

NEW YORK
state department of
HEALTH

Public

Nirav R. Shah, M.D., M.P.H.
Commissioner

Sue Kelly
Executive Deputy Commissioner

November 1, 2011

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Jose M. Poulouse, M.D.
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Williston Park, New York 11596

Jose M. Poulouse, M.D.
REDACTED ADDRESS

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Hoffman, Polland & Furman, PLLC
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New York, New York 10017

Joel E. Abelove, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2512
Albany, New York 12237

RE: In the Matter of Jose M. Poulouse, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 11-201) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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 SIGNATURE

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

Jose M. Poulouse, 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. 11-201

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): Joel E. Abelove, Esq.
For the Respondent: Mark L. Furman, Esq.

After a hearing below, a BPMC Committee determined that the Respondent's New York criminal conviction, for attempted dissemination of indecent material to a minor, made the Respondent liable for disciplinary action against the Respondent's license to practice medicine in New York State (License). The Committee voted to limit the Respondent's License, to suspend the Respondent from practice, to stay the suspension and to place the Respondent on probation for five years, with a practice monitor. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2011), the Respondent asks the ARB to modify that Determination to remove the monitor and the Petitioner requests that the ARB overrule the Committee and revoke the Respondent's License. After considering the hearing record and the parties' review submissions, the ARB overturns the penalty the Committee imposed and we vote to revoke the Respondent's License.

Committee Determination on the Charges

The Committee conducted a hearing in this matter 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)(i) (McKinney 2009) by engaging in conduct that resulted in a felony conviction under New York State 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, 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 New York State Supreme Court for Queens County to attempted dissemination of indecent material to a minor in the first degree, a Class E Felony under New York Penal Law §§ 110 & 235.22. The Court placed the Respondent on probation for five years, classified the Respondent as a Sex Offender and assessed surcharges and fees amounting to \$5,425.00. The record indicated that the Respondent engaged in an online internet conversation with a presumed 14 year old girl and Respondent sent this person pornographic material and attempted to meet this person for sex.

At the Direct Referral Hearing, the Respondent testified that he sent a video of a couple having sex to a person who stated she was 14 years of age [Hearing Transcript, page 69] and that he went to meet the 14 year old girl for sex [Hearing Transcript page 42]. At the site for the rendezvous, the Respondent learned that the person was 26 or 28 years old and was part of a police sting. Several other persons testified for the Respondent at the Direct Referral Hearing,

including patients, the Respondent's pastor and the Respondent's psychiatrist, Richard Krueger, M.D. Dr. Krueger testified that he treated and assessed the Respondent and Dr. Krueger concluded that the Respondent was not a pedophile or paraphile of any sort, that the Respondent presented a low risk towards any patients and that there had been no accusations of criminal or inappropriate behavior within the Respondent's medical practice. On cross-examination, Dr. Krueger conceded that there were no guarantees about whether the Respondent's criminal conduct could re-occur.

The Committee voted to place a permanent restriction on the Respondent's License to limit the Respondent to treating only those over 18 years of age. The Committee voted further to suspend the Respondent's License for three years and to stay the suspension in full. The Committee also placed the Respondent on probation for five years, with a physician practice monitor. The probation terms appear as the Appendix to the Committee's Determination. The probation terms provided that the Respondent could practice only with the monitor present in the Respondent's Office and that the monitor must be on-site during office hours, unless determined otherwise by the Director of the Office for Professional Medical Conduct (OPMC Director).

Review History and Issues

The Committee rendered their Determination on August 15, 2011. This proceeding commenced on August 24, 2011, when the ARB received the Petitioner's Notice requesting a Review. The Respondent submitted a request for review that the ARB received on August 31, 2011. The record for review contained the Committee's Determination, the hearing record, the

Petitioner's brief and the Respondent's brief/reply brief. The record closed when the ARB received the Respondent's brief on September 22, 2011.

