



STATE OF NEW YORK  
DEPARTMENT OF HEALTH

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

Richard F. Daines, M.D.  
Commissioner

Public

Wendy E. Saunders  
Chief of Staff

August 4, 2009

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Mark Lewis Wasserman, M.D.  
Redacted Address

Robert Bogan, Esq.  
NYS Department of Health  
Hedley Park Place  
433 River Street - Suite 303  
Troy, New York 12180

**RE: In the Matter of Mark Lewis Wasserman, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 09-91) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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,

Redacted Signature

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

Mark Lewis Wasserman, 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. 09-91

COPY

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

For the Department of Health (Petitioner): Robert Bogan, Esq.  
For the Respondent: Pro Se

The Respondent holds a medical license in Connecticut, in addition to 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 2009), the ARB considers whether to take disciplinary action against the Respondent, after Connecticut placed the Respondent on probation for drug use. After a hearing below, a Committee placed the Respondent's License on probation to run for the same time period as the probation in Connecticut (coterminous). The Petitioner then requested administrative review and asked that the ARB modify the probation terms that the Committee set. After reviewing the hearing record and the Petitioner's request, the ARB affirms the Committee's Determination that the Respondent engaged in conduct in Connecticut that made the Respondent liable for discipline against his License and the ARB affirms the Committee's Determination to place the Respondent on probation coterminous with his probation in Connecticut. The ARB modifies the terms on the New York probation.

### Committee Determination on the Charges

The Committee conducted a hearing in this matter under the expedited hearing procedures (Direct Referral Hearing) in PHL § 230(10)(p). The Petitioner charged that the Respondent violated New York Education Law (EL) §§ 6530(9)(b) & 6530(9)(d) by committing professional misconduct, because the duly authorized professional disciplinary agency from another state, Connecticut,

- found the Respondent guilty for improper professional conduct [6530(9)(b)], and/or,
- took disciplinary action against the Respondent's medical license in that state [6530(9)(d)],

for conduct that would constitute professional misconduct, if the Respondent had committed such conduct in New York. The Petitioner's Statement of Charges [Direct Referral Hearing Exhibit 1] alleged that the Respondent's misconduct in Connecticut would constitute misconduct if committed in New York, under the following specifications:

- practicing medicine fraudulently or beyond its authorized scope, a violation under EL § 6530(2);
- being a habitual abuser of alcohol, or being dependent on or a habitual user of narcotics, a violation under EL § 6530(8);
- exercising undue influence over a patient, a violation under EL § 6530(17); and,
- engaging in conduct in the practice of medicine that evidences moral unfitness to practice, a violation under EL § 6530(20).

Following the Direct Referral Proceeding, the Committee rendered the Determination now on review. In the Proceeding, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The evidence at hearing indicated that the Respondent entered into a Consent Order with the Connecticut Department of Public Health, Healthcare Systems Branch, Medical Examining Board (Connecticut Board) in January 2008 [Direct Referral Hearing Exhibit 5]. In the Consent Order, the Respondent admitted to prescribing Oxycontin and Roxicodone for a patient who also worked as a nurse in the Respondent's practice. The Respondent prescribed the drugs in double the dosage that the nurse required and the Respondent made the nurse fill the prescription and then give the Respondent half the drugs for the Respondent's personal use. The Respondent also admitted abusing or using to excess Oxycontin, Roxicodone and codeine. The Connecticut Board placed the Respondent on probation for five years.

The Connecticut probation terms include the requirement that the Respondent submit to random urine tests for drugs and alcohol. The Respondent has submitted to 167 random screens from May 2007 until April 2009, with no positive results. The Respondent also participates in the Health Assistance Intervention Education Network (HAVEN) an assistance and monitoring program for health care professionals who suffer from chemical dependence. The evidence from the Direct Referral Hearing indicates that the Respondent has complied with all treatment recommendations, including residential care followed by an intensive outpatient program. Both the HAVEN Executive Director and the Respondent's treating physician submitted letters to the Direct Referral Committee attesting to how well the Respondent has embraced his recovery.

The Direct Referral Committee found the Respondent's dedication to sobriety impressive and the Committee concluded that no need existed to prohibit the Respondent from practice in New York. The Committee did conclude that, to protect the public, New York should place the Respondent's License on probation in case the Respondent chooses to return to practice in New York before the Respondent completes his Connecticut probation. The Order at pages 6-7 of the Committee's Determination provided some probation terms and requirements that the Respondent report to Office for Professional Medical Conduct (OPMC). The Committee's Order provided further that the bulk of the probation terms would be the same as those the Connecticut Board imposed and the Committee included the Connecticut Probation terms as Appendix 2 to the Committee's Determination. Appendix 2 requires that the Respondent comply with certain

regulations of the Connecticut Department of Health and the Connecticut Department of Consumer Protection, Drug Control Division. One section in the Committee's Order provided that the New York probation should be coterminous with the Connecticut probation, but the Committee's Order at paragraph 5 provided that the New York probation would be tolled, or suspended, during any period in which the Respondent is not engaged in active medical practice in the State of New York.

#### Review History and Issues

The Committee rendered their Determination on May 12, 2009. This proceeding commenced on May 22, 2009, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record and the Petitioner's brief. The record closed when the ARB received the brief on June 22, 2009.

