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**NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS**

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
BOARD OF MEDICAL EXAMINERS
OAL DKT. NO. BDS 1999-84
DOCKET NO. H-83-5148

In the Matter of the Suspension)
or Revocation of the License of

ROBERT S. DENGROVE, M.D.)

To Practice Medicine & Surgery)
in the State of New Jersey)

Administrative Action

FINAL DECISION AND
ORDER

This matter was initially brought before the New Jersey State Board of Medical Examiners on the application of Irwin I. Kimmelman, Attorney General of New Jersey, by Joan D. Gelber, Deputy Attorney General, for an order temporarily suspending respondent's authority to prescribe, dispense or possess controlled dangerous substances, which was filed, along with a verified complaint, with the Board of Medical Examiners on August 31, 1983. The verified complaint alleged, in seventeen counts, that respondent violated numerous statutes and administrative regulations in prescribing controlled substances to seventeen patients between December of 1978 and September of 1981. Specifically, it was alleged that respondent's prescribing evidenced violations of N.J.S.A. 45:1-13 (indiscriminate prescribing of controlled dangerous substances), N.J.S.A. 45:1-21(c) or (d) (gross malpractice or negligence or repeated malpractice or negligence), N.J.A.C. 13:35-6.16, now codified at N.J.A.C. 13:35-6.7 (limiting the prescription of amphetamines), N.J.A.C. 8:65-7.4 (Department of Health regulation prohibiting prescribing for detoxification or maintenance), N.J.A.C. 8:65-7.8(e) (prohibiting the prescribing of Schedule II Controlled Substances in an amount greater than

one hundred and twenty dosage units or a thirty day supply) and N.J.A.C. 45:1-21(h) (failure to comply with the laws and rules administered by the Board).

An answer to the verified complaint was filed in September of 1983. The application for temporary restraints was withdrawn in October of 1983, and the matter was transferred to the Office of Administrative Law on March 21, 1984. A supplemental complaint was filed on April 18, 1984 which contained one additional count relating to respondent's preparation and submission of a letter opinion in connection with a child custody dispute in Superior Court. That conduct was alleged to evidence misrepresentation (in violation of N.J.S.A. 45:1-21(b)) and professional misconduct (in violation of N.J.S.A. 45:1-21(e)) as well as poor professional judgment and incompetency (in violation of N.J.S.A. 45:1-21(d)). Respondent admitted that he prepared the letter, but denied having sent it.

At trial respondent was represented by Steven I. Kern, Esq.; Deputy Attorney General Joan D. Gelber appeared on behalf of the Attorney General of New Jersey. The first six hearing days were presided over by Robert P. Glickman, Administrative Law Judge, on January 10, 11, 12, 24, 29 and 30. The continued hearing dates, May 2, 3, 6, 7, 9, 10, 20, 21, 23, 28, 30, 31, June 3, 11 and 13, were presided over by Arnold Samuels, Administrative Law Judge, who prepared the initial decision in the matter, which was issued on February 20, 1986 and is incorporated by reference, as if fully set forth herein. Exceptions to that initial decision were filed by respondent's counsel on March 19, 1986. Complainant's exceptions were filed on March 12, 1986. After due consideration of the

Administrative Law Judge's decision, transcripts, exhibits, exceptions and arguments of counsel, the Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

With respect to the first seventeen counts, Judge Samuels aptly synopsised the focus of the State's case:

The State acknowledged that Dr. Dengrove was very concerned with the health and welfare of his patients, but questioned the appropriateness of his treatments in prescribing, over relatively long periods of time, very large quantities of a wide variety of drugs, controlled and non-controlled. The Board claimed that these drugs and the combinations thereof created adverse effects on the stability of the patients, and that respondent's prescribing practices deviated substantially from accepted standards of practice. It was claimed that Dr. Dengrove overlooked the addictive and habituating propensities of the substances, and that he did not properly manage their use. The State's attitude toward Dr. Dengrove's treatment of his patients was that he was hard-working, caring and acting in good faith, with the best intentions; he was not a pusher or seller; but according to the Board, he was naive and misguided, and he used poor judgment to the point where he violated the statutes and regulations listed in the charges. [Initial Decision, p.7].

Judge Samuels also capsulized Dr. Dengrove's posture:

Dr. Dengrove claims that his use of psychoactive or sedative - hypnotic substances in these cases was consistent with modern and current practices in the field of psychopharmacology, and is acceptable drug treatment of psychiatric disorders. He and his expert witnesses claim that his prescribing practices comported with methods learned in his

training at well-respected institutions, such as Johns Hopkins, and with theories contained in texts by eminent writers in the field, such as Dr. Klein. Dr. Dengrove claimed that the psychoactive drugs were not dangerous when properly administered; that none of the patients were habituated or addicted; and that all were able to discontinue the medication without withdrawal problems. Furthermore, the respondent claimed that the overall condition of most of the patients was significantly and substantially improved after treatment using Schedule II drugs [Initial Decision, p. 7].

