



## Department of Health

KATHY HOCHUL  
Governor

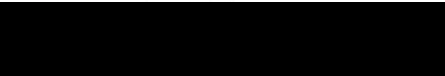
MARY T. BASSETT, M.D., M.P.H.  
Commissioner

KRISTIN M. PROUD  
Acting Executive Deputy Commissioner

March 3, 2022

### CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Colin Pemberton, M.D.



Douglas Doneson, Esq.  
142 West 57<sup>th</sup> Street, 11<sup>th</sup> Floor  
New York, New York 10019

Marc Nash, Esq.  
Bureau of Professional Medical Conduct  
Corning Tower Building, Room 2512  
Empire State Plaza  
Albany, New York 12237

**RE: In the Matter of Colin Pemberton, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 22-041) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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,

A large black rectangular redaction box covering the signature of Dawn MacKillop-Soller.

Dawn MacKillop-Soller  
Acting Chief Administrative Law Judge  
Bureau of Adjudication

DXM:nm  
Enclosure

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

In the Matter of

Colin Pemberton, M.D. (Respondent)

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

COPY

Administrative Review Board (ARB)

Determination and Order No. 22- 041

Before ARB Members Torrelli, Rabin, Wilson and Milone  
Administrative Law Judge Jean T. Carney drafted the Determination

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

Following the Respondent's disciplinary action by the New Jersey State Board of Medical Examiners (NJ Board), a BPMC Hearing Committee determined that the Respondent's conduct amounted to professional misconduct and voted to revoke his license to practice medicine in New York State (license). In this proceeding pursuant to New York Public Health Law (PHL) § 230-c(4)(a), the Respondent asked the ARB to review that Determination. After reviewing the hearing record and the parties' review submissions, the ARB affirms the hearing committee's determination 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 alleged that the Respondent committed professional misconduct under New York

Education Law (Educ. Law) § 6530(9)(d) by having his license to practice medicine revoked, suspended, or having other disciplinary action taken against his license by a duly authorized professional disciplinary agency of another state where the conduct resulting in the disciplinary action would constitute professional misconduct if committed in New York State as defined in Educ. Law § 6530(29) by violating any term of probation or condition or limitation placed on the licensee.

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 demonstrated that on October 8, 2019, the NJ Board filed an Order of Automatic Suspension of the Respondent's license to practice medicine in the State of New Jersey (NJ license) because the Respondent tested positive for cocaine and THC in violation of a Consent Order of Reinstatement dated January 28, 2018. Under the terms of the Consent Order of Reinstatement, the Respondent was required to abstain from all psychoactive substances and noncompliance would result in automatic suspension of his NJ license.

The Committee determined that the Respondent's conduct made him liable for action against his license pursuant to Educ. Law § 6530(9)(d), based on the Respondent violating a condition or limitation placed on him by the NJ Board that resulted in the indefinite suspension of his NJ license. The conduct resulting in the disciplinary action would constitute professional misconduct if committed in New York State as defined in Educ. Law § 6530(29).

On the issue of penalty, the Committee determined to revoke the Respondent's License, citing the Respondent's lack of insight regarding the gravity of his actions that prompted the indefinite suspension of his NJ license. The Respondent failed to acknowledge any need to adjust his behavior, despite his addiction to psychoactive

substances; and offered no persuasive mitigating information to the Committee that would merit a lesser penalty.

### Review History and Issues

The Hearing Committee rendered their Determination on May 24, 2021. This proceeding commenced on June 14, 2021, 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 September 27, 2021.

The Respondent asked the ARB to vacate the Committee's determination and remand for reconsideration and further proceedings. The Respondent argued that he did not receive a fair hearing; and that the Committee's determination was based on procedural and evidentiary errors and bias. The Respondent contends that he reasonably believed the hearing had been adjourned; that it should have been adjourned; and that he was coerced into testifying. The Respondent also alleged bias by the Committee and the administrative officer. Finally, the Respondent argued that the penalty of revocation is inconsistent with the record, and not based on a preponderance of the evidence.

