



STATE OF NEW YORK DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Richard F. Daines, M.D.
Commissioner

Wendy E. Saunders
Chief of Staff

June 19, 2008

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Michael A. Hiser, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2509
Albany, New York 12237

Ivan A. D'Souza, M.D.
1026 Union Road
West Seneca, New York 14224

Lawrence J. Viardo, Esq.
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Connors & Vilardo, LLP
1000 Liberty Building
424 Main Street
Buffalo, New York 14202

RE: In the Matter of Ivan D'Souza, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 07-279) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

A solid black rectangular box used to redact the signature of James F. Horan.

James F. Horan, Acting Director
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Ivan D'Souza, M.D. (Respondent)

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

Administrative Review Board (ARB)

Determination and Order No. 07-279

COPY

Before ARB Members Grossman, Pellman, Wagle and Wilson¹
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Michael Hiser, Esq.
For the Respondent: Lawrence J. Vilardo & Jennifer R. Scharf, Esqs.

Following a hearing below, a BPMC Committee determined that the Respondent engaged in professional misconduct, during the course of treating four patients. The Committee voted to revoke the Respondent's License to practice medicine in New York State (License). In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2008), the Respondent asks the ARB to nullify that Determination. After reviewing the record below and the parties' review submissions, the ARB affirms the Committee's Determination that the Respondent committed professional misconduct and the ARB affirms the Committee's Determination to revoke the Respondent's License.

Committee Determination on the Charges

The Committee conducted a hearing on charges that the Respondent, an Obstetrician/Gynecologist, violated New York Education Law (EL) §§ 6530(2-6), 6530(20) &

¹ ARB Member Therese Lynch recused herself from participating in this case, so the ARB reviewed the case with a four-member quorum.

6530(31-32)(McKinney 2008) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross negligence,
- practicing medicine with incompetence on more than one occasion,
- practicing medicine with gross incompetence,
- engaging in conduct that evidences moral unfitness to practice,
- willfully harassing, abusing or intimidating a patient, and,
- failing to maintain accurate patient records.

The charges arose from the Respondent's conduct toward eleven patients (A-K). The record refers to the Patients by initials to protect patient privacy. The Respondent denied the charges. Following the hearing, the Committee rendered the Determination now on review.

The Committee sustained charges that the Respondent committed willful abuse and engaged in conduct that evidenced moral unfitness in his conduct towards Patients A, B, C and K. The Committee also found that the Respondent practiced with gross negligence and practiced fraudulently in treating Patient B. The Committee sustained factual allegations that charged the Respondent with:

- telling Patient A to contact the Respondent outside the office and telling the Patient that the Respondent would leave his wife for Patient A;
- fondling Patient B's breast and genitals for no medical reason;
- asking to meet Patient B outside the Respondent's office,
- calling Patient B at home and asking to meet;
- engaging in sexual intercourse with Patient B at the Respondent's home;
- meeting with Patient B on several occasions outside the Respondent's office to discuss the Respondent's personal/romantic attachment for the Patient;
- fondling Patient B's breasts in the hospital and attempting to have Patient B perform oral sex;

- standing between Patient C's knees while the Patient disrobed;
- hugging Patient C;
- kissing Patient C on the cheek, neck and ear;
- holding Patient C's face with the Respondent's hands and kissing Patient C on the lips;
- telling Patient K that women would pay to have breasts like hers and that she should "show them off more often";
- telling Patient K that the Respondent wanted a "real kiss", kissing the Patient on the mouth and pushing the Respondent's tongue into the Patient's mouth; and,
- telling Patient K to call the Respondent if the Patient ever wanted to "get together on the side".

The Committee dismissed the charges concerning all other Patients and dismissed allegations concerning negligence on more than one occasion, incompetence on more than one occasion, gross incompetence and failure to maintain accurate records.

