respondent, was authorized to practice medicine in New York state on June 17, 1975, by the issuance of license number 123973 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about March 31, 1999, the state of Florida Board of Medicine (hereinafter "Florida Board"), filed a Final Order, (hereinafter "Florida Order"), that issued the Respondent a Letter of Concern, ordered him to spend three (3) days with a Perinatologist, observing technique and treatment of fetus and maternal patient in early gestational stages, required him to complete 20 hours of CME in prenatal risks, and fined him \$6,000.00 based on his failure to keep medical records justifying the course of treatment, performing professional services not duly authorized by the client, and gross or repeated malpractice or the failure to practice medicine as being acceptable under similar conditions and circumstances.

B. The conduct resulting in the Florida Board's disciplinary action against Respondent would constitute misconduct under the laws of New York state, pursuant to the following sections of New York state law:

1. New York Education Law §6530(3) (negligence on more than one occasion);
2. New York Education Law §6530(4)(gross negligence);
3. New York Education Law §6530(5) (incompetence on more than one occasion);
4. New York Education Law §6530(6) (gross incompetence);
5. New York Education Law §6530(26)(performing professional services which have not been authorized); and/or
6. New York Education Law §6530(32)(failing to maintain an accurate record).

SPECIFICATIONS

FIRST SPECIFICATION

Respondent violated New York Education §6530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that Petitioner charges:

1. The facts in paragraphs A and/or B.

SECOND SPECIFICATION

Respondent violated New York State Education Law §6530(9)(d) by having had disciplinary action taken against him by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the disciplinary action would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that Petitioner charges:

2. The facts in paragraphs A and/or B.

DATED: *Sept 27*, 1999
Albany, New York


PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional
Medical Conduct