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STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION
BOARD OF MEDICINE

AGENCY FOR HEALTH CARE
ADMINISTRATION, BOARD OF
MEDICINE,

Petitioner,

v.

VLADIMIR EINISMAN, M.D.,

Respondent.

_____ /

Final Order No. AHCA-95-01808 Date 12-28-95

FILED

Agency for Health Care Administration
AGENCY CLERK

R.S. Power, Agency Clerk

By: *Alanna C. Kirk*
Deputy Agency Clerk

AHCA CASE NO: 93-20914
DOAH CASE NO: 94-6752
LICENSE NO: ME 0040325

FINAL ORDER

THIS MATTER was heard by the Board of Medicine (hereinafter Board) pursuant to Section 120.57(1)(b)10., Florida Statutes, on December 1, 1995, in Miami, Florida, for consideration of the Hearing Officer's Recommended Order, (Attached as Exhibit B) in the case of Agency for Health Care Administration, Board of Medicine v. Vladimir Einisman. At the hearing before the Board, Petitioner was represented by Steven Rothenburg, Medical Attorney. Respondent was present and represented by Richard D. Saba, Esquire. Upon consideration of the Hearing Officer's Recommended Order after review of the complete record and having been otherwise fully advised in its premises, the Board makes the following findings and conclusions:

FINDINGS OF FACT

1. The Hearing Officer's Recommended Findings of Fact are approved and adopted and are incorporated herein by reference as the Findings of Fact of the Board in this cause.

2. There is competent, substantial evidence to support the

Board's findings herein.

EXCEPTIONS TO CONCLUSIONS OF LAW

1. That part of the Conclusions of Law, paragraph 13, beginning with the words, "The statute", at Section 458.331(3) does not . . . and ending with the words "the burden remains clear and convincing evidence," is rejected as not being a correct statement of law.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this case pursuant to Section 120.57 and Chapter 458, Florida Statutes.

2. The findings of fact set forth above do not establish that Respondent has violated Section 458.331(1)(p), Florida Statutes as charged in the Administrative Complaint.

3. The Conclusions of Law of the Recommended Order, as amended are approved and adopted and incorporated herein.

DISPOSITION

Based upon the Recommended Findings of Fact and Conclusions of Law, the Hearing Officer recommended the following penalty:

WHEREFORE, it is found, ordered and adjudged that the Respondent is not guilty of violating Section 458.331(1)(p), Florida Statutes and that this matter is hereby DISMISSED.

This Final Order becomes effective upon its filing with the Clerk of the Agency for Health Care Administration.

NOTICE

The parties are hereby notified pursuant to Section 120.59(4), Florida Statutes, that an appeal of this Final Order may be taken

pursuant to Section 120.68, Florida Statutes, by filing one copy of a Notice of Appeal with the Clerk of the Agency for Health Care Administration and one copy of a Notice of Appeal with the required filing fee with the District Court of Appeal within thirty (30) days of the date this Final Order is filed.

DONE and ORDERED this 22 DAY OF December, 1995.

BOARD OF MEDICINE

Gary E Winchester M.D.
GARY E. WINCHESTER, M.D.
CHAIRMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order and its attachments have been forwarded by U.S. Mail to Vladimir Einisman, M.D., 1217 E. Avenue, #211, Sarasota, Florida 34239-2329, Richard D. Saba, Esquire, 2033 Main Street, Suite 303, Sarasota, Florida 34237, Arnold H. Pollock, Hearing Officer, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-1550 and by hand delivery to Larry G. McPherson, Jr., Chief Medical Attorney, Agency for Health Care Administration, 1940 North Monroe Street, Tallahassee, Florida 32399-0792 on this _____ day of _____, 1995.

Marm Harris, Ed.D.
Executive Director

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)
ADMINISTRATION, BOARD OF MEDICINE))
Petitioner,) 09-08-95 P01:19 IN
)
vs.) CASE NO. 94-6752
)
VLADIMIR EINISMAN, M.D.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held in this case in Sarasota, Florida on July 17, 1995, before Arnold H. Pollock, a Hearing Officer with the Division of Administrative Hearings.

