

**Before the
New Hampshire Board of Medicine
Concord, New Hampshire 03301**

In The Matter Of:

Docket No.: 11-09

Bradley N. Libenson, D.O.
License No.: 10305
(Adjudicatory/Disciplinary Proceeding)

FINAL DECISION AND ORDER

Before the New Hampshire Board of Medicine ("Board") is an adjudicatory/disciplinary proceeding of Bradley N. Libenson, D.O. ("Respondent" or "Dr. Libenson").

Background Information:

On April 7, 2009, the Board issued a Settlement Agreement in *In the Matter of Bradley N. Libenson, D.O.* On or about February 2010, the Board received information that Respondent may have engaged in professional misconduct by failing to comply with all the terms of his April 7, 2009 Settlement Agreement with the Board. On June 3, 2011, the Board issued a Notice of Hearing to Show Cause. This hearing occurred on October 3, 2012.

On Wednesday, October 3, 2012, at 1:00 p.m., the Board commenced an adjudicatory/disciplinary hearing in the above captioned matter. Board members present were:

Robert J. Andelman, Physician Member, Presiding Officer
Robert Vidaver, Physician Member
Michael Barr, Physician Member
John Wheeler, Physician Member
Louis E. Rosenthal, Physician Member
John H. Wheeler, Physician Member
Mark Sullivan, Physician Assistant Member
Daniel Morrissey, Public Member
Edmund Waters, Jr., Public Member
Gail Barba, Public Member

The prosecution was represented by Hearing Counsel Attorney Sarah Blodgett of the Administrative Prosecutions Unit ("APU") of the Office of the Attorney General. Dr. Libenson appeared *pro se*.

Hearing Counsel presented two witnesses who were cross-examined by Respondent. Hearing Counsel presented 10 exhibits (Exhibits 1 through 10). All except Exhibit 8 were not

objected to and were admitted. Exhibit 8 was admitted over Respondent's objection. The two witnesses were Todd Flanagan, Investigator, Administrative Prosecutions Unit and Dori Lefebvre, Board of Medicine Investigator. The Board found Flanagan and Lefebvre to be professional, forthright and credible. The Respondent presented 5 exhibits (Exhibit A -E) that were not objected to and were admitted. Exhibits 2, 3, 4 and 5 were admitted under seal. The Respondent presented Dori Lefebvre and also testified on his own behalf.

Findings of Fact:

In light of the testimony and exhibits, the Board finds the following facts:

As a result of allegations of professional misconduct, the Respondent and APU negotiated a settlement agreement. The Respondent signed the settlement agreement on March 18, 2009 (Exhibit 1: page 9). The Board approved the settlement agreement in April and it was issued on April 7, 2009. (Exhibit 1: page 9).

Contained in the 2009 settlement agreement were three requirements that Respondent shall institute as set forth in the Maine Order and imposed by the Maine Board regarding the Requirement of a Chaperone, Monitoring and Patient Surveys.

The first condition related to the requirement of a Chaperone. The settlement agreement required that "in all instances in which a chaperone is required, Dr. Libenson must have the adult chaperone, who is not a family member, sign the medical chart, whether in a paper or electronic format, on the date of the office visit, signifying that the individual acted as a chaperone during the treatment and/or examination provided by Dr. Libenson. In the case of a family member, Dr. Libenson shall make a chart entry identifying the chaperone." (Exhibit 1, Attachment 1 at page 3)

The second condition related to Patient Surveys. The settlement agreement required that "[p]rior to the execution of this Agreement, Dr. Libenson shall have in place a system to assess patient satisfaction or concerns that is approved by the Board or Case Reporter. The patient survey used to assess patient satisfaction or concerns must be disseminated by office staff to each patient or responsible party at the end of each patient encounter . . ." (Exhibit 1, Attachment 1 at page 4)

The third condition related to providing his office staff with a copy of the conditions of the 2008 Maine Order and an acknowledgement that the staff member has read the conditions.

Specifically, "Dr. Libenson will provide a copy of these Conditions to office staff who may be asked to serve as a chaperone and retain in his files for inspection by Board representatives, a signed and dated acknowledgment from each office staff that he or she has read these Conditions, or any subsequent amendments." (Exhibit 1, Attachment 1 at page 7)

Based on the testimony of Todd Flanagan and his review of the Patient Records (exhibits 2-5), less than 50 percent of the records reviewed had chaperones documented with initials.

Transcript at page 34. In addition, a patient record from 4-13-09, about one week after Dr. Libenson signed the 2009 settlement agreement, contained no documented chaperone. Transcript at 37.

Patient surveys were left on a counter for a patient to take after a visit. They could be placed in a suggestion box which was not marked nor located in a place where patients could see it as the box was obscured by a plant and unlabelled. Transcript at 43. After approximately ten months of being under the terms of the settlement agreement, there were only ten filled out surveys in the suggestion box. Transcript at 44. The staff did not hand the surveys out to each patient, there was no system for ensuring that patients received them and there was no system for returning them that stood out. Transcript at 45. At no time did Dr. Libenson ask staff members to pass out survey forms at the end of each patient visit nor were they instructed to discuss patient surveys with the patients. Transcript at 75. Dr. Libenson did not instruct his assistants to pick up the forms and hand them to the patients. Transcript at 113.

The acknowledgement form that Dr. Libenson used with his staff members was not the form that the State of Maine had approved, and it did not contain an acknowledgement that the staff member understood the form. Transcript at 41. Despite the fact that there was no language in the settlement agreement that allowed Dr. Libenson to change, modify or add in any way amend the form that he was to provide to his staff, Dr. Libenson altered the form and provided a version to his staff other than the one that had been approved by the Maine Board of Osteopathy. Transcript at 123-126.

Rulings of Law:

The 2009 Settlement Agreement states in pertinent part:

Respondent's breach of any terms or conditions of this *Settlement Agreement* or any breach of the terms and conditions of the Maine Order shall constitute unprofessional conduct pursuant to RSA 329:17, VI(d), and a separate and sufficient basis for further disciplinary action by the NH Board.

The Board finds that the Respondent has engaged in professional misconduct between April 7, 2009 and March 25, 2010 by violating paragraph 12 of the April 7, 2009 Settlement Agreement by failing to comply with the Maine Board requirements for documenting utilization of chaperones, which had been incorporated in the 2009 NH Agreement, in violation of RSA 329:17, VI (d).

The Board finds that the Respondent has engaged in professional misconduct between April 7, 2009 and March 25, 2010 by violating paragraph 12 of the April 7, 2009 Settlement Agreement in failing to comply with the Maine Board requirements for patient satisfaction surveys which had been incorporated in the 2009 NH Agreement, in violation of RSA 329:17, VI (d).

The Board finds that the Respondent has engaged in professional misconduct between April 7, 2009 and March 25, 2010 by violating paragraph 12 of the April 7, 2009 Settlement Agreement in failing to ensure that patient satisfaction surveys are disseminated by office staff to each patient or responsible party at the end of each patient encounter and retained in a manner that the information can be easily reviewed by an agent of the NH Board, in violation of RSA 329:17, VI (d).

The Board finds that the Respondent has engaged in professional misconduct between April 7, 2009 and March 25, 2010 by violating paragraph 12 of the April 7, 2009 Settlement Agreement in failing to provide each staff member with a copy of the conditions of the 2008 Maine Order, with a signed and dated acknowledgement form from each of his office staff that he or she has read the conditions, in violation of RSA 329:17, VI (d).

Disciplinary Action:

Based upon the Findings of Facts and Rulings of Law above, the Board has voted to order the following:

IT IS ORDERED that the Respondent is REPRIMANDED:

IT IS ORDERED that the Respondent is assessed an ADMINISTRATIVE FINE in the amount of two thousand dollars (\$2,000);

IT IS FURTHER ORDERED that Respondent shall meaningfully participate in a comprehensive multidisciplinary assessment conducted by Acumen Assessments ("Acumen") in Lawrence, Kansas. The assessment shall be scheduled within ninety (90) days of the date of issuance of this Order. Acumen shall review:

- a) This Order
- b) The 1995 Oregon Order
- c) The 1998 Settlement Agreement with the NH Board of Medicine
- d) The 2002 Settlement Agreement with the NH Board of Medicine
- e) The 2008 Consent Agreement with the Maine Board
- f) The 2009 Settlement Agreement with the New Hampshire Board of Medicine
- g) All exhibits submitted to the Board as part of the hearing in this matter
- h) The Board's "Final Decision and Order" in Docket No. 11-05
- i) All communications submitted by the Respondent to the Board since his initial licensure
- j) All police reports and court orders relating to Respondent's conviction for Simple Assault.

IT IS FURTHER ORDERED that Respondent shall bear all costs of the comprehensive assessment and any evaluation, reporting, further education and/or other measures recommended by the assessment. He shall at his own expense meaningfully participate in and satisfactorily complete, without interruption, such evaluation, reporting, further education and/or other measures as may be recommended to him by Acumen;

IT IS FURTHER ORDERED that Respondent shall sign any and all releases necessary for the Board to make inquiries relating to his participation in the comprehensive assessment and his compliance with any recommendations set forth in the comprehensive assessment;

IT IS FURTHER ORDERED that Respondent shall provide the Board with a copy of the comprehensive assessment and any other evaluations completed during the assessment within thirty (30) days of the completion of the assessment;

IT IS FURTHER ORDERED that Respondent shall institute all recommendations from the assessment within thirty (30) days of the date on which the Acumen assessment was completed;

IT IS FURTHER ORDERED that Respondent shall provide the Board with documentation of his completion of any follow-up recommendations made in the Acumen assessment within thirty (3) days of his completion of any recommended measures;

IT IS FURTHER ORDERED that the Board may consider Respondent's compliance with the terms and conditions herein and Respondent's compliance with the Acumen assessment and any recommendations made therein in any subsequent proceeding before the Board regarding Respondent's license;

IT IS FURTHER ORDERED that the Respondent's failure to comply with any terms or conditions imposed by this Final Decision and Order shall constitute unprofessional conduct pursuant to RSA 329:17, VI(d), and a separate and sufficient basis for further disciplinary action by the Board against the Respondent.

IT IS FURTHER ORDERED that this Final Decision and Order shall become a permanent part of the Respondent's file, which is maintained by the Board as a public document.

IT IS FURTHER ORDERED that this Final Decision and Order shall take effect as an Order of the Board on the date an authorized representative of the Board signs it.

Date: 11/14/2012

*\BY ORDER OF THE BOARD

Penny Taylor
(Signature)

PENNY TAYLOR
(Print or Type Name)

Authorized Representative of the
New Hampshire Board of Medicine

*\ Board members Amy Feitelson, M.D. and Robert Cervenka, M.D. recused