



Department of Health

ANDREW M. CUOMO
Governor

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

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

July 27, 2017

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ian H. Silverman, Esq.
NYS Department of Health
Corning Tower Room 2412
Empire State Plaza
Albany, New York 12237

Patrick McLaughlin, Esq.
35 Koenig Road, Suite 101
Tonawanda, New York 14150

William A. Swagler, III, M.D.


RE: In the Matter of William A. Swagler, III, D.O.

Dear Parties:

Enclosed please find the Determination and Order (No. 17-213) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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: 
Enclosure

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

In the Matter of

William A. Swagler, III, D.O. (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. 17- 213

Before ARB Members D'Anna, Koenig, Grabiec, Wilson and Milone
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Ian H. Silverman, Esq.
For the Respondent: Patrick McLaughlin, Esq.

Following the Respondent's Pennsylvania criminal conviction for Driving Under the Influence of Alcohol or Controlled Substance: Highest Rate of Alcohol, a BPMC Committee determined that the Respondent's conduct amounted to professional misconduct in New York State. The Committee voted to Censure and Reprimand the Respondent and the Committee placed the Respondent on Probation for five years under the terms that appear as the Attachment A to the Committee's Determination. The Probation terms require a practice monitor and an evaluation by the Committee for Physicians Health (CPH). In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2017), the Petitioner asks the ARB to modify the probation terms. After reviewing the hearing record and the parties' review submissions, the ARB modifies the Probation Terms relating to the evaluation.

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)(iii) (McKinney 2017) by engaging in conduct that resulted in a criminal conviction under the law in another jurisdiction. 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 the Respondent entered a guilty plea on February 4, 2014 in the Court of Common Pleas of Erie County, Pennsylvania to Driving Under the Influence of Alcohol or Controlled Substance: Highest Rate of Alcohol. The Court sentenced the Respondent to a restrictive intermediate punishment for 24 months, to undergo electronic monitoring for 90 days, to pay a \$1,500.00 fine and to pay \$2,685.50 in court costs. The Pennsylvania action against the Respondent began in July 2013, when the Respondent drove his car off a roadway and struck a tree. The Respondent's blood alcohol concentration (BAC) at that time measured at 0.18%.

At the Direct Referral Hearing, the Respondent admitted that he consumed alcohol on the night of the crash to the point that the Respondent blacked out and that he had no memory of getting into his car and driving. The Respondent also acknowledged a previous arrest in New York in March 2013 for driving while intoxicated, which resulted in a plea down to driving while ability impaired. The Respondent testified that stress due to marital difficulties caused the alcohol misuse. He submitted a September 2014 letter from the alcohol counselor who began treating the Respondent in August 2013. The letter indicated that the Respondent's therapeutic

involvement had been good and that the Respondent was no longer using alcohol. The Respondent testified that he abstained from alcohol during the two years of the Pennsylvania restrictive intermediate punishment, but he acknowledged that he now consumes an occasional glass of wine. The Committee noted that the Respondent submitted no evidence of any professional treatment since September 2014 and no evidence that a health care professional has evaluated the risk associated with the Respondent's resumption in alcohol usage. The Respondent works currently in a hospital emergency department. The Respondent's current supervisor submitted a letter indicating that the Respondent has a strong work ethic, is highly regarded by colleagues and patients and that there has been no evidence of the Respondent in an altered mental state during that time.

The Committee found that the conduct that resulted in the Pennsylvania criminal conviction made the Respondent liable for disciplinary actions against the Respondent's License to practice medicine in New York State (License) pursuant to EL §6530(9)(a)(iii). The Committee voted to censure and reprimand the Respondent and to place the Respondent on probation for five years, with terms that included an impairment monitor. The Committee also required that, within 90 days, the Respondent undergo an evaluation by The Committee on Physician Health (CPH) or a similar program approved by the Director of the Office for Professional Medical (Director) and that the Respondent must follow the treatment recommendations of that evaluation. The Probation Terms also require the Respondent to abstain from the use of alcohol during the probation and imposed a sobriety monitor to oversee the Respondent's compliance with the Probation Terms and to direct testing for the presence of alcohol.

The Committee noted that the Petitioner had requested a censure and reprimand, a \$3000.00 fine and an impairment monitor. The Committee expressed grave concerns about the Respondent's resuming alcohol consumption and discontinuing treatment for alcohol abuse. The Committee indicated that they imposed the requirement for the evaluation in lieu of the fine.

Review History and Issues

The Committee rendered their Determination on February 3, 2017. This proceeding commenced on February 17, 2017, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's Brief, a letter from the Respondent's attorney and a letter from the Respondent responding to the Petitioner's Brief.

The Petitioner requested that the ARB modify the Committee's Determination. The Petitioner argued that the Committee lacked the authority to order the Respondent to undergo a CPH evaluation. The Petitioner recommended that the ARB request the Director of the Office for Professional Medical Conduct (OPMC Director) convene a BMC Committee pursuant to PHL § 230(7) to determine whether the Respondent should undergo an evaluation concerning impairment. The Petitioner also requested that the ARB add to the Probation Terms requirements for a practice supervisor, therapy monitor, therapy and drug testing.