Judge Samuels noted that although many different medications were prescribed by respondent for the seventeen patients, the charges "primarily focused on the Schedule II amphetamines and barbituates. The one drug that drew the greatest amount of attention (because it was prescribed in very substantial amounts for most of the involved patients) was Dexedrine, a Schedule II amphetamine" (Initial Decision, pp. 10-11). The Board found Judge Samuel's general discussion of the expert testimony, which was set forth with extraordinary detail and clarity, to be invaluable to an understanding of this case, and thus adopts that discussion, in its entirety.

The Board adopts all of the findings of fact set forth in Judge Samuel's Initial Decision at pages 24 to 74, as well as his findings with respect to the credibility of the expert witnesses set forth at pages 91 to 94.* Judge Samuels expressly

*The Board has, however, reached a different conclusion with respect to Count XV, but it has done so, in reliance upon the facts found by Judge Samuels at pages 59 to 64 of his Initial Decision.

found that the "across the board" opinions of Drs. Klein and Wilson, who testified on behalf of respondent, that Dr. Dengrove's high dosage and long term prescribing were always acceptable, were not always "convincing in light of the high risk and danger of abuse, dependence, habituation, addiction and subsequent withdrawal problems." He found Dr. Klein's "blanket across the board endorsement of all of respondent's prescribing practices in every case, with practically no variation from one patient to the other, lent an air of unreality to the relatively wide spectrum of case situations that he dealt with in his testimony." Initial Decision page 92. Judge Samuels found Dr. Wilson was "much more down to earth"; although he "accepted and supported respondent and Dr. Klein's avant-garde positions on drug use," he acknowledged that he had personally never gone as far "even in the hospital as Dr. Dengrove did outside of a controlled setting." Initial Decision, pages 93 to 94. With respect to Dr. Simring, the State's expert, Judge Samuels noted a "feeling of practicality" in that Dr. Simring "did not follow straight lines" as Dr. Klein did and he "frequently seemed to go out of his way to understand the rationale of respondent's treatment even though disagreeing with it." Initial Decision page 93.

We find Judge Samuel's interpretation of and observations regarding the testimony to be perceptive and well articulated and, accordingly, herein adopt those findings as our own.

CONCLUSIONS OF LAW

GENERAL DISCUSSION

At page 74 of his Initial Decision, Judge Samuels undertakes

an analysis of various statutes and regulations which the State has alleged that respondent violated.

INDISCRIMINATE PRESCRIBING - N.J.S.A. 45:1-13

In each of the first seventeen counts, the Attorney General has alleged that respondent's prescribing violated N.J.S.A. 45:1-13, which provides that the dispensing of controlled dangerous substances in an indiscriminate manner, or not in good faith, or without good cause can be the basis for disciplinary action. Judge Samuels, relying on the dictionary definition of indiscriminate, concludes that N.J.S.A. 45:1-13 is inapplicable to this matter since, in his view, respondent's prescribing was not marked by a "lack of discrimination". He writes: "...the facts clearly indicate that each controlled substance prescribed by the doctor was chosen deliberately, intentionally and with careful distinction." Initial Decision at page 75. Judge Samuels rejects the Attorney General's contention that since, through respondent's prescribing, excess quantities of controlled substances were made available to his patients, that prescribing could be characterized as indiscriminate. Judge Samuels notes that this possibility does not alter the initial purposefulness of the prescribing.

Without necessarily adopting Judge Samuels' somewhat narrow and concrete interpretation of N.J.S.A. 45:1-13, this Board is satisfied that respondent's conduct can be adequately addressed for the analysis and application of other more pertinent statutes and regulatory provisions. Moreover, we note that the Attorney General, via exceptions, has not expressly challenged Judge Samuels' refusal to apply N.J.S.A. 45:1-13 to the instant facts.

GROSS MALPRACTICE AND REPEATED MALPRACTICE -
N.J.S.A. 45:1-21(c) and (d)

In his general legal discussion at pages 78 through 82, Judge Samuels rejects the application of N.J.S.A. 45:1-21(c) to the instant matter, concluding that since respondent's prescribing practices did not evidence "willful and reckless endangerment of the health and lives of his patients" or a "conscious and reckless indifference to their welfare", the citation of the statutory provision relating to gross malpractice, negligence or incompetence was misplaced. The Board rejects this restrictive interpretation of N.J.S.A. 45:1-21(c), namely, that an "inherently evil course of conduct" need be proven to sustain a charge of gross malpractice. Instead, the Board finds that such a charge need only be established by proof that the physician conduct represents a "patently wide departure from accepted standards of care and treatment ordinarily exercised and required of a practicing physician." Initial Decision, page 80. The Board, nevertheless, will not disturb Judge Samuels' dismissal of the gross malpractice charges in this case in view of the mitigating factors. Thus, the Board, like Judge Samuels, is giving respondent the benefit of the doubt. It concurs with Judge Samuels' conclusion that with respect to the counts delineated below, respondent's conduct evidences a repeated and recurring course of negligent prescribing, such as to prove a violation of N.J.S.A. 45:1-21(d).