The Committee voted 2-1 to revoke the Respondent's License. The Committee recognized the Respondent's surgical skills and the Respondent's reputation for providing quality obstetrical/gynecological care to high-risk patients. The Committee found, however, that the Respondent's inability to meet acceptable standards in interpersonal relationships with female patients reflected a flaw in the Respondent's character. The Committee members who voted for revocation indicated that they could find no other suitable penalty to protect the public in the future from further egregious violations of acceptable medical practices. The other Committee member felt that a License suspension for a period of time would alert the Respondent adequately to the necessity to conform to acceptable ethical and professional standards.

Review History and Issues

The Committee rendered their Determination on December 28, 2007. This proceeding commenced on December 28 & 31, 2007, when the ARB received the Respondent's and then the

Petitioner's Notices requesting Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and reply brief and the Petitioner's brief and reply brief. The record closed when the ARB received the reply briefs on February 29, 2008.

The Respondent asked that the ARB nullify the Committee's Determination on the charges and on the penalty. The Respondent alleged that the Committee's Administrative Officer erred by receiving hearsay evidence into the record, limiting testimony and letters in support of the Respondent, curtailing cross-examination by the Respondent's counsel, permitting the hearing to continue in the absence of a Committee member, failing to recuse Committee members for bias, failing to provide the Respondent with additional discovery and refusing to accept new evidence into the record after the close of the hearing. The Respondent argued further that the Committee made findings against the weight of the evidence and that the Committee imposed an overly harsh penalty.

The Petitioner requested that the ARB overturn the Committee and sustain additional factual allegations concerning Patients A and C and that the ARB sustain factual allegations relating to the Respondent's conduct toward Patients G, H and J.

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 in full.

The Respondent alleged that a number of decisions by the Committee's Administrative Officer constituted errors that denied the Respondent due process. Under PHL § 230-c(4)(b), the ARB may remand to a Committee for further proceedings. The ARB considered the Respondent's allegations as a request for remand. We reject the request and we find no grounds for further proceedings. The Respondent alleged first that the Administrative Officer erred in admitting hearsay statements that the Petitioner classified as "prompt outcry" statements. Hearsay statements are admissible in BPMC proceedings and may provide the basis for disciplinary action, Coderre v. DeBuono, 247 A.D.2d 793, 669 N.Y.S.2d 440 (3rd Dept. 1998). Further, the Committee indicated that they found the hearsay statements of limited assistance [Committee Determination page 22]. The Respondent also complained because the Committee's Administrative Officer limited the Respondent in the number of witnesses and documents that the Administrative Officer would receive into the record and in cross-examination. The record demonstrates, however, that the Administrative Officer gave the Respondent extensive opportunities to present testimony from patients, family and colleagues about the Respondent's skills as a physician. The Administrative Officer holds the authority to limit such evidence, Amato v. State of New York Department of Health, 229 A.D.2d 754 (3rd Dept. 1996) and the Committee indicated that such information played little impact in helping the Committee decide if the incidents at issue actually occurred. As to the cross-examination, the Respondent received an extensive opportunity for cross-examination and the Administrative Officer holds the authority under 10 NYCRR § 51.9(c)(7) to limit cross-examination. The Respondent also alleged

error because the Administrative Officer failed to provide the Respondent with discovery that the Respondent requested, in addition to the disclosure the Respondent must receive under New York Administrative Procedure Act (SAPA) § 401. The ARB sees no error in the Administrative Officers' refusal to grant the Respondent additional disclosure beyond what SAPA requires. The Respondent also complained because the Administrative Officer refused to provide the Committee with a document that the Respondent produced following hearing. The Petitioner received no opportunity to challenge that document at the hearing. The ARB sees no error in the Administrative Officer refusing to receive a document following the hearing, when the other party received no chance to comment on or challenge the document, Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997).