The Petitioner argues that the Committee's Determination and Order contain inconsistent provisions because at one point the Committee states that the New York probation should run coterminous with the Connecticut probation, but at another point the Committee states that the New York probation would be tolled at any time the Respondent is not practicing actively in New York State. The Petitioner argued further that the Committee inserted unenforceable probation terms by relying on portions of the Connecticut probation terms. The Petitioner requests that the ARB: a.) amend the Committee's Determination by deleting Appendix 2 and any reference to Appendix 2, b.) expand one provision in paragraph 4 of the Committee's Order, and c.) replace the current paragraph 5 in the Committee Order with a new paragraph that the Petitioner suggests.

The Respondent provided no response to the Petitioner's brief.

### 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 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 (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 Petitioner's brief. The ARB affirms the Committee's Determination that the Respondent's conduct in Connecticut made the Respondent liable for disciplinary action against his License and the ARB affirms the Committee's Determination to place the Respondent on probation that would run coterminous with the Respondent's probation in Connecticut. Neither party challenged those provisions in the Committee's Determination. The ARB grants the Petitioner's motion to overturn or modify provisions in the Committee's Determination, which are inconsistent and unenforceable.

The ARB agrees with the Committee that the Respondent has demonstrated dedication to sobriety and recovery and that the appropriate sanction for the Respondent's misconduct would be to place the Respondent on probation coterminous with the probation that the Respondent serves under the Connecticut Board's Order. The coterminous probation period will encourage the Respondent to remain in Connecticut to continue in recovery and in compliance with the probation terms in that state, because there would be no advantage to return to practice in New York, where the Respondent would face the same sanction. The ARB agrees with the Petitioner that the Committee's Order at paragraph 5 contains a provision inconsistent with a coterminous probation. Paragraph 5 in the Committee's Order would toll, or suspend, the running of the New York probation, for any time period during which the Respondent is not practicing in New York. The toll would apply then to the time that Respondent resides currently in Connecticut under the



Connecticut probation terms. The ARB modifies the Committee's Order to remove the current paragraph 5 and the tolling provision.

The ARB also agrees with the Petitioner that the Committee created unenforceable probation terms by adopting the entire Connecticut terms of probation as Appendix 2 to the Committee's Determination. The Connecticut terms refer to Connecticut state regulations that New York would be unable to enforce against one of our licensees. The ARB overturns the Committee and deletes the provisions in Appendix 2 as probation terms. The ARB also amends paragraph 1 in the Committee's Order to delete reference to Appendix 2. The ARB grants the Petitioner's request that the ARB expand the language at paragraph 4 in the Committee's Order to read:

*" 4. The Respondent must comply with the terms and conditions of his Connecticut Order and any extensions and/or modifications thereof and shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of the Respondent's compliance with the terms of his Order and shall personally meet with a person designated by OPMC when so requested. The Respondent shall authorize the Connecticut Board to provide OPMC with any and all documentation that OPMC requests regarding the Respondent's compliance with the Connecticut Order. "*

The ARB also adds a new paragraph 5 to the Committee's Order to replace the former paragraph 5, to read:

*"5. Should the Respondent return to New York State to practice medicine, prior to the termination of his probation in the State of Connecticut, the Respondent shall provide 90 days advance written notice to the New York State Department of Health, addressed to the Director OPMC, Hedley Park Place, 433 River Street, Suite 303, Troy, NY 12180-2299, of his intention to return; said notice must include the Respondent's current mailing address and telephone number(s); a letter from the Connecticut Board reporting the status of the Respondent's Order of January 15, 2008 and any extension or modification thereof (Connecticut Order); certified documentation from the Connecticut Board regarding the Respondent's compliance with the Connecticut Order; and, certified documentation from the Connecticut Impaired Physician's Program regarding the Respondent's compliance with the terms of his contract.*

- a. *At the request of OPMC, the Respondent shall be required to appear in person at the offices of OPMC, to meet with a person or persons designated by the Director of OPMC, to meet with a person or persons designated by OPMC, in order for the*

*Respondent to discuss his practice plan, plan for continuing medical education, plan for continued recovery from alcohol and/or substance abuse and the status of his Connecticut Order.*

- b. The Director of OPMC may at his discretion determine what terms, conditions and/or limitations to impose upon the Respondent's proposed practice in New York State.*
- c. The Respondent will be required to comply with all terms, conditions and limitations imposed by the Director of OPMC.*

The ARB affirms all other probations terms that appear in the Committee's Order.

#### 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 place the Respondent on probation.
3. The ARB modifies the terms for the probation as we explain in our Determination.


Thea Graves Pellman  
Datta G. Wagle, M.D.  
Linda Prescott Wilson  
John A. D'Anna, M.D.  
Richard D. Milone, M.D.

In the Matter of Mark Lewis Wasserman, M.D.

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

Dated: *27 July*, 2009

, Redacted Signature

 Linda Prescott Wilson

In the Matter of Mark Lewis Wasserman, M.D.

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

Dated: July 27, 2009

Redacted Signature

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Thea Graves Pellman

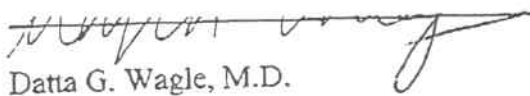
In the Matter of Mark Lewis Wasserman, M.D.

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

Matter of Dr. Wasserman.

Dated: 7/26/ 2009

Redacted Signature

  
Datta G. Wagle, M.D.

In the Matter of Mark Lewis Wasserman, M.D.

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

Matter of Dr. Wasserman.

Dated: August 4, 2009

Redacted Signature

Richard D. Milone, M.D.

In the Matter of Mark Lewis Wasserman, M.D.

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

Matter of Dr. Wasserman.

Dated: July 27, 2009

Redacted Signature

 John A. D'Anna, M.D.