APPEARANCES

For the Petitioner: Steve Rothenburg, Esquire
Agency for Health Care
Administration
9325 Bay Plaza Boulevard, #210
Tampa, Florida 33619

For the Respondent: Richard D. Saba, Esquire
2033 Main Street, Suite 303
Sarasota, Florida 34237

STATEMENT OF THE ISSUES

The issue for consideration in this hearing is whether Respondent's license as a physician in Florida should be disciplined because of the matters alleged in the Administrative Complaint filed herein.

PRELIMINARY MATTERS

By Administrative Complaint filed in this matter On April 29, 1994, the Petitioner, Agency for Health Care Administration, (AHCA), on behalf of the Board of Medicine, (Board), seeks to

discipline Respondent's license as a physician in Florida alleging that Respondent failed to insure that a patient consent form for the administration of prescription medications was properly executed by the patient, which resulted in medications and/or therapy being administered to the patient which had not been duly authorized by either the patient or his legal representative, in violation of Section 458.331(1)(p), Florida Statutes. Respondent requested formal hearing on the allegations and this hearing ensued.

At the hearing, Petitioner presented the testimony of Imogene S., widow of the patient in issue, and introduced Petitioner's Exhibits 1 through 4. Respondent testified in his own behalf and presented the testimony of Robert Moore, Executive Director of Manatee Glens Corporation, the owner and operator of the facility through which the outpatient therapy was administered; Anne K. Phillips, an outreach therapist for Manatee Glens; and George Djelic, owner of Campbell House, an Adult Congregate Living Facility in Sarasota. Respondent also introduced Respondent's Exhibits A through E. Respondent's Exhibit F was offered but not admitted.

A transcript of the proceedings was furnished, and subsequent to the hearing, both counsel submitted Proposed Findings of Fact which have been ruled upon in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to the issues herein the Board of Medicine was the state agency in Florida responsible for the

licensing of physicians and the regulation of the medical profession in Florida. Respondent was licensed as a physician in Florida under license No. ME 0040325, and at all times pertinent was assigned as Medical Director of Manatee Glens Corporation, (Manatee).

2. Manatee is a corporation which operates a community mental health center and which provides out patient therapy sessions for residents of various Adult Congregate Living Facilities, (ACLF'S). One of the facilities where Manatee personnel provide therapy is Campbell House in Sarasota. A part of Respondent's responsibility as Medical Director of Manatee was to supervise the treatment of patients residing in the ACLF's, to review the appropriateness of treatment and to review the authorizations for treatment.

3. Patient #1 and his wife, Imogene, were married for 52 years. He was a retired officer in the United States Army, and after his military service, worked for several years in the real estate and securities field in the Sarasota area. Some time after his retirement, Patient #1 was diagnosed as having Parkinson's Disease. In 1986, he began hallucinating. His condition deteriorated badly and reached the point where he could not make decisions. Because of that, Imogene obtained a durable Power of Attorney to allow her to conduct her husband's affairs.

4. In March, 1993, when Imogene could no longer care for her husband at home, she placed him in Campbell House. At the time of the placement, Imogene provided the staff with the power of attorney and her home phone number. By this time Patient #1

had ceased communicating and, she believed, could neither talk nor read.

5. Shortly after his placement, on March 30, 1993, the patient was interviewed by Anne Phillips, an outreach therapist for Manatee, to determine if he was a suitable participant in Manatee's outreach program. After she explained the program to him in detail and in what was described as simple terms, Ms. Phillips requested that the patient sign the consent for treatment form for enrollment in the Manatee program.

6. As a result, Patient #1 signed a consent form authorizing Manatee Glens Corporation to provide him with therapy services at the ACLF. There is no evidence that the patient was coerced or threatened in order to make him sign the form. However, Petitioner claims, as does Imogene, that the signature is not valid because Patient #1 was not mentally competent to consent to, or otherwise authorize, such treatment for himself. There is evidence to the contrary, however. Ms. Phillips indicates the patient appeared able to concentrate on what he was being told and to understand what he was being asked to sign.

7. On March 31, 1993, the day after Patient #1 signed the consent form, Manatee Glens began providing therapy services to him. Respondent authorized the treatment plan utilized for the patient. Imogene had never authorized any treatment for her husband, and when, in mid-October, 1993 she learned that he was receiving the therapy sessions, she asked that they be discontinued. By that time, the patient's mind had deteriorated to the point where he did not recognize his wife.

