State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 1, 2004 93529

In the Matter of PAUL L. MAGLIONE,
Petitioner,
v MEMORANDUM AND JUDGMENT

NEW YORK STATE DEPARTMENT OF HEALTH et al.,
Respondents.

Calendar Date: April 21, 2004

Before: Peters, J.P., Spain, Mugglin, Rose and Lahtinen, JJ.

Tabak & Stimpfl, Uniondale (T. Lawrence Tabak of counsel), for petitioner.

Eliot Spitzer, Attorney General, New York City (George A. Alvarez of counsel), for respondents.

Mugglin, J.

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to Public Health Law § 230-c [5]) to review a determination of the Administrative Review Board for Professional Medical Conduct which, inter alia, suspended petitioner's license to practice medicine in New York.

Petitioner, a physician licensed to practice medicine in New York since 1959, was charged by the Bureau of Professional Medical Conduct (hereinafter the BPMC) with 49 specifications of misconduct in violation of Education Law § 6530, including practicing medicine with gross negligence and gross incompetence, practicing medicine negligently on more than one occasion,

flowed from it'" (Matter of Yoonessi v State Bd. for Professional Med. Conduct, 2 AD3d 1070, 1071 [2003], quoting Matter of Sunnen v Administrative Review Bd. for Professional Med. Conduct, 244 AD2d 790, 791 [1997], lv denied 92 NY2d 802 [1998]). The factual demonstration must overcome "'the presumption of honesty and integrity accorded to administrative body members'" (Matter of Yoonessi v State Bd. for Professional Med. Conduct, supra at 1071, quoting Matter of Sunnen v Administrative Review Bd. for Professional Med. Conduct, supra at 792; see Matter of Kole v New York State Educ. Dept., 291 AD2d 683, 686 [2002]; Matter of Richstone v Novello, supra at 739).

After careful analysis, we conclude that petitioner's claims are either unsupported by the record or they amount to no more than an allegation of bias with no factual demonstration supporting the allegation or that the administrative outcome flowed from it. Moreover, despite the allegations of note shredding, the Hearing Committee found the witness to be credible, a finding to which the ARB deferred, and that determination may not be disturbed by this Court (see Matter of Bottros v De Buono, 256 AD2d 1034, 1036 [1998]; Matter of Brown v New York State Dept. of Health, 235 AD2d 957, 958 [1997], lv denied 89 NY2d 814 [1997]).

Next, since this proceeding is to review the determination of the ARB, petitioner's second argument that the findings of the Hearing Committee were not proven by substantial evidence is flawed (see Matter of Brown v New York State Dept. of Health, supra at 957-958). "In reviewing a determination of the ARB, [this Court is] limited to ascertaining whether it was 'arbitrary and capricious, affected by error of law or an abuse of discretion'" (Matter of Bottros v De Buono, supra at 1035-1036, quoting Matter of Chua v Chassin, 215 AD2d 953, 954 [1995], lv denied 86 NY2d 708 [1995]; see Matter of Lugo v New York State Dept. of Health, 306 AD2d 766, 766-767 [2003]; Matter of Citronenbaum v New York State Dept. of Health, 303 AD2d 855, 857 [2003]). "Under this standard, [this Court's] inquiry is whether the administrative determination has a rational basis supported by fact" (Matter of Brown v New York State Dept. of Health, supra at 958 [citation omitted]). When making such a determination, this Court "may not consider credibility issues, for to do so

would impinge upon the province of the administrative fact finder" (Matter of Bottros v De Buono, supra at 1036).

Guided by these principles, we first address the findings of practicing medicine negligently on more than one occasion. "A physician is guilty of negligence on more than one occasion * * * when he or she has 'failed to exercise the care that a reasonably prudent physician would exercise under the circumstances'" (Matter of Gonzalez v New York State Dept. of Health, 232 AD2d 886, 889 [1996], lv denied 90 NY2d 801 [1997], quoting Matter of Bogdan v New York State Bd. for Professional Med. Conduct, 195 AD2d 86, 88 [1993], appeal dismissed, lv denied 83 NY2d 901 [1994]). Petitioner argues that both the Hearing Committee and the ARB erred when they found that "minor mistakes" made by petitioner amounted to negligence. In our view, a proper reading of the record is that the ARB made the reference to minor mistakes to reject the BPMC's argument that petitioner was guilty of gross negligence on more than one occasion but sustained the finding of negligence. Our independent review of the record leads to the conclusion that the ARB's determination has a rational basis supported by fact when it sustained findings of negligence in that petitioner failed to send patient A to the hospital when he exhibited symptoms of suffering from a stroke, that petitioner failed to monitor patient E's thyroid function, did an incomplete neurologicial examination of patient C, inappropriately exceeded the time limit for treating patient E with testosterone, used Methotrexate on a trial basis for patient F, and failed to contact patient G periodically to monitor that patient's diabetes and blood pressure. We do not agree that these charges lacked specificity to the degree that petitioner's defense was impaired.

A physician is also guilty of "professional misconduct" for "[f]ailing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient" (Education Law § 6530 [32]). "A medical record which 'fails to convey objectively meaningful medical information concerning the patient treated to other physicians is inadequate'" (Matter of Gonzalez v New York State Dept. of Health, supra at 890, quoting Matter of Mucciolo v Fernandez, 195 AD2d 636, 625 [1993], lv denied 82 NY2d 661 [1993]). Again, the record amply demonstrates a rational

basis supported by fact for the eight determinations of inadequate record-keeping for each of the patients. Notably, petitioner does not even address the findings with respect to patients D and H and, on several occasions, petitioner's own expert agreed that the records were inadequate.

Lastly, a penalty imposed by the ARB will be modified or annulled only when "the punishment is so disproportionate in light of the offense that it shocks one's sense of fairness" (Matter of Brigham v De Buono, 228 AD2d 870, 874 [1996], lv denied 89 NY2d 801 [1996]; see Matter of O'Keefe v State Bd. for Professional Med. Conduct, 284 AD2d 694, 696-697 [2001], lv denied 96 NY2d 722 [2001]; Matter of Chua v Chassin, 215 AD2d 953, 956 [1995], lv denied 86 NY2d 708 [1995]). In view of the sustained charges, we conclude that the ARB acted well within its authority in sustaining the penalty imposed (see Matter of Gross v New York State Dept. of Health, 277 AD2d 825, 829 [2000]) and that the penalty is not so disproportionate to the offenses as to shock one's sense of fairness.

Peters, J.P., Spain, Rose and Lahtinen, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

Michael J. Novack
Clerk of the Court