



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

August 28, 2019

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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Thomas Savino, M.D.
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Marc S. Nash
Associate Counsel
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New York State Department of Health
Corning Tower, Room 2512
Empire State Plaza
Albany, New York 12237

RE: In the Matter of Thomas Savino, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 19-223) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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,



James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: cmg
Enclosure

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

In the Matter of

Thomas Savino, M.D. (Respondent)

Administrative Review Board (ARB)

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

Determination and Order No. 19- 223

Before ARB Members D'Anna, Grabicec, Wilson and Rabin
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Marc S. Nash, Esq.

For the Respondent:

Amy Kulb, Esq.

In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2019), the Respondent requested that the ARB overrule a Determination by a BPMC Committee. Following a hearing, the Committee found the Respondent guilty for professional misconduct, due to the Respondent's Federal criminal conviction, and the Committee voted to revoke the Respondent's license to practice medicine in New York State (License). Under PHL § 230-c (4)(c), all Determinations must be based on a majority concurrence of the ARB, meaning that three ARB members must concur in any result, Wolkoff v. Chassin, 89N.Y.2d 250 (1996). After reviewing the hearing record and the parties' review submissions, the ARB was unable to muster a three-member majority to overrule the Committee. The Committee's Determination remains in effect.

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 New York Education Law (EL) §6530(9)(a)(ii) (McKinney Supp. 2019) by engaging in conduct that resulted in a criminal conviction under Federal Law. 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, (supra).

The evidence before the Committee demonstrated that a jury in the United States District Court for the District of New Jersey found the Respondent guilty of:

- one count of Conspiracy to Violate the Federal Anti-Kickback Statute and Travel Act to Defraud Patients of Honest Services, a violation under Title 18 USC § 371;
- three counts of Illegal Remunerations in Violation of the Federal Anti-Kickback Statute, violations under Title 42 USC § 1320a-7b(b)(1)(A);
- three counts of the use of the Mail and Facilities in Interstate Commerce and Interstate Travel to Promote, Carry On and Facilitate Commercial Bribery, violations under Title 18 USC §§ 1952(a)(1) & (3); and
- three counts of Honest Services Fraud, violations under Title 18 USC §§ 1343 and 1346.

On May 31, 2018, the District Court sentenced the Respondent to forty-eight months' imprisonment, followed by a three-year supervised release. The Court also ordered that the Respondent pay a \$100,000.00 fine and a \$27,500.00 forfeiture.

The Committee determined that the Respondent's criminal conduct made the Respondent liable for action against his License pursuant to EL § 6530(9)(a)(ii). The Committee voted to

revoke the Respondent's License. The Committee found that the Respondent lacked insight as to the harm his actions caused, manifested no remorse and refused to acknowledge that he engaged in criminal activity. The Committee considered but rejected a penalty less severe than revocation, such as probation or practice with a monitor, upon finding such alternatives unfeasible due to the Respondent's lack of credibility and integrity.

Review History and Issues

The Committee rendered their Determination on December 11, 2018. This proceeding commenced on December 21, 2018, when the ARB received the Respondent's Notice requesting a Review. The record on review included the hearing record, the Respondent's brief and the Petitioner's reply brief. The record closed when the ARB received the reply brief on January 31, 2019.

The Respondent asked that the ARB overturn the Committee's Determination to revoke the Respondent's License and reduce the sanction to an actual suspension until the Respondent's release from incarceration, followed by three years on probation. The Respondent argued that he had practiced with an unblemished record previously; he submitted 152 letters to the Committee and he presented three character witnesses to attest to his competency, integrity, extraordinary dedication and devotion to his patients. The Respondent's criminal conviction involved payments the Respondent accepted from BLS Laboratory (BLS) to refer blood samples to BLS for testing. The Respondent's brief notes that several other New York physicians were also prosecuted for accepting payments from BLS and that revocation is inconsistent with the penalties BPMC imposed against the other New York physicians involved with BLS.

