

diseases at Georgetown University Medical Center. Subsequently, in 1963, he returned to Rutland to practice internal medicine, with a subspecialty in infectious disease, and has continued to do so to the present time.

3. Respondent has served the people of Rutland County in many capacities including as a dedicated physician, City Health Officer, and in numerous educational and charitable capacities. While practicing medicine and engaging in the other community services, he raised five children who, in turn, have provided him with 15 grandchildren.

4. On October 31, 2003, the Respondent and the State of Vermont entered into an agreement set forth in a Stipulation and Consent Order that was signed on that date by an Assistant Attorney General on behalf of the State, the Respondent, and Respondent's Counsel at that time. Respondent, represented by counsel, acknowledged in the Stipulation and Consent Order that he knowingly and voluntarily agreed to it. He further agreed that he had read and carefully considered all of the terms and conditions and that he would be bound by such until expressly relieved from them, in writing, by the Board. The Stipulation and Consent Order was approved, ordered, entered, and became effective on November 5, 2003.

5. As a result of the Stipulation and Consent Order, Respondent's Vermont license to practice medicine was "Conditioned" for a period of 24 months. Among the conditions placed on Respondent's license was a requirement that Respondent have a current diagnostic assessment and treatment plan for each office patient for whom he prescribes controlled substances; a requirement that Respondent clearly note in writing in the patient's office record each controlled substance that he prescribes for that patient; and a requirement that Respondent copy and retain in duplicate all prescriptions written by him for patients other than those seen in hospital and nursing home settings – one copy to be placed in a chronologically-ordered file, and the other copy in the patient's chart. Respondent agreed to make these records promptly available to the Board or its agent upon request.

6. In addition to the record-keeping conditions set forth in Finding No. 5, Respondent agreed to and was ordered to attend and satisfactorily complete educational coursework within one year of the effective date of the Stipulation and Consent Order. The coursework agreed to and ordered was the four-day intensive course in controlled substance management offered by the School of Medicine of the Case Western Reserve University. Respondent agreed to and was ordered to ensure that documentation and evaluation of his participation and satisfactory completion of the coursework would be forwarded to the Board within 30 days after Respondent completed the course. This license condition was subject to review and approval by the Board in its sole discretion.

7. Respondent further agreed to and the Stipulation and Consent Order ordered that Respondent's failure to comply with the terms of the Order, specifically the educational and record-keeping requirements, may constitute unprofessional conduct and may subject Respondent to such further disciplinary action.

8. After Respondent had agreed to and the Board had ordered the above-stated conditions, the required Case Western course was offered on the following dates: December 10-13, 2003;

May 19-22, 2004; December 15-18, 2004; May 11-14, 2005; and December 7-10, 2005. Respondent did not attend the required course on any of those dates. Respondent did attend and satisfactorily complete the required course on May 10-13, 2006. Respondent did not satisfactorily complete the required course within one year of the effective date of the Stipulation and Consent Order. In fact, Respondent did not complete the required course until approximately two-and-a-half years after the date on which the requirement was ordered by the Board.

9. Respondent offered several explanations why he did not or could not attend and complete the required course within the required time period. He testified that he did not attend the required course in December 2003, because he attended an infectious disease course that he takes every year. The infectious disease course did not and does not satisfy the required course ordered by the Board. He further testified that he did not attend the required course in May 2004, because it was around the time that his brother was discharged from hospital care after suffering serious injuries in an automobile accident. Respondent felt that he needed to be available for his brother at all times.

10. Subsequently, Respondent attempted to find a course that would be accepted by the Board as a substitute for the course required by the Board order. The Investigative Committee of the Board and the Assistant Attorney General did not agree to substitute any other course. Respondent felt he needed a physician's input, and in his letter dated July 15, 2004, to Patricia A. King, M.D., Chair of the North Investigative Committee of the Board, Respondent requested her intercession to allow him to attend another course as a substitute for the required course. Respondent wrote the letter without informing his attorney of record, who was his brother, subsequently causing his attorney to withdraw from further representation of Respondent concerning this matter. Respondent wrote the letter, because he was frustrated with what was happening.

11. Respondent's letter to Dr. King prompted the Assistant Attorney General to write a letter, dated September 9, 2004, to Respondent. The Assistant Attorney General informed Respondent that Dr. King could not unilaterally change the condition of the required course, and that the Investigative Committee was very firm that the proposed substitute course was not acceptable. The Assistant Attorney General restated the requirements of the Stipulation and Consent Order, requested Respondent to attend the required course in December 2004, and notified Respondent that his failure to do so would subject him to unprofessional conduct charges for failure to comply with the Board's Order.

12. Respondent's explanations as set forth above do not constitute legitimate and acceptable excuses for his failure to comply with the Board order he had agreed to. He simply failed to complete the required course within the required time period despite reasonable opportunities to do so.

13. On March 16, 2005, Board Investigator Philip Ciotti visited Respondent's office to review records that Respondent was required to compile pursuant to the Stipulation and Consent Order. Mr. Ciotti had not contacted Respondent or his office prior to making the visit. Respondent was in Florida when Mr. Ciotti arrived. Mr. Ciotti spoke with Linda Lewis, who is

the bookkeeper for Respondent. Mr. Ciotti asked for the records that were required to be kept pursuant to the Stipulation and Consent Order, but Ms. Lewis was unaware of any such records. She tried nonetheless to be helpful and did make copies of some records for Mr. Ciotti. Mr. Ciotti made no other attempt to contact Respondent and made no further visits to his office except for a visit in December 2005.