The Petitioner asked that the ARB overturn the Committee and revoke the Respondent's License. The Petitioner argued that the Committee imposed too lenient a sanction by allowing a felon to remain in medical practice and thus diminished the standard of excellence and high moral character required of licensed physicians. The Petitioner contended that the Respondent placed at risk all underage girls who log onto the internet and that the Respondent's predatory behavior was dangerous and morally indefensible. The Petitioner asked the ARB to take appropriate measures to enforce the high moral standards of the medical profession.

The Respondent opposed the Petitioner's request to increase the penalty and questioned how the Petitioner could request revocation for a single, aberrational act unrelated to patient care. The Respondent noted the testimony on his behalf, including the testimony from Dr. Krueger that described the Respondent as low risk and without the need for further treatment. The Respondent contended that the Petitioner is seeking automatic revocation for a felony conviction, which is disproportionate to the conduct at issue. As to the penalty the Committee imposed, the Respondent called the on-site monitor a severe limitation on his ability to practice medicine. The Respondent contended that a full-time chaperone, who the Respondent already employs, could fulfill the responsibilities the Committee sought from the physician monitor. The Respondent requested clarification as to whether the Respondent would have to pay the monitor from the Respondent's earnings. The Respondent pointed out that his case involved no issues with patient care and that the Committee already limited the Respondent to treating only adults. The Respondent requested that the ARB strike or modify the monitoring requirement.

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' submissions. The ARB affirms the Committee's Determination that the conduct that resulted in the Respondent's criminal conviction amounted to professional misconduct. Neither party challenged the Committee's Determination on the charges. The ARB overturns the Committee's Determination to restrict the Respondent's License and place the Respondent on probation. The ARB votes 5-0 to revoke the Respondent's License.

The Respondent conceded that he sent a video of a couple having sex to someone the Respondent believed to be 14 years old. The Respondent conceded further that on the day of his arrest he went to meet a 14 year old girl with the expectation that the Respondent would be having sex with a 14 year old girl. The Committee heard this and other testimony from the Respondent and his supporting witnesses. The penalty that the Committee crafted showed that the Committee placed little or no trust in the Respondent's assertions of remorse and in other testimony concerning the Respondent being at low risk to repeat his conduct. The Committee banned the Respondent from treating minors and the Committee required a full-time physician monitor on the Respondent's practice during probation. The ARB members can recall no such monitoring or practice supervision restriction in the past. The Committee has required, in effect, a full-time physician chaperone for the Respondent. The Committee also quoted Dr. Krueger's

testimony on cross-examination that there was no guarantee as to chances for the Respondent's misconduct to occur.

The ARB discussed the evidence in this case at length and considered whether we could impose any penalty less severe than revocation. In considering the evidence, we returned again and again to the Respondent's testimony that he went to meet a 14 year old girl, with the intent to have sex with the 14 year old girl. That admission by the Respondent demonstrated his unfitness to practice medicine in New York State. We conclude that revocation constitutes the only appropriate penalty in this case.

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 overturns the Committee's Determination to restrict the Respondent's License and place him on probation.
3. The ARB revokes the Respondent's License.

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 Jose M. Poulouse, M.D.

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

Dated: 25 October, 2011

REDACTED SIGNATURE

Linda Prescott Wilson

In the Matter of Jose M. Poulouse, M.D.

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

Dated: Oct. 25, 2011

REDACTED SIGNATURE

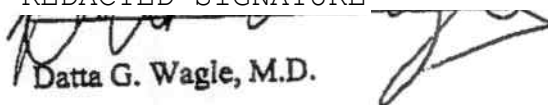

Peter S. Koenig, Sr.

In the Matter of Jose M. Poulouse, M.D.

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

Dated: 10/31, 2011

REDACTED SIGNATURE


Datta G. Wagle, M.D.

In the Matter of Jose M. Poulouse, M.D.

Richard D. Milone, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Poulouse.

Dated October 25, 2011

REDACTED SIGNATURE

Richard D. Milone, M.D.

In the Matter of Jose M. Poulouse, M.D.

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

Matter of Dr. Poulouse.

Dated: Oct 26, 2011

REDACTED SIGNATURE

John A. D'Anna, M.D.