The Petitioner replied that the Respondent's Brief concentrated on BLS related Determinations that resulted in penalties less severe than revocation and ignored BLS related cases in which BPMC and/or the ARB revoked a license. The Petitioner argued that the Respondent continued to deny that he referred any patients to BLS even after a jury found the Respondent guilty for just such conduct. The Petitioner contended that the refusal to accept responsibility for wrongful conduct is a significant factor in assessing an appropriate penalty. The Petitioner noted that in the cases the Respondent discussed involving penalties less severe than revocation, the physicians all showed remorse, accepted responsibility or cooperated with authorities.

ARB Authority

Under PHIL §§ 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 [PIIL § 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 conduct that resulted in the Respondent's criminal conviction constituted professional misconduct. Neither party challenged the Committee's Determination on the charges. The four-member ARB quorum is unable to muster a three-member majority to overrule the Committee's Determination.

The provisions on Administrative Review at PHL § 230-c(2) created the ARB with five members, appointed by the Governor with the consent of the New York Senate. The New York Courts have ruled that the ARB may consider a case with less the five members, but that at three

members of a three or four-member quorum (a majority of the five-member ARB) is necessary to support any Determination, Wolkoff v. Chassin, (supra); Tang v. Debuono, 235 A.D.2d 745, 652 N.Y.S.2d 745 (3rd Dept. 1997). The Court in Wolkoff based its holding on New York General Construction Law § 41, which provides that a majority of a whole body constitutes a quorum and that not less than a majority of the body may exercise its power and authority. The ARB has functioned as a four-member quorum since December 2018, due to the resignation of Member Peter Koenig.

The ARB Quorum conducted deliberations in this case for the first time in the late winter of 2019. That Quorum included Richard Milone, M.D. At that time, two members voted to sustain the Committee's Determination to revoke the Respondent's License and two members voted to overturn the Committee and impose a less severe sanction. One of those members voted for an actual suspension and License limitation. The other member favored a censure and reprimand on the grounds that the Respondent received a sufficient sanction for his misconduct under the sentence in the criminal case. All four ARB members agreed to then hold this case over in hopes that a replacement for Mr. Koenig would break the impasse.

In June 2019, the New York Senate confirmed Jill Rabin, M.D. to replace Dr. Milone, whose term on the ARB had ended. There has been no replacement confirmed so far for Mr. Koenig. The newly constituted ARB Quorum met the following month to consider this case again.

The ARB discussed a number of penalties but was again unable to reach a consensus. In the final vote, one member supported the Committee's Determination, two members considered imposing an actual suspension with a permanent License limitation and the fourth member voted for a suspension with no limitation. That fourth member rejected any limitation because that

member felt the sanction in the criminal proceeding was sufficient punishment for the Respondent's misconduct. One of the members who considered suspension/limitation then indicated that without a License limitation in the sanction, that member would vote for revocation. At that point, the ARB concluded that they were deadlocked, with no indication when a fifth member might join the ARB. The ARB then reached agreement to close this matter and agreed further that the inability to muster enough votes to overrule the Committee meant that the Committee's Determination remained in effect.

ORDER

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

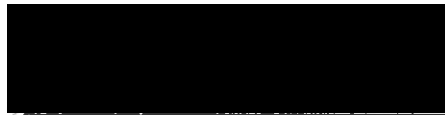
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB is deadlocked in trying to reach a Determination and unable to overrule the Committee's Determination on penalty.
3. The ARB closes this matter.
4. The Committee's Determination remains in effect.

Steven Grabiec, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Jill Rabin, M.D.

In the Matter of Thomas Savino, M.D.

ARB Member Linda Prescott Wilson concurs in the Determination and Order in the
Matter of Dr. Savino.

Dated: 5 August, 2019



Linda Prescott Wilson

In the Matter of Thomas Savino, M.D.

ARB Member Steven Grabiec, M.D. concurs in the Determination and Order in the
Matter of Dr. Savino.

Dated: 8/20, 2019

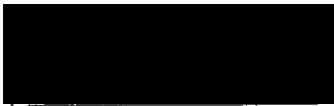


Steven Grabiec, M.D.

In the Matter of Thomas Savino, M.D.

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

Dated: August 22, 2019



John A. D'Anna, M.D.

In the Matter of Thomas Savino, M.D.

ARB Member Jill Rabin concurs in the Determination and Order in the Matter of Dr.

Savino.

Dated: August 15th, 2019



Jill Rabin, M.D.