8. There is a conflict in the evidence as to whether the patient was able to participate in or benefit from the therapy sessions which were conducted. Treatment records indicate that at times he seemed to be aware of his peers but he could not name them and could not discuss anything about them. There is some substantial doubt as to whether he even knew the name of the counselor who conducted the therapy sessions, Anne Phillips. He would, at times, sleep through all or a part of a session and often had trouble giving yes or no answers to simple questions.

9. On the other hand, Mr. Djelic, the home operator who observed the patient on a daily basis, reports he regularly read the newspaper and occasionally read a magazine. He was capable of feeding himself, getting dressed and letting others know when he had to go to the bathroom and, in the opinion of Mr. Djelic, was relatively functional. His medications at the time included Senement which has the side effects of confusion, depression and memory impairment. He had both good and bad days depending upon the effects of his medication and his Parkinson's disease. When he was examined by Dr. Schwartzbaum on March 8, 1993, he was diagnosed as having Parkinson's disease, but there was no indication of any mental health limitation, and none of the records presented at the hearing indicated any diagnosis of Alzheimer's disease. The evidence of that diagnosis came solely from the patient's wife and is hearsay.

10. Respondent did not examine the patient in question before authorizing the treatment complained of. He reviewed the patient's medical records, including the report by Dr.

Schwartzbaum, and from them concluded that when the patient signed the consent form on March 30, 1993, he was knowledgeable, aware and cognizant about what he was signing, what the treatment entailed, and that he would be paying for the treatment. Respondent also determined that the patient participated in identifying some goals for treatment. Based on this information, Respondent concluded that the patient was competent to sign the consent form. There was no evidence that Patient #1 had ever been declared incompetent by a court or that a guardian had been appointed to manage his affairs.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

12. Petitioner alleges that by authorizing therapy services for Patient #1 which had not properly been authorized by the patient or his legal representative, Respondent violated Section 458.331(1)(p), Florida Statutes which defines those actions which constitute grounds for which disciplinary action may be taken.

13. In the Administrative Complaint, the Department asserts that since it does not seek to impose permanent revocation or suspension of Respondent's license to practice medicine in this state, its burden of proof is only a preponderance of the evidence. The statute, at Section 458.331(3) does not use the word "permanent" in reducing the burden of proof from "clear and convincing evidence" to "the greater weight of the evidence." In the instant case, in the Prayer paragraph of the Administrative

Complaint the Agency requests the Board impose restriction, fine, reprimand, probation "and/or any other relief that the Board deems appropriate." It would appear that at least temporary suspension of Respondent's license is a possible option open to the Board. Because Section 458.331(3) refers only to "suspension or revocation", the burden of proof remains "clear and convincing evidence."

14. In this case the evidence shows only that Respondent reviewed medical records presented to him regarding a patient who had apparently signed a consent form for therapy. At that time, Respondent had before him medical records which did not indicate any mental infirmity which would interfere with the patient's competence to sign the consent form. Petitioner has presented no evidence, other than the testimony of the patient's wife, (the substance of which was not before the Respondent at the time he approved the treatment), that the patient was incompetent. Clearly, the evidence of Respondent's guilt of the alleged violation is not proven by clear and convincing evidence. In this case, however, the state of the evidence does not even establish his guilt by the greater weight of the evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is, therefore:

RECOMMENDED that the Administrative Complaint in this matter charging Dr. Einisman with a violation of Section 458.331(1)(p), Florida Statutes, be dismissed.

RECOMMENDED this 6th day of September, 1995, in Tallahassee, Florida.

Arnold H. Pollock

ARNOLD H. POLLOCK, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of September, 1995.

APPENDIX TO RECOMMENDED ORDER
IN CASE NO. 94-6752

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties to this case.

FOR THE PETITIONER:

- 1. & 2. Accepted and incorporated herein.
- 3. Accepted and incorporated herein except for the diagnosis of Alzheimer's disease which is not supported by any independent evidence or record.
- 4. Accepted and incorporated herein.
- 5. First sentence accepted and incorporated herein. Second sentence not proven by competence evidence of record.
- 6. & 7. Accepted and incorporated herein.
- 8. First and second sentences accepted and incorporate herein. Remainder not proven by competent evidence of record.
- 9. - 11. Not proven by competent evidence of record.