DEPARTMENT OF HEALTH REGULATIONS-
N.J.A.C 8-65-7.4 and 8:65-7.8

The Board will not disturb Judge Samuels' dismissal

of the charges, which were grounded in the above Department of Health regulations, noting that those dismissals were not challenged by way of the Attorney General's exceptions.

AMPHETAMINE REGULATION-N.J.A.C. 13:35-6.16
(6.7 - RECODIFIED)

In analyzing the above regulation, known as the amphetamine rule, Judge Samuels rejects respondent's contention that, **the regulation permits amphetamines may be** prescribed for depression, during the initial period, prior to the time that other depression medications are expected to have a therapeutic effect. We concur. The express language of the regulation permits prescribing of amphetamines for "depression shown to be refractory to other therapeutic modalities." Adequate trial with those "other therapeutic modalities" obviously must precede the prescribing of amphetamines. We do note that since in his discussion of the rule at page 90, Judge Samuels constructs an excellent definition of "refractory," we are at a loss to understand why he describes, at page 85, the regulatory language as "often nebulous or uncertain." We deem the regulation, on its face, to be clear and, thus, expressly reject respondent's argument that a rule clarification is warranted.

MISREPRESENTATION AND PROFESSIONAL MISCONDUCT
N.J.S.A. 45:1-21(b) and (e)

In Count XVIII, the State has charged that respondent engaged in misrepresentation in violation of N.J.S.A. 45:1-21(b) when he prepared a letter opinion to be presented to a Superior Court judge in an ongoing custody dispute.

This Board concurs with Judge Samuels' interpretation of subsection (b) by which he concludes that the traditional elements required for a showing of fraud need not be proven to substantiate a charge that a licensee has engaged in misrepresentation. We also agree that professional misconduct in violation of N.J.S.A. 45:1-21(e) is evidenced by such a course of conduct as well. **However,** this Board will not disturb Judge Samuels' dismissal of the charge that such conduct evidenced a repeated act of negligence in violation of N.J.S.A. 45:1-21(d).

ADDITIONAL LEGAL ARGUMENTS OF RESPONDENT

Finally, the Board notes its agreement with Judge Samuels' disposition with regard to arguments raised by counsel relating to the applicable standard of proof (Initial Decision, page 89), merger of functions (Initial Decision, page 89), and the decision to pursue the instant matter by adjudication rather than rule making (Initial Decision, page 86). Additionally, the Board specifically concurs with Judge Samuels' conclusion that in the context of a disciplinary proceeding, a finding of gross or repeated malpractice need not be accompanied by proof of actual harm to any patient. We find his reasonings set forth at pages 87 to 89 to be in accord with the Board's interpretation, notwithstanding the Board's prior adoption, without discussion, of an earlier A.L.J. decision.

COUNTS I TO XVII
CONCLUSIONS OF LAW

At pages 96 through 110, Judge Samuels sets forth his specific conclusions of law with respect to each of the counts of the complaint. He concludes that with respect to each of

the counts enumerated below, the following violations have been proven:

<u>COUNT</u>	<u>VIOLATIONS PROVEN</u>
I	N.J.S.A. 45:1-21(d) N.J.A.C. 13:35-6.16(6.7) and thus N.J.S.A. 45:1-21(h)
VI	N.J.S.A. 45:1-21(d) N.J.A.C. 13:35-6.16(6.7) and thus N.J.S.A. 45:1-21(h)
VIII	N.J.S.A. 45:1-21(d)
IX	N.J.S.A. 45:1-21(d)
XIV	N.J.S.A. 45:1-21(d) N.J.A.C. 13:35-6.16(6.7) and thus N.J.S.A. 45:1-21(h)
XV	N.J.S.A. 45:1-21(d)
XVIII	N.J.S.A. 45:1-21(b) N.J.S.A. 45:1-21(e)

The Board adopts all of the above conclusions of law but modifies Judge Samuels' conclusion with regard to Count XV of the complaint. It expressly rejects Judge Samuels' conclusion that the amphetamine rule, N.J.A.C. 13:35-6.16(6.7) was not violated. At page 108, Judge Samuels writes:

It is also concluded that, because of the strong possibility that this patient was properly diagnosed as having an attention deficit disorder where amphetamines are permitted to be used under the rule, the respondent did not violate the amphetamine rule.