The Respondent also argued that the Committee's Administrative Officer should have recused Committee members, in one case for absence and in other instances for bias. On the absence issue, a Committee member was absent from a portion of the hearing and missed the cross-examination of Patient D. The ARB sees no harm to the Respondent from that absence because a Committee member may miss testimony and still participate in a Committee Determination, if that member reads and considers the transcript of the portion of the proceeding that the Committee member missed, Shafer v. Board of Regents, 243 A.D.2d 838, 663 N.Y.S.2d 359 (3rd Dept. 1977). Further, as the Petitioner's Reply brief points out, the Committee dismissed all charges concerning Patient D. As to the bias allegations, the Respondent argued that the Administrative Officer should have recused Committee members due to an electronic mail communication from a Committee member to the Petitioner's counsel and due to sympathy that the Committee expressed for Patient witnesses. The electronic mail message requested information on scheduling of testimony on an upcoming hearing date. The Respondent alleged

that the message constituted an improper "ex parte" contact. Under SAPA § 307(2), no decision maker may communicate with a party to an administrative proceeding concerning an issue of fact or law, except upon notice and an opportunity for all parties to participate. In this instance, the message involved scheduling rather than an issue of fact or law, so the message was not a forbidden "ex parte" contact. On the Patient testimony, the Respondent argued that the Committee demonstrated bias by expressing sympathy for Patients A and G during testimony by those witnesses. To prove bias, a party must demonstrate actual bias and must prove that the outcome in a proceeding flowed from that bias, Moss v. Chassin, 299 A.D.2d 889, 618 N.Y.S.2d 931 (3rd Dept. 1994). The Respondent's allegations on the Committee members fail to convince the ARB that the outcome in this proceeding flowed from bias by Committee members. The Committee dismissed all allegations concerning Patient G and the Committee dismissed a number of the allegations concerning Patient A. As we note below, the ARB finds that the outcome in this proceeding resulted from evidence that the Committee found credible, to prove the allegations that the Committee sustained.

Both the Petitioner and Respondent challenged the Committee's conclusions on the evidence and asked that the ARB overturn the Committee's Determination on witness credibility. Under PHL § 230(10)(f), a hearing committee makes findings of fact from the evidence at a hearing and under PHL §§ 230(10)(i) & 230-c(1), the ARB reviews those findings to assure that the findings are consistent with the Committee's Determination. The ARB defers to hearing committees, as the finders of fact, in the Committee's assessments about witness credibility. In this case, testimony by Patients A, B, C and K established that the Respondent willfully abused those Patients and engaged in contact that evidenced moral unfitness. In the case of Patient B, the evidence showed that the Respondent practiced with gross negligence and practiced fraudulently.


The Respondent had every opportunity to challenge the testimony by the Patients and to call into questions the Patients' motives in testifying. The Committee also gave great scrutiny to all the Patients' testimony. The ARB sees no bias whatsoever towards the Patients over the Respondent in the Committee's findings. Of all the witnesses in this case, the Respondent had the greatest interest in the outcome and the Committee could certainly consider that interest in rejecting the Respondent's version of the events at issue. The ARB finds that the evidence the Committee found credible provided preponderant evidence for the Committee's findings and the Committee's Determination to sustain charges involving Patients A, B, C and K. The ARB also defers to the Committee in their Determinations on credibility as to the other witnesses in the hearing and in the Committee's Determination to dismiss the remaining charges.

The ARB affirms the Committee's Determination to revoke the Respondent's License. The Respondent engaged in misconduct involving four Patients over an extended period of time. The Respondent used his position as a physician to betray the trust of these four Patients. No questions were raised about the Respondent's clinical skills and he clearly enjoyed a high reputation among his colleagues, family and among other patients. In his conduct towards Patients A, B, C and K, however, the Respondent demonstrated his unfitness to practice medicine in New York State. The ARB agrees with the Committee's majority that no other sanction under PHL § 230-a would provide adequate protection to Patients.

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.


Thea Graves Pellman
Datta G. Wagle, M.D.
Stanley L. Grossman, M.D.
Linda Prescott Wilson

In the Matter of Ivan D'Souza, M.D.

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

Dated: 10/14/08 .2008

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Linda Prescott Wilson

In the Matter of Ivan D'Souza, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the
Matter of Dr. D'Souza.

Dated: May 14, 2008


Thea Graves Pellman

In the Matter of Ivan D'Souza, M.D.

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

Matter of Dr. D'Souza.

Dated: 5/22/, 2008

Redacted Signature

Datta G. Wagle, M.D.

In the Matter of Ivan D'Souza, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. D'Souza.

Dated: May 20, 2008


Stanley L. Grossman, M.D.