The Petitioner replied that sufficient evidence to sustain the charge was presented to the Committee, and the penalty of revocation was appropriate. The Petitioner argued that there was no violation of the respondent's due process rights, and that the administrative officer clearly communicated with the parties that the hearing would proceed as scheduled on May 13, 2021. The Petitioner also contended that the Respondent failed to show any proof of bias, or that the alleged bias resulted in the Committee's determination. Finally, the Petitioner noted that the Respondent's conduct during the hearing was disruptive and evinced a lack of respect for the proceeding.

### 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 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 agree with the Committee that the Respondent's conduct resulting in disciplinary action in New Jersey would constitute professional misconduct if committed in New York State. We affirm the Committee's Determination to revoke the Respondent's License.

As previously stated, this hearing was held pursuant to expedited procedures, and was limited to determining the scope and penalty to be imposed. The record reflects that the hearing was originally scheduled for March 2021, and adjourned at the Respondent's request, with the Petitioner's consent, for two months. The Respondent waited until two days before the hearing to request another adjournment, based on the same reason as his first adjournment request: that he was waiting for a final decision from the NJ Board. However, the Respondent gave no indication of when that decision would be issued. The administrative officer informed the parties that the hearing would proceed as scheduled, and explained at the hearing that the Respondent could apply to the BPMC for reconsideration if the status of his NJ license changed. The determination to move forward with the hearing based on the action the NJ Board had already taken against the Respondent's license was reasonable.

The ARB further finds that the record does not support the Respondent's contention that he was "coerced" into testifying. The Respondent could have declined to be sworn in, and the record contains several examples of the Respondent vociferously objecting to a variety of issues, evincing the capability of declining to be sworn in. Yet he raised no objection to testifying when the administrative officer offered to swear him in. Further, it is well settled that in administrative hearings, a factual negative inference may be taken against a party who declines to testify. (*Terra v. Department of Health*, 199 A.D.2d 577 [3<sup>rd</sup> Dept. 1993], citing *Matter of DeBonis v. Corbisiero*, 155 A.D.2d 299, 300, *lv. denied* 75 N.Y.2d 709, *cert. denied* 496 U.S. 938). The Respondent's due process rights were not violated when he was sworn in and testified.

The Respondent's remaining allegation of bias has no merit inasmuch as he failed to show that the Committee's determination flowed from the alleged bias. (*Warder v. Board of Regents of University of State of New York*, 53 N.Y.2d 186[1981]). The Committee's determination was based on the Respondent violating a condition or limitation placed on him by the NJ Board that resulted in the indefinite suspension of his NJ license; and such conduct would constitute professional misconduct if committed in New York State as defined in Educ. Law § 6530(29).

We agree with the Committee that the Respondent failed to show any appreciation for the effect his substance abuse has on his ability to practice the profession. A penalty determination may properly be based on a respondent's conduct at the hearing, as well as on professional misconduct. (*Matter of Elbaz v. New York State Dept. of Health*, 156 A.D.3d 972 [3d Dept. 2017]). Here, the Respondent behaved erratically throughout the hearing; showing little consideration or respect for the other participants. Along with the fact that that the Respondent's NJ license continued to be suspended as of the date of the hearing, we find sufficient evidence in the record to support sustaining the charge, and agree that the penalty of revocation is appropriate.

#### 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.

Linda Prescott Wilson  
Jill Rabin, M.D.  
Richard D. Milone, M.D.  
Carmela Torrelli



In the Matter of Colin Pemberton, M.D.

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

Dated: 16 February, 2022

  
Linda Prescott Wilson

In the Matter of Colin Pemberton, M.D.

Jill M. Rabin, M.D., an ARB Member concurs in the Determination and Order in  
the Matter of Dr. Pemberton.

Dated: 2/25/2022, 2022



~~Jill M. Rabin, M.D.~~

In the Matter of Colin Pemberton, M.D.

Carmela Torrelli, an ABB Member concurs in the Determination and Order in the  
Matter of Dr. Pemberton.

Dated: March 2, 2022

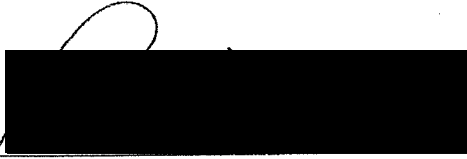


Carmela Torrelli

In the Matter of Colin Pemberton, M.D.

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

Dated: July 25, 2022

  
Richard D. Milone, M.D.