The Respondent objected to the Petitioner's request for a practice supervisor as incompatible with the Respondent's practice in a high volume acute care Emergency Room (ER). The Respondent argues that he is already monitored in the "fish bowl" ER with a glass enclosed work station and monitoring cameras. The Respondent referred to the letter in evidence from his ER supervisor, which indicated that there had been no episode of tardiness or

unexpected absence from work and no evidence of the Respondent in an altered state. The review submission from the Respondent's counsel also challenged the recommendation on the practice supervisor. The counsel stated that a practice supervisor would place an undue burden on the Respondent in practicing in the ER and that there is no history of performance or disciplinary issues connected to the Respondent's practice.

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 Kubnick 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 Respondent committed professional misconduct. Neither party challenged the Committee's Determination on the charges. The ARB shares the Committee's concerns about the Respondent renewing use of alcohol and discontinuing treatment. The ARB affirms the Committee's Determination to place the Respondent on probation for five years under the Probation Terms that appear at Attachment A to the Committee's Determination. We modify the provision in the Committee's Determination to remove the Probation Term at Paragraph 5, which ordered the Respondent to undergo a CPH evaluation.

The ARB agrees with the Petitioner that the Committee lacked the authority to order the Respondent to undergo the evaluation. The provisions on professional misconduct penalties at PHL § 230-a(2) do provide a BPMC Committee the authority to suspend a licensee until a

licensee has completed a course of therapy or treatment. There is no provision in PHL § 230-a, however, that allows a Committee to order an evaluation. Under PHL § 230(7)(a), the OPMC Director may convene a Committee to determine whether a licensee must submit to an examination concerning some form of impairment.

The ARB urges the Respondent to seek an evaluation voluntarily concerning alcohol impairment from CPH or some other evaluator who the Respondent may choose, subject to the approval of the OPMC Director. If the Respondent fails to arrange for and complete the evaluation within the first 90 days during the probation, then the ARB recommends that the OPMC Director convene a BPMC Committee, pursuant to PHL § 230(7)(a), to determine if cause exists to order the Respondent to submit to an examination concerning impairment due to alcohol.

The ARB affirms the Probation Terms at Paragraphs 6 and 7 that require the Respondent to abstain from alcohol during the probation and that requires a Sobriety Monitor to oversee the Respondent's compliance. The Sobriety Monitor will be proposed by the Respondent and approved in writing by the OPMC Director. Paragraph 7 requires that the Sobriety Monitor shall have tests performed to test the Respondent for the presence of alcohol.

The ARB rejects the Petitioner's request that we include an order for therapy and a therapy monitor in the Probation Terms. There has been no determination yet in this case concerning therapy. It would be for the voluntary evaluation or the 230(7)(a) proceeding to make such a determination.

We also reject the Petitioner's request that the Probation Terms include a practice supervisor. The ARB sees no need for such supervision, due to the Respondent's practice in the heavily monitored ER where the Respondent works currently. The Probation Terms at Paragraph

3 require that the Respondent provide OPMC with all information on professional addresses and inform OPMC within 30 days concerning any changes in the required information. The OPMC Director holds authority to supervise probation under PHL § 230(18). If during the probation, the Respondent changes jobs to a less heavily monitored practice, the Director may require a licensee to obtain an appropriate monitor to monitor the licensee's practice pursuant to PHL § 230(18)(a)(iii).

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 censure and reprimand the Respondent.
3. The ARB modifies the Probation Terms that the Committee imposed under Attachment A to the Committee's Determination.

Peter S. Koenig, Sr.
Steven Grabiec, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

In the Matter of William A. Swagler, III, D.O.

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

Dated: 27 July, 2017

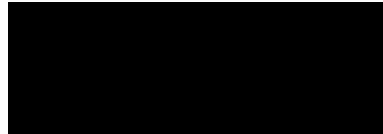


Linda Prescott Wilson

In the Matter of William A. Swagler, III, D.O.

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

Dated: July 24, 2017

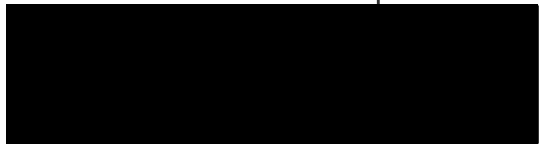
A large black rectangular redaction box covers the signature of Peter S. Koenig, Sr.

Peter S. Koenig, Sr.

In the Matter of William A. Swagler, III, D.O.

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

Dated: 7/24, 2017

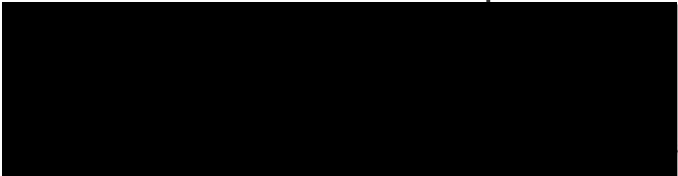


Steven Grabiec, M.D.

In the Matter of William A. Swagler, III, D.O.

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

Dated: July 24, 2017



Richard D. Milone, M.D.

In the Matter of William A. Swagler, III, D.O.

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

Dated: JULY 24, 2017



John A. D'Anna, M.D.