

NEW YORK
state department of
HEALTH

Public

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

Sue Kelly
Executive Deputy Commissioner

October 10, 2012

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Colin Kelley, M.D.
REDACTED

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

RE: In the Matter of Colin Kelly, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 12-85) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine if **said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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

Colin Kelley, 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. 12-85

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 Abelove, Esq.
For the Respondent: Pro Se

In this proceeding pursuant to New York Public Health Law (PHL) § 230-c
(4)(a)(McKinney 2012), 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 aiding and abetting health care fraud. Following a
hearing below, a BPMC Committee voted to revoke the Respondent's License. The Respondent
then sought administrative review and requested that the ARB modify the Committee's
Determination and remove the permanent bar from practice in New York. After reviewing the
hearing record and the parties' review submissions, the ARB votes 5-0 to affirm the Committee's
Determination and to revoke the Respondent's License.

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 2012) by engaging in conduct that resulted in a 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, 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 the United States District Court for the Western District of Tennessee to Aiding and Abetting Health Care Fraud, a felony. The Court sentenced the Respondent to two years on probation, unsupervised, with reporting requirements. The Court also ordered the Respondent to pay a \$100.00 special assessment and \$124,000.00 in restitution to the Centers for Medicare and Medicaid, at the Health and Human Services Administration. The Respondent did not appear at the hearing.

The Committee determined that the Respondent's action amounted to professional misconduct and the Committee voted to revoke the Respondent's License. The Committee noted that the record contained no mitigating evidence. The Committee concluded that the only appropriate action, following the Respondent's felony conviction, was to revoke the Respondent's License.

Review History and Issues

The Committee rendered their Determination on May 1, 2012. This proceeding commenced on May 21, 2012, 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 July 12, 2012.

The Respondent asks the ARB to reverse the permanent bar on the Respondent's return to practice in New York State. The Respondent notes that neither Medicaid nor Medicare sought permanent bars against the Respondent, but rather barred the Respondent from participation for five years, before consideration for re-application. The Respondent argues that the revocation resulted from the Committee's mistaken conclusion that the Respondent showed no remorse and from the Respondent's failure to participate in the "initial review". The Respondent contends that he accepted culpability for his conduct and cooperated in the prosecution against his former employer. The Respondent offers to agree to never practice in New York, but asks for a change in the permanent bar because he hopes to return to practice elsewhere in the United States at some point and he fears the permanent bar would affect his opportunity to practice in other states.

The Petitioner contends that the Committee imposed an appropriate penalty and that the Respondent does not oppose revocation, only the permanent ban on return to practice. The Petitioner argues that the record contains no mitigating evidence or evidence of remorse because the Respondent failed to submit such evidence to the Hearing Committee. The Petitioner also argues that the Respondent can request reinstatement of his revoked license after three years. The Petitioner requests that the ARB affirm the Committee's Determination.

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 revoke the Respondent's License.

We find that the Committee acted appropriately in revoking the Respondent's License for the conduct that resulted in the Respondent's felony conviction. The Respondent aided in committing health care fraud and the District Court sentenced the Respondent to pay restitution totaling \$124,000.00. We see no error by the Committee for failing to consider mitigating factors or the Respondent's remorse, because the Respondent failed to appear at hearing to discuss remorse and mitigation and he failed to submit information on remorse and mitigation to the Committee by mail, the method that the Respondent used to raise those issues with the ARB.

The Respondent objected to the revocation as a permanent bar. The Petitioner's brief points out correctly that the Respondent may request restoration of his License three years following the revocation.

The Respondent also objected to the revocation because the action might impact the Respondent's ability to obtain a medical license in another state. The ARB has found that the Respondent engaged in serious misconduct that would warrant a severe sanction. Other states would learn of any severe sanction New York would impose, just as the other states will learn of the Respondent's conviction. The ARB concludes that the Respondent's conduct, rather than New York's sanction, will be the main factor when other states consider the appropriate action they must take in the Respondent's case. The ARB sees no reason to reduce the sanction against

the Respondent merely on speculation as to how the revocation could impact the Respondent in other states.

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 revoke 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 Colin Kelley, M.D.

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

Dated: 7 October, 2012

REDACTED

Linda Prescott Wilson

In the Matter of Colin Kelley, M.D.

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

Dated: ___ October 4, 2012

REDACTED

Peter S. Koenig, Sr.

In the Matter of Colin Kelley, M.D.

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

Dated: 10/4, 2012

REDACTED

~~Datta G. Wagle, M.D.~~

In the Matter of Colin Kelley, M.D.

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

Matter of Dr. Kelley.

Dated October 4, 2012

REDACTED

Richard D. Milone, M.D.

In the Matter of Colin Kelley, M.D.

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

Dated: Oct 8th, 2012

REDACTED

John A. D'Anna, M.D.