



STATE OF NEW YORK  
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Richard F. Daines, M.D.  
Commissioner

James W. Clyne, Jr.  
Executive Deputy Commissioner

Public

November 2, 2010

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Tomasz Wojciech Kowacz, M.D.

REDACTED

Christine Radman, Esq.  
NYS Department of Health  
90 Church Street – 4<sup>th</sup> Floor  
New York, New York 10007

George Rosenbaum, Esq.  
ROSENBAUM & ROSENBAUM, PC  
110 Wall Street  
New York, New York 10005

**RE: In the Matter of Tomasz Wojciech Kowacz, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 10-122) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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  
Hedley Park Place  
433 River Street-Fourth Floor  
Troy, New York 12180

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, Acting Director  
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Tomasz Wojciech Kowacz, 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. 10-122

COPY

Before ARB Members Koenig, Wagle, Wilson and Milone<sup>1</sup>  
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Christine Radman, Esq.  
For the Respondent: George Rosenbaum, Esq.

Following a hearing below, a BPMC Committee found that the Respondent failed to maintain accurate records in treating one patient. The Committee voted to place the Respondent on probation for three years. In this proceeding pursuant to New York Public Health Law (PHL) §230-c (4)(a)(McKinney 2010), the Respondent asks the ARB to nullify that Determination. After reviewing the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination that the Respondent committed professional misconduct and we affirm the Committee's Determination to place the Respondent on probation for three years and to limit the Respondent's practice location for the first year under the probation. On own motion, we modify the terms of the practice limitation and we vote to censure and reprimand the Respondent.

<sup>1</sup> ARB Members John A. D'Anna, M.D. did not participate in this case. The ARB proceeded to consider the case with a four-member quorum, Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

## Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(3-4), 6530(20), 6530(30) & 6530(32) (McKinney 2010) by committing professional misconduct under the following specifications:

- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross negligence,
- engaging in conduct in the practice of medicine that evidences moral unfitness,
- abandoning a patient, and,
- failing to maintain accurate patient records.

The negligence on more than one occasion and the records charges concerned the treatment that the Respondent provided to two persons (Patients A and B) at the Psychiatric Emergency Department at the Kings County Hospital Center (Center) on June 18-19, 2008. The gross negligence, abandonment and moral unfitness charges concern the treatment for Patient A only. Following the hearing, the Committee rendered the Determination now on review.

The Committee dismissed all the specifications concerning the treatment for Patient A. The Petitioner made no request for review over the Committee's Determination on those specifications, so this review concerns the Committee's findings on Patient B alone.

The Committee sustained factual allegations that charged the Respondent with failing to perform and record an accurate psychiatric assessment, failing to provide appropriate psychopharmacologic treatment in a timely fashion and failing to diagnose Patient B as suffering from a psychotic, delusional state. The Committee also sustained the misconduct specification that alleged failure to maintain a medical record that accurately reflects a patient's condition. The record for Patient B indicated that she came to the Center from a shelter, acting abnormally and refusing to take medication from a previously diagnosed psychiatric condition. The Respondent's notes in the patient chart indicated that the Patient had strong social supports and the notes indicated a voluntary admission. The Respondent ordered close observation, but no immediate medication. At hearing, the Petitioner's medical expert, Brett Blatter, M.D., testified that the

Respondent prepared an inaccurate and inconsistent medical record. The Respondent recorded Patient B as acting normally, but a nursing note indicated that the Patient was loud, angry and professing to be a goddess reincarnated. There was a short time period between the Respondent's note and the nursing note and Dr. Blatter testified that it would be highly unusual for an un-medicated patient to experience such a dramatic change in a short time. Dr. Blatter concluded that Patient B was very ill at the time she entered the Center. The Committee found Dr. Blatter's testimony credible and found that the Respondent could not himself make sense of the record the Respondent created for Patient B. The Committee concluded that the Respondent's failure to record information, analyze and diagnose Patient B accurately fell below accepted standards of medical practice.

The Committee voted to place the Respondent on probation for three years under the terms that appear at Appendix B to the Committee's Determination. The terms include the requirement that, during the first year on probation, the Respondent practice with a monitoring physician, in a facility licensed under PHL Article 28.

#### Review History and Issues

The Committee rendered their Determination on July 8, 2010. This proceeding commenced on July 16, 2010, when the ARB received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's reply brief. The record closed when the ARB received the reply brief on August 23, 2010.

The Respondent requested that the ARB dismiss the findings against the Respondent. The Respondent argued that the Committee's findings were inconsistent with testimony and facts from the record, that the Respondent was never the Attending Psychiatrist in the Emergency Department and that the Respondent's records reflect record keeping policy at the Center. In the

alternative, the Respondent argued that, even if his conduct did amount to professional misconduct, the Committee imposed an excessive penalty.

In reply, the Petitioner argues that the testimony by Dr. Blatter, which the Committee found credible, provided the basis for the Committee's findings. The Petitioner argued further that the medical profession sets the standards for practice and that no basis exists in law for the Respondent's argument that the facility sets the standard for record keeping. Finally, the Petitioner argued that poor record-keeping impacts patient care directly and that probation with a monitor and a practice limitation is the minimum sanction necessary to address the Respondent's professional inadequacies.

