

June 17, 2013

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Michael G. Bass, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2512
Albany, New York 12237

William Comiskey, Esq.
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677 Broadway
Albany, New York 12207

Robert Joseph Aquino, M.D.

REDACTED

RE: In the Matter of Robert Joseph Aquino, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 13-185) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct
New York State Department of Health
Riverview Center
150 Broadway – Suite 355
Albany, New York 12204

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

REDACTED

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

In the Matter of

Robert Joseph Aquino, M.D. (Respondent)

A proceeding to review a Determination by a
Committee (Committee) from the Board for
Professional Medical Conduct (BPMC)

Administrative Review Board (ARB)

Determination and Order No. 13-185

COPY

Before ARB Members D'Anna, Koenig, Wagle, Wilson and Milone
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Micheal G. Bass, Esq.
For the Respondent: William Comiskey, Esq.

In this proceeding pursuant to New York Public Health Law (PHL) § 230-c
(4)(a)(McKinney 2013), the ARB considers whether to take disciplinary action against the
Respondent's license to practice medicine in New York State (License) following the
Respondent's Federal felony conviction for conspiracy to commit bribery. Following a hearing
below, a BPMC Committee voted to suspend the Respondent's License for one year, to stay the
suspension, to place the Respondent on probation and to limit the Respondent from owning or
administering a medical practice or facility. Both parties sought administrative review and
requested that the ARB modify the sanction the Committee imposed. After reviewing the hearing
record and the parties' review submissions, the ARB votes 5-0 to affirm the Committee's
Determination to suspend the Respondent's License, stay the suspension and place the
Respondent on probation. We modify the provision on ownership/administration to allow the
Respondent to operate his own private practice.

Committee Determination on the Charges

Pursuant to PHL § 230 *et seq*, BPMC and its Committees function as a duly authorized professional disciplinary agency of the State of New York. The BPMC Committee in this case conducted a hearing under the expedited hearing procedures (Direct Referral Hearing) in PHL §230(10)(p). The Petitioner's Statement of Charges [Hearing Exhibit 1] alleged that the Respondent committed professional misconduct under the definition in N. Y. Education Law (EL) §6530(9)(a)(ii) (McKinney 2013) by engaging in conduct that resulted in a conviction under Federal Law. The action against the Respondent began with an order from the Executive Deputy Commissioner of Health suspending the Respondent's License summarily (Summary Order) pursuant to PHL § 230(12)(b). The Summary Suspension became effective September 13, 2013. In the Direct Referral Hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996). Following the Direct Referral Hearing, the Committee rendered the Determination now on review.

The evidence before the Committee indicated that the Respondent entered a guilty plea in United States District Court for the Southern District of New York, to felony Conspiracy to Commit Bribery, a violation under Title 18 United States Code §§ 1952(a)(3) and 371. The Court sentenced the Respondent to four months imprisonment. The evidence before the Committee showed that the Respondent purchased the financially troubled Parkway Hospital in 2004 and then declared bankruptcy in 2005. In 2005, the New York State Commission on Health Care Facilities in the 21st Century determined to close Parkway. In 2008, a New York State Senator proposed a scheme under which the Senator would save Parkway from closure in exchange for a \$60,000.00 bribe that the Respondent would pay to the Senator's co-conspirator for radiology services. The Respondent's conviction arose from that scheme.

The Committee found that the Respondent's criminal conduct constituted professional misconduct and "a colossal ethical lapse", but the Committee rejected the Petitioner's request to revoke the Respondent's License. The Committee voted to suspend the Respondent's License for one year, to stay the suspension and place the Respondent on probation for one year, under the terms that appear as Appendix II to the Committee's Determination. The probation terms required that the Respondent practice with a monitor and complete a continuing medical education course on medical/professional ethics. The Committee also placed a limitation on the Respondent's License to forbid the Respondent from owning or administering a medical practice or Article 28 Facility.

The Committee based their decision on the Respondent's expression of remorse and on supportive testimony from several former colleagues. The Committee also found mitigating factors because the Respondent's conduct placed no patients at risk and made no direct impact on the practice of medicine. The Committee stated that they placed the restrictions on the Respondent's License to allow the Respondent to continue practicing medicine without getting involved in the management side again. The Committee cited to testimony from the Respondent's own witness to the effect that the Respondent experienced difficulty balancing care and compassion for patients with the business needs of an organization. The Committee felt that removing the Respondent from the administrative process would enable the Respondent to focus his energies on providing medical care.

Review History and Issues

The Committee rendered their Determination on March 18, 2013. This proceeding commenced on March 21 and 22, 2013, when the ARB received the parties' Notices requesting Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief, the Respondent's brief and the Petitioner's reply brief. The record closed when the ARB received the reply brief on May 2, 2013.