14. After reviewing the copies he had received, Mr. Ciotti had several phone calls with Respondent's new attorney of record, Mr. Berger. By letter dated June 13, 2005, Mr. Berger corresponded with the Assistant Attorney General advising him that the requested records were available for review. By letter dated July 28, 2005, Mr. Berger corresponded with Investigator Ciotti enclosing copies of the requested records and a copy of the June 13, 2005 letter. No other written requests for records were made to either Respondent or Mr. Berger regarding this matter at that time. When requests were made to Mr. Berger, Mr. Berger promptly replied.

CONCLUSIONS OF LAW

Count 1

A. Respondent failed to attend and complete the course within the time period required by the Stipulation and Consent Order. He failed to do so despite having several reasonable opportunities to satisfy the requirement. His failure to comply with an order of the Board and his violation of a condition imposed on his license by the Board is a violation of 26 V.S.A. § 1354(a)(25) and constitutes unprofessional conduct.

Count 2

B. Respondent entered into an agreement with the State of Vermont whereby he would attend a remedial educational course within a specified time period. Fulfilling that agreement a year-and-a-half after the required time period constitutes unprofessional conduct as set forth in 26 V.S.A. § 1398.

Count 3

C. While Respondent's actions regarding his failure to comply in a timely manner with the educational requirement of the Board's Order constitutes unprofessional conduct under Counts 1 and 2 as concluded above, it does not constitute unfitness to practice medicine in violation of 26 V.S.A. § 1354(a)(7).

Count 4

D. Respondent's written letter to a member of the Board of Medical Practice was an inappropriate and improper *ex parte* attempt to address compliance with a Board Order. While not an egregious act, it was an action that constitutes a technical violation of 26 V.S.A. § 1398, and as such is unprofessional conduct.

Count 5

E. Count 5 was withdrawn by the State prior to the beginning of the hearing and was not considered by the Hearing Committee.

Counts 6, 7, and 8

F. These Counts allege that Respondent failed to maintain and timely produce records that were required to be kept under the Stipulation and Consent Order. The evidence regarding these allegations does not prove by a preponderance of the evidence that Respondent failed to comply with the record-keeping requirements of the Order. The Stipulation and Consent Order requires that Respondent make the records in question available upon request. The evidence establishes only that an employee of the Respondent was orally requested to produce the records; Respondent was never personally requested or asked to follow-up on the request to his employee. Once Respondent's attorney was contacted, the testimony and other evidence establish that this request was promptly complied with.

In General

G. The Board has the power and duty to investigate all complaints and charges of unprofessional conduct against any license holder and to hold hearings regarding such charges. 26 V.S.A. § 1351(1). A contested case before an administrative agency, such as the Board, may be disposed of informally by "stipulation, agreed settlement, consent order, or default". 3 V.S.A. § 809(d).

H. Although Respondent offered several reasons why he could not comply with the educational requirement in a timely manner, and he did ultimately complete the course, the Hearing Committee feels that Respondent could have easily complied within the required time period, or at least have formally requested an extension of time or modification from the Board. The Stipulation and Consent Order that Respondent knowingly and voluntarily agreed to and was ordered by the Board is clearly "an order of the board" under 26 V.S.A. § 1354(25), noncompliance of which is unprofessional conduct.

I. The facts of this matter demonstrate that Respondent should be held to his "free, calculated and deliberate choice embodied in the stipulation." See Estate of Emilio v. St. Pierre, 146 Vt. 421, 424 (1985) and In re Norris Trust, 143 Vt. 325, 328 (1983) ("... free, calculated, deliberate choices are not to be relieved from."). "Once a party agrees to a stipulation he or she is bound by it ..." Angolano v. City of So. Burlington, 142 Vt. 131, 136 (1982). Compliance with Board orders must be respected and enforced. The protection of the public and the credibility of the statutory scheme would be rendered ineffectual if a licensee could fail to comply with the Board's order without the consequence of any disciplinary action.

PROPOSED DECISION

While the Hearing Committee has determined that Respondent's failure to timely comply with the Board Order to successfully complete a remedial education course was unprofessional conduct, it feels that such failure stemmed more from sheer stubbornness rather than from any egregious or aggravating circumstances. It is unlikely, considering Respondent's exemplary professional history, there will be a repetition of this conduct. However, Respondent's failure to comply and the methods he chose to address the issue were unprofessional, and the Committee decides, for the reasons stated in Conclusions H and I, that discipline is warranted.

Based upon the Findings of Fact and Conclusions of Law, the Hearing Committee proposes the following Decision be adopted and ordered by the Board:

1. Counts 4, 5, 6, 7, and 8 should be DISMISSED;
2. No disciplinary action should be imposed regarding Count 3;
3. Respondent's license to practice medicine in Vermont should be suspended for 10 days for his unprofessional conduct as concluded in Counts 1 and 2.

THE BOARD HEARING COMMITTEE:

Margaret Funk Martin
Margaret Funk Martin, Public Member

12/19/06
Date

Russell P. Davignon M.D.
Russell P. Davignon, M.D. Physician Member

12/13/06
Date

Filed with Board Office:

12/22/06
Date

Date of Entry: December 22, 2006