



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

March 2, 2009

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Herbert Gaston, M.D.

Redacted Address

Ralph A. Erbaio, Esq.
Kern, Augustine, Conroy et al
420 Lakeville Road
Lake Success, New York 11042

Robert Bogan, Esq.
NYS Department of Health
Bureau of Professional Medical Conduct
433 River Street, Suite 303
Troy, New York 12180-2299

RE: In the Matter of Herbert Gaston, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 08-196) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

Herbert Gaston, M.D. (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. 08-196

COPY

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

For the Department of Health (Petitioner): Robert Bogan, Esq. & Michael G. Bass, Esq.
For the Respondent: Ralph A. Erbaio, Esq.

In this proceeding pursuant to New York Public Health Law (PHL) § 230-c
(4)(a)(McKinney 2008), the ARB considers whether to impose a sanction against the
Respondent's license to practice medicine in New York State (License) following the
Respondent's Federal felony conviction for destroying evidence in a Federal investigation. After
a hearing below, a BPMC Committee voted to suspend the Respondent's License, to stay the
suspension in part and to place the Respondent on probation for two and one-half years, under
terms that appear in the Appendix to the Committee's Determination. The Petitioner then
requested this review. The Petitioner asked that the ARB either overturn the Committee and
revoke the Respondent's License or modify the probation terms. After reviewing the hearing
record and the parties' review submissions, the ARB votes to 4-0 to reject the request for
revocation, to increase the time on probation from two and one-half years to five years and to
modify the probation terms.

¹ ARB Member Richard Milone, M.D. did not participate in this case. The ARB proceeded to consider the case with
a four-member quorum, Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

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 commenced the proceeding by a March 28, 2008 Summary Order from the New York Commissioner of Health suspending the Respondent's License pursuant to the Commissioner's authority under PHL § 230(12). The Petitioner's Statement of Charges [Hearing Exhibit 1] alleged that the Respondent committed professional misconduct under the definition in N. Y. Education Law (EL) §6530(9)(a)(ii) (McKinney 2009) by engaging in conduct that resulted in a felony conviction under Federal Law. 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, (supra). Following the Direct Referral Hearing, the Committee rendered the Determination now on review.

The evidence at the hearing demonstrated that the Respondent was convicted in the United States District Court for the Western District of New York upon a guilty plea to one count of destruction, alteration or falsification of records in a Federal investigation, a felony under Title 18, United States Code § 1519. The Court sentenced the Respondent to six months imprisonment, with two years supervised release, a \$100.00 assessment and a \$2000.00 fine. The record indicated that the Federal investigation against the Respondent concerned child pornography. The Respondent testified at the Direct Referral Proceeding that he never viewed child pornography intentionally, but the Respondent admitted that he destroyed his computer hard drive after Federal investigators examined the computer. The Respondent also acknowledged the illegality and the foolishness of his actions. At the time the Respondent was

Considering the guilty plea, he resigned from the hospital at which he practiced and the Respondent has not practiced medicine since December 2006.

The Committee sustained the charge that the Respondent's conduct amounted to professional misconduct under EL §§ 6530(9)(a)(ii). The Committee voted to suspend the Respondent's License until December 31, 2011, to stay the suspension from July 1, 2009 until December 31, 2011, to place the Respondent on probation during the time of the stayed suspension and to require that the Respondent complete one hundred hours of continuing medical education from the time of the Committee's Order until the time that the Respondent resumes practice. The Committee also ordered that the Respondent enroll in the Committee for Physician Health (CPH) and enter a contract with CPH to undergo an evaluation for a sexual disorder (Evaluation) and to comply with any treatment program that CPH recommends. The Committee indicated that they rejected the Petitioner's request that the Committee revoke the Respondent's License, because the hearing record contained a psychologist's evaluation that the Respondent is not a pedophile and poses little or no risk to children or the general community. The Committee also noted that there have been no allegations that the Respondent ever exploited a patient in a sexual way, even though there was extensive coverage concerning the Respondent's arrest and conviction in his local newspapers. The record also contained letters from sixty-five individuals who attested to the Respondent's personal competence and character as a physician.

Review History and Issues

The Committee rendered their Determination on October 15, 2008. This proceeding commenced on October 27, 2008, 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 and the Respondent's reply brief. The record closed when the ARB received the reply brief on December 8, 2008.

The Petitioner asks that the ARB overturn the Committee and revoke the Respondent's License. The Petitioner argued that the Respondent destroyed his computer hard drive because the Respondent knew that Federal agents would be looking on the computer for evidence of viewing child pornography. The Petitioner contends that the Committee failed to impose a disciplinary sanction to protect the public. The Petitioner points out that the Committee's Determination found no allegation that the Respondent ever exploited a physician-patient relationship in a sexual way and that the Committee's Determination found credible a psychologist's assessment that the Respondent was not a pedophile and not a danger to the community. The Committee, however, included in the probation terms that the Respondent enter into a contract with CPH and undergo the Evaluation and any treatment deemed necessary. The Petitioner calls such statements by the Committee contradictory and the Petitioner suggests that the Committee lacked confidence concerning whether the Respondent poses a danger to the Community. In the event that the ARB chooses against revocation as a sanction, the Petitioner argues that the ARB must modify the probation. Among the modifications, the Petitioner requests that the ARB send the Respondent for an evaluation by a psychiatrist, licensed mental health care professional