Respondent's diagnosis of patient K.T.'s attention deficit disorder was far from conclusive. Moreover, it appears that no substantial effort was made to substantiate that diagnosis. Without such efforts, the prescribing of Dexedrine to patient K.T. is not, in our view, conduct protected by the exceptions to the amphetamine rule.

Accordingly, we conclude that a violation of N.J.A.C. 13:35-6.16(6.7) has been proven, and thus basis for disciplinary action exists pursuant to N.J.S.A. 45:1-21(h).

ASSESSMENT OF PENALTY

The Board concurs with Judge Samuels assessment of the mitigating factors applicable in this matter, but disagrees with the manner in which he has calculated penalty. In reliance on In re Suspension of License of Wolfe, 116 N.J. Super. 114, 121 (Appellate Division 1978), Judge Samuels recommends the assessment of Seven Thousand Five Hundred (\$7,500) Dollars based on his theory that the State had proven three separate statutory or regulatory violations and that the maximum penalty (\$2,500) should attach. We modify that recommendation and hereby assess penalties in the amount of One Thousand (\$1,000) Dollars for each of the counts and as to each of the patients where violations were proven. While the Board possesses the authority pursuant to N.J.S.A. 45:1-25 to impose a civil penalty of Two Thousand Five Hundred (\$2,500) Dollars for each **issue**, we have chosen to impose less than the maximum penalty in view of the substantial costs, much of which we believe should properly be borne by the respondent in this matter. We expressly reject Judge Samuels' construction of N.J.S.A. 45:1-25 which would preclude the Board from assessing additional penalties for violations of the same statute. As the Supreme Court of New Jersey recognized in In re DeMarco, 83 N.J. 25 (1980), the Board is authorized to impose multiple penalties for multiple instances of malpractice. Thus, Judge Samuels' reliance on In re Wolfe, decided prior to DeMarco, appears misplaced. The logic of the DeMarco court seems to apply with equal force to the present

matter. The Board must be in a position to impose sanctions which correlate to the extent as well as the severity of a violation so that it may effectively deter licensees from engaging in wrongful conduct.

We also disagree with Judge Samuels' recommendation that no useful purpose will be served by the imposition of a period of suspension, since, in our view, a benefit is derived in deterring such conduct in the future by this licensee as well as by others, and in assuring the public that the Board will act appropriately in the face of proven misconduct. Nevertheless, since the Board is not desirous of imposing an unduly harsh result in the instant matter, it has determined to suspend the entire period of active suspension imposed herein.

For the same reason, although the Board has concluded that it is authorized to order a full recoupment of the costs of the investigation and prosecution of the matter, including expert witness fees, investigatory charges and transcript charges, it is satisfied that the assessment of Ten Thousand (\$10,000) Dollars is appropriate in view of the very high sums involved. It expressly rejects respondent's contention that there should be some pro-rated apportionment of the costs in this matter.

Finally, the Board rejects A.L.J. Samuels' recommendation that continuing medical education requirement be part of the Board order. In view of respondent's testimony that his current prescribing practices are not in accord with his past practice, that he has tempered his therapeutic zeal in the face of his clinical experience and the indication on his curriculum vitae that he has engaged in several continuing medical education

courses since the inception of this action, the Board deems such a requirement to be unnecessary. It will, however, compel respondent to appear before the Board or a committee thereof at the conclusion of the period of suspension.

Counsel for respondent has urged this Board to give respondent the benefit of our doubt and, in fact, has personally extolled respondent's virtue as a treating and caring physician. We are mindful that the record supports this view and, accordingly, conclude that the disposition in this matter fairly and adequately addresses the violations proven.

Accordingly, it is on this *4th* day of *August*, 1986
ORDERED:

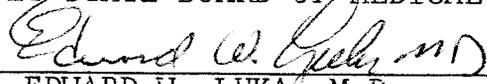
1. Respondent's license to practice medicine and surgery in the State of New Jersey is hereby suspended for a period of two (2) years effective on the date of entry of this Order. The entire period of suspension shall in turn be stayed if all other terms of the within Order have been met.

2. Upon the completion of the period of suspension, respondent shall be required to appear before the Board or a committee of the Board for the purpose of conducting a status conference.

3. Respondent shall pay to the Board of Medical Examiners penalties in the amount of Seven Thousand (\$7,000) Dollars and costs in the amount of Ten Thousand (\$10,000) Dollars, which payment shall be made within six (6) months of the entry of this Order, or in accordance with an installment plan as the Board office may authorize, spreading the payments over no more than two (2) years. Payments shall be made by money order or certified check to the

State of New Jersey. Failure to pay any installment in accordance with the plan authorized shall render the entire balance due and owing and may subject the respondent to additional disciplinary sanctions.

NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

By: 
EDWARD W. LUKA, M.D.
PRESIDENT