The Petitioner argued that the Respondent's serious criminal conduct and the need to deter future misconduct warrant a significant penalty, such as revocation or at least a multi-year suspension. The Petitioner argued that the Respondent's conduct did involve the practice of medicine, because the Respondent bribed a public official in an effort to overturn a State commission's determination on which hospitals in the state should close or remain open.

The Respondent asks the ARB to reduce the penalty against the Respondent to a censure and reprimand, or at least limit the penalty to the stayed suspension and probation that the Committee imposed. The Respondent requests that the ARB remove the License restriction on the grounds that the restriction limits unfairly the Respondent's ability to gain employment and exceeds the Committee's authority to impose sanctions under PHL § 230-a.

ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL §230-a permits. The ARB may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3rd Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3rd Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even

without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination that the Respondent committed professional misconduct. Neither party challenged the Committee's Determination on the charges. We also affirm the Committee's Determination to suspend the Respondent's License for one year, to stay the suspension, to place the Respondent on probation under the terms the Committee imposed and to limit the Respondent's License. We modify the limitation on the Respondent's License to allow the Respondent to operate his own solo medical practice.

The ARB agrees with the Committee that the mitigating factors in this case demonstrate that revocation would constitute an overly harsh penalty. The Respondent engaged in serious criminal conduct, but the Respondent spent time in prison and the Respondent's License was suspended from the Summary Order until the time of the Committee's Determination, approximately six months later. The ARB believes that the imprisonment and actual suspension will deter further misconduct by the Respondent and will also serve to deter others from such conduct. Further, the Respondent's conduct harmed no patients and raises no concerns about the Respondent's clinical abilities.

The Respondent asked that the ARB remove the sanctions the Committee imposed and to reduce the penalty to a censure and reprimand. The ABR concludes that the Respondent's conduct does require a sanction beyond the imprisonment the Court imposed and actual suspension under the Summary Order. The Respondent should serve one year on probation. We agree with the Committee that the Respondent's conduct constituted a colossal ethical lapse and we agree with the probation term that requires the Respondent to complete a continuing medical education course on medical/professional ethics. The Respondent also has been away from medical practice for a time, so we agree with the Committee that the Respondent should practice with a monitor for one year.

The Committee found the need for a restriction on the Respondent's License due to evidence indicating that the Respondent experienced difficulty balancing his care and compassion for patients with the business needs of the organization. The ARB agrees that the Respondent should concentrate on clinical practice and abandon the administrative responsibilities that eventually drove the Respondent to his criminal misconduct.

The Committee limited the Respondent from owning or administering a private medical practice or an Article 28 Facility. The Respondent's brief noted that this restriction would prohibit the Respondent from opening his own solo practice. The ARB concludes that banning the Respondent from solo practice is unnecessary. The Respondent questioned whether the Committee could limit the Respondent's License in this fashion. The ARB concludes that the Committee could, in effect, limit the Respondent to the clinical practice of medicine. We modify the sanction to allow the Respondent to run a solo practice and continue the limitation on operation and/or ownership of an Article 28 Facility and any private practice beyond a solo office practice by the Respondent.

ORDER

NOW, with this Determination as our basis, the ARB renders the following ORDER:

1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to suspend the Respondent's License for one year, stay the suspension and place the Respondent on probation for one year under the terms from the Committee's Determination.
3. The ARB modifies the limitation on the Respondent's License to ban the Respondent from ownership or operation of any Article 28 Facility and from ownership or operation of a group or private practice other than a solo practice by the Respondent.

Peter S. Koenig, Sr.
Datta G. Wagle, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

In the Matter of Robert Joseph Aquino, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the Matter of Dr. Aquino.

Dated: 7 June, 2013

REDACTED

Linda Prescott Wilson

In the Matter of Robert Joseph Aquino, M.D.

Peter S. Koenig, Sr., an ARB Member concurs in the Determination and Order in the
Matter of Dr. Aquino.

Dated: June 11, 2013

REDACTED

Peter S. Koenig, Sr.

In the Matter of Robert Joseph Aquino, M.D.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Aquino.

Dated:

7/17/2013

REDACTED

Datta G. Wagle, M.D.

In the Matter of Robert Joseph Aquino, M.D.

Richard D. Milone, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Aquino.

Dated: June 14, 2013

REDACTED

Richard D. Milone, M.D.

In the Matter of Robert Joseph Aquino, M.D.

John A. D'Anna, M.D., an ARB Member concurs in the Determination and Order in the
Matter of Dr. Aquino.

Dated: 6-12-13, 2013

REDACTED

John A. D'Anna, M.D.