#### 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 (3<sup>rd</sup> 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 (3<sup>rd</sup> Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3<sup>rd</sup> 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 (3<sup>rd</sup> 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 failed to maintain an accurate record for Patient B and we affirm the Committee's Determination to place the Respondent on probation for three years with a practice monitor and a practice limitation in the first year of probation. On our own motion, we vote to censure and reprimand the Respondent and we modify the practice limitation as we provide below.

The ARB affirms the Committee's finding that the Respondent failed to record information, analyze and diagnose Patient B accurately. The testimony in the record from Dr.

Blatter provided the basis for those findings and the Committee indicated that they found such testimony from Dr. Blatter credible. The Respondent's brief argued that testimony in the record from Joseph Charlot, M.D. contradicted the Committee's findings. The Committee's Determination at the beginning of their Findings of Fact [Committee Determination page 3] noted that the Committee considered and rejected any evidence in the record that conflicted with the evidence the Committee cited for their Findings. The ARB defers to the Committee as the finder of fact as to the Committee's conclusions on witness credibility.

The Respondent argued further that the Respondent's record keeping complied with the standards at the Center, so that basis existed to sustain the record keeping charge concerning the treatment for Patient B. The ARB rejects that argument. A medical record that fails to convey objectively meaningful information concerning the patient treated to other physicians is inadequate, Maglione v. New York State Department of Health, 9 A.D.3d 522, 779 N.Y.S.2d 319 (3<sup>rd</sup> Dept. 2004). The failure to follow the accepted standards of the profession as to medical record-keeping constitutes misconduct, Gant v. Novello, 302 A.D.2d 690, 754 N.Y.S.2d 746 (3<sup>rd</sup> Dept. 2003). The Committee did recognize deplorable conditions and "culture" at the Center [Committee Determination page 7] and the Committee considered that culture in making their findings on Patient A, but the Committee did not adopt the culture at the Center as the standard by which a physician should practice. The Committee noted instead that long-term exposure to the conditions at the Center blurred the Respondent's understanding about what constitutes good practice and the Committee sought to impose a sanction to correct the deficiencies in the Respondent's practice.

The ARB agrees with the Committee that three years on probation, with a monitor for the first year on probation, will provide the Respondent oversight and guidance in correcting his



problems. As we noted above, 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, (supra). The ARB elects to exercise that authority in this case. Under PHL § 230-a(9), a Committee may impose probation as a sanction, with or without any other sanction available under § 230-a. The ARB finds it appropriate to censure and reprimand the Respondent, pursuant to PHL § 230-a(1).

In addition to requiring that the Respondent practice with a monitor for the first year on probation, the Committee also limited the Respondent to practice during that year in a facility holding licensure under PHL Article 28. Article 28 provides the licensing requirements for medical facilities such as general hospitals, nursing homes and diagnostic and treatment centers. The ARB has approved such a limitation in the past for licensee's requiring supervision and oversight because a medical facility holding government licensure must comply with certain standards for supervision and such a facility is subject to government inspections. We have found such settings preferable to a private practice setting that lacks definite lines of supervisions and which does not undergo regular inspections. The ARB has, however, also approved limitations to government operated facilities such as hospitals or facilities operated by the United States Veteran's Administration or Public Health Service or to facilities holding other government licensure, such as psychiatric facilities that hold licensure under New York Mental Hygiene Law Article 31 (McKinney 2010). On our own motion, the ARB modifies the probation terms at Paragraph 8 [Committee Determination page 15] to delete the words "an Article 28 facility" and to insert the words " a facility operated by the government (such as the United States Veteran's Administration or Public Health Service) or licensed by the government (such as under PHL Article 28 or MHL Article 31)".

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 place the Respondent on probation for three years, with a practice monitor and a practice limitation during the first year on probation.
3. On our own motion, the ARB votes 4-0 to censure and reprimand the Respondent and to modify the terms under the probation to expand the possible practice sites during the first year on probation.

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

In the Matter of Tomasz Wojciech Kowacz, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Kowacz.

Dated: *L.P. Wilson* . 2010

REDACTED

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Linda Prescott Wilson

In the Matter of Tomasz Wojciech Kowacz, M.D.

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

Dated: 10/26/2010, 2010

REDACTED

  
Peter S. Koenig, Sr.

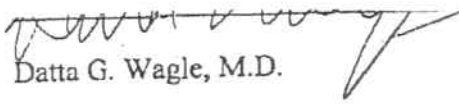
In the Matter of Tomasz Wojciech Kowacz, M.D.

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

Matter of Dr. Kowacz.

Dated: November 1, 2010

REDACTED

  
Datta G. Wagle, M.D.

In the Matter of Tomasz Wojciech Kowacz, M.D.

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

Matter of Dr. Kowacz.

Dated: October 26, 2010

REDACTED

Richard D. Milone, M.D.