FOR THE RESPONDENT:

- 1. - 3. Accepted and incorporated herein.
- 4. First 5 sentences accepted and incorporated herein. Sixth sentence not a Finding of Fact but a restatement of testimony. Seventh sentence accepted and incorporated herein. Eighth sentence accepted.
- 5. & 6. Accepted and incorporated herein.
- 7. Accepted but considered in light of the fact that the witness is the Respondent.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency which will issue the Final Order in this case concerning its rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency which will issue the Final Order in this case.

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
BOARD OF MEDICINE

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,

PETITIONER,

vs.

CASE NO. 9320914

Vladimir Einisman, M.D.

RESPONDENT.

ADMINISTRATIVE COMPLAINT

COMES NOW the Petitioner, Department of Business and Professional Regulation, hereinafter referred to as "Petitioner," and files this Administrative Complaint before the Board of Medicine against Vladimir Einisman, M.D. hereinafter referred to as "Respondent," and alleges:

1. Petitioner is the state agency charged with regulating the practice of medicine pursuant to Section 20.165, Florida Statutes; Chapter 455, Florida Statutes; and Chapter 458, Florida Statutes.

2. Respondent is and has been at all times material hereto a licensed physician in the State of Florida, having been issued license number ME 0040325. Respondent's last known address is 1217 E Avenue, #211, Sarasota, Florida 34239-2329.

3. Respondent specializes in geriatric and general psychiatry and he is not board certified.

4. Respondent was at all times material hereto the Medical Director of Manatee Glens Corporation, a company that provides

therapy sessions for various Adult Congregate Living Facilities (ACLF).

5. In or about March of 1993, Patient #1, a 72 year old male, was a resident of Campbell House, a licensed ACLF.

6. Patient #1 had previously been diagnosed with Alzheimer's disease and Parkinson's disease.

7. In or about March of 1993, Patient #1 was not mentally competent to consent to medical or psychological treatment. Because of Patient #1's condition, his wife had obtained his legal power of attorney, and was at all times available to make decisions concerning Patient #1's medical and psychological care.

8. On or about March 30, 1993, Patient #1 signed a consent form authorizing Manatee Glens Corporation to provide therapy services to him at the ACLF. Patient #1's signature on the consent form was not valid because Patient #1 was not mentally competent to consent to, or otherwise authorize, such treatment for himself.

9. From on or about March 31, 1993, to on or about October 14, 1993, Manatee Glens provided therapy services to Patient #1. The treatment plan utilized for Patient #1 was authorized by Respondent.

10. Patient #1's wife did not consent to, or otherwise authorize, the therapy treatments referenced in paragraph nine (9) above.

11. Respondent performed unauthorized professional services on Patient #1 in that Respondent was the Medical Director of

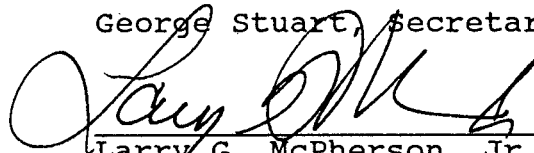
Manatee Glens which provided therapy services to Patient #1 without a valid consent from Patient #1 or his legal representative.

12. Based on the preceding allegations, Respondent has violated Section 458.331(1)(p), Florida Statutes, by performing professional services which have not been duly authorized by the patient or client, or his legal representative, except as provided in s. 743.064, s. 768.13, or s. 766.103.

WHEREFORE, the Petitioner respectfully requests the Board of Medicine enter an Order imposing one or more of the following penalties: restriction of the Respondent's practice, imposition of an administrative fine, issuance of a reprimand, placement of the Respondent on probation, and/or any other relief that the Board deems appropriate. Petitioner is not seeking permanent revocation or suspension of the Respondent's license.

SIGNED this 29 day of April, 1994.

George Stuart, Secretary


Larry G. McPherson, Jr.
Chief Medical Attorney

COUNSEL FOR DEPARTMENT:

Larry G. McPherson, Jr.
Chief Medical Attorney
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1940 North Monroe Street
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PCP: April 19, 1994
Katims, Diblan, Fenwick

FILED
Department of Business and Professional Regulation
AGENCY CLERK

CLERK Sarah L. Washman
DATE 4-29-94