

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

In The Matter Of:

Docket No.: 11-05

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

FINAL DECISION AND ORDER

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

Background Information:

The Board received information that Dr. Libenson refused to provide medical records during a Board investigation. On March 4, 2011, the Board issued a Notice of Hearing. This hearing was conducted on May 4, 2011.

On Wednesday, May 4, 2011, at 3:00 p.m., the Board commenced with the adjudicatory/disciplinary hearing in the above-captioned matter. Board members present¹ were:

Robert Andelman, Physician Member, Chair and Presiding Officer
Gail Barba, Public Member
Nick Perencevich, Physician Member
John Wheeler, Physician Member
Mark Sullivan, Physician Assistant Member
Edmund Waters, Jr., Public Member
Louis Rosenthal, Physician 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 was represented by Attorney Peter Mosseau of Nelson, Kinder, Mosseau & Saturley, P.C.

The following exhibits were introduced into evidence and accepted into the record:

- Hearing Counsel's exhibits: 1 through 4.
- The Respondent's exhibits: A through C².

¹ These same Board members also deliberated and voted on this Final Decision and Order.

² Exhibit C was admitted over an objection.

At the hearing, Hearing Counsel submitted a motion to amend the notice of hearing correcting a scrivener's error. The Respondent did not object and the motion was granted.

Findings of Fact:

The Board heard testimony from Dori Tohill, the Board's Investigator. The Board finds Tohill's testimony was professional, forthright and credible. The Board also heard testimony from the Respondent. The Board finds Dr. Libenson's testimony was professional and forthright.

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

The Board first granted Dr. Libenson a New Hampshire license in 1998. Since that time, the Board has disciplined Dr. Libenson twice (both times as reciprocal discipline). Thus, he is aware of the Board's authority in disciplining physicians. On June 17, 2010, when he submitted his New Hampshire license renewal, Dr. Libenson certified under the penalty of perjury that he has familiarized himself with the Board's statutes and the Board's rules. (Exhibit 4³).

Dr. Libenson has two medical offices and practices in both Berwick, Maine and in Weirs Beach, New Hampshire. In addition to his family practice - Dr. Libenson has been grandfathered in as Board Certified in Family Practice since 1980 - he has a large pain practice. About fifty (50%) percent of his New Hampshire patients are at-risk patients who have pain and substance abuse issues. The Board recognizes the difficulty of this area of treatment and found credible Dr. Libenson's testimony that he has been effective in treating this difficult "group of higher risk patients." (Exhibit A). Dr. Libenson is one of the few authorized Suboxone-prescribers in his geographic area. Dr. Libenson has a wait list of about 50 potential patients who are seeking his care to reduce their opioid -dependency through Suboxone treatment with him.

L.S. has been a patient of Dr. Libenson in his New Hampshire office since July 2007. In the past four years, L.S. has seen Dr. Libenson for treatment on a monthly basis. L.S. is one of Dr.

³ Above the Respondent's signature, in capitalized and bold letters it states:

"I HEREBY CERTIFY UNDER PENALTY OF PERJURY THAT ALL INFORMATION ON THIS FORM IS CURRENTLY ACCURATE. I acknowledge that I am governed by the Medical Practice Act (RSA 329), the New Hampshire Code of Administrative Rules (Med 100-500), and the American Medical Association's Code of Medical Ethics. I have familiarized myself with these documents and acknowledge that deviation from the standards set therein may subject me to disciplinary action by the New Hampshire Board of Medicine."

Libenson's Suboxone patients. She has been seeing him not only for her narcotic dependency treatment, but also for her underlying psychiatric illness.

On September 20, 2010, L.S. filed a complaint with the Board against Dr. Libenson. (Exhibit 1). In her e-mailed complaint, L.S. made several allegations against Dr. Libenson. The Board's Investigator sent L.S. a letter acknowledging the Board's receipt of her complaint and informing her that it was conducting an investigation. (Exhibit B).

On January 14, 2011, the Board's Investigator sent a letter to Dr. Libenson informing him of the investigation. (Exhibit 2). The letter specifically states "You should also understand the confidentiality of any records obtained by the Board will be strictly maintained as required by RSA 329:18." With this letter, the Board's Investigator also sent Dr. Libenson a subpoena for records. The subpoena specifically asked for L.S.'s medical and billing records. The subpoena's language clearly states that Dr. Libenson was required to provide these records to the Board pursuant to RSA 329:18, V. The subpoena explicitly required the documents to be provided to the Board by January 28, 2011. (Exhibit 2).

On or about the day Dr. Libenson received the notification letter and the subpoena, L.S. came to his office for a scheduled appointment. In the course of her treatment, Dr. Libenson confronted L.S. about whether she had written a complaint to the Board. L.S. denied writing a complaint.

At this juncture, the Board notes two findings: First, the Board often receives third-party complaints, meaning the complainant is neither the patient nor the physician. Often times, the patient may not know that a complaint has been filed concerning his or her treatment. The Board has the statutory authority to investigate these complaints and to obtain any necessary and relevant records, regardless of whether the complainant is the patient. Thus, although the patient here was the complainant, the Board is un-persuaded by the Respondent's claim that because he believed that the patient did not file a complaint with the Board, he did not need to comply with the Board's investigation.

Second, Dr. Libenson treats an "at-risk" population. L.S. has received psychiatric counseling from Dr. Libenson. He has treated her for her bi-polar disease. She has been working with Dr. Libenson for many years to break her severe narcotic addiction. She is reliant on Dr. Libenson for continuing her monthly Suboxone treatment. Moreover, this specialized treatment is not readily available from other providers in this geographic area. The Board finds that it was inappropriate and unprofessional for Dr. Libenson to confront such a vulnerable patient, who was and is so extraordinarily dependent on him, about this matter. The Board is un-persuaded by Dr. Libenson's characterization of this physician-patient relationship as so open as to allow the patient to speak freely about a complaint to the physician's licensing Board. Dr. Libenson's claim that he could not release records without a patient's consent but that he did not ask L.S. for her consent at that time is likewise indicia of how inappropriate this confrontation was.

On January 20, 2011, Dr. Libenson wrote, what can best be described as, a nasty letter to the Board's Investigator outlining his refusal to comply with the Board's subpoena. (Exhibit 3). After acknowledging receipt of the Board's Investigator's January 14th request, Dr. Libenson arrogantly wrote that L.S. did "not file any complaint" with the Board.⁴ Dr. Libenson continued by stating:

Therefore, with all respect to RSA 329:18, V⁵, I will not be forwarding any of this patient's information unless you have both a formal letter of complaint and a signed release of information from the patient. Both of which I would need to see.

Dr. Libenson impetuously continued with: "Surely, Ms. Tothill, there are more pressing issues that taxpayer monies should be paying the Board to pursue." He concluded the letter with the contemptuously impertinent "Good luck." (Exhibit 3).

As stated above, on March 4, 2011, the Board issued a Notice of Hearing. By his own admission, after he received the Notice of Hearing, Dr. Libenson hired a lawyer who advised him to provide the records and to submit a letter to the Board apologizing and explaining the circumstances

⁴ As stated above, the Board is also statutorily mandated to investigate matters where third-parties complain. Thus, it was irrelevant whether L.S. did or did not file a complaint with the Board.

⁵ It is worthy of note that despite Dr. Libenson certifying under the pains and penalties of perjury that he read this statute (Exhibit 4) on 6/17/10, Dr. Libenson testified under oath at the 5/4/11 hearing before the Board that he had not read this statute before writing the 1/20/11 letter.

of his misunderstanding. The Respondent provided such letter to the Board a few weeks before the scheduled hearing. (Exhibit A).

Admirably, Dr. Libenson has continued to treat L.S. on a monthly basis. Less admirably, the doctor again broached the subject of this complaint/investigation with his patient, L.S., during the course of a scheduled patient examination/treatment. Dr. Libenson asked L.S. to write a letter on his behalf, either to the Board directly or to him and he would forward such letter to the Board, retracting the allegations articulated in the complaint. Indeed, L.S. wrote such a letter. (Exhibit C).

Rulings of Law:

As stated in the Notice of Hearing, the question currently before the Board is:

Whether on or about January 20, 2011, Respondent engaged in professional misconduct by refusing to provide records subpoenaed by the Board as part of an ongoing investigation, in violation of RSA 329:17, VI (d); and/or RSA 329:18, VII and/or Med 501.02(c).

Applicable Laws:

RSA 329:17, VI (d) states in pertinent part:

The board, after hearing, may take disciplinary action against any person licensed by it upon finding that the person: ... Has engaged in ... unprofessional conduct.

RSA 329:18, VII states in pertinent part:

The board may also require the licensee or applicant to provide the board with complete copies of records concerning any patient whose treatment may be material to allegations of possible professional misconduct being investigated by the board. Licensees and applicants shall respond to either type of request within 15 days from the date of the request, or within such greater time period as the board may specify.

Med 501.02(c) states:

A licensee shall cooperate with investigations and requests for information from the board....

Rulings:

The Board makes the following findings by a preponderance of the evidence:

1. On or about January 20, 2011, the Respondent engaged in professional misconduct by refusing to provide records subpoenaed by the Board as part of an ongoing investigation, in violation of RSA 329:17, VI (d)

2. On or about January 20, 2011, the Respondent engaged in professional misconduct by refusing to provide records subpoenaed by the Board as part of an ongoing investigation, in violation of RSA 329:18, VII.

3. On or about January 20, 2011, the Respondent engaged in professional misconduct by refusing to provide records subpoenaed by the Board as part of an ongoing investigation, in violation of Med 501.02(c).

Disciplinary Action:

After making its findings of fact and rulings of law, the Board deliberated on the appropriate disciplinary action. (Notice of Hearing, paragraph 6B - "If the above allegation is proven, whether and to what extent [should the Respondent] be subjected to one or more of the disciplinary sanctions authorized by RSA 329:17, VII).

Based upon the above the Board has voted the following:

IT IS ORDERED that the Respondent is Reprimanded.

IT IS FURTHER ORDERED that the Respondent is assessed an ADMINISTRATIVE FINE in the amount of three thousand dollars (\$3,000).

IT IS FURTHER ORDERED that the Respondent pay this entire sum of three thousand dollars (\$3,000) within ninety (90) days of the effective date of this Final Decision and Order. The entirety of the payment is due on or before September 5, 2011. The payment shall be made in the form of a money order or bank check made payable to "Treasurer, State of New Hampshire" and delivered to the Board's office at 2 Industrial Park Drive, Suite 8, Concord, NH 03301.

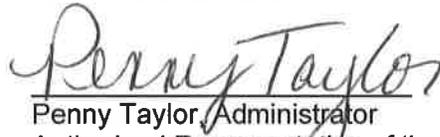
IT IS FURTHER ORDERED that the Board may consider the fact that discipline was imposed by this Final Decision and Order as a factor in determining appropriate discipline should any further misconduct be proved against the Respondent in the future.

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.

*BY ORDER OF THE NEW HAMPSHIRE
BOARD OF MEDICINE

Date: June 6, 2011



Penny Taylor, Administrator
Authorized Representative of the
New Hampshire Board of Medicine

*\ Amy Feitelson, M.D. and Robert P. Cervenka, M.D., Board members, recused.
Robert Vidaver, M.D. and Daniel Morrissey, O.P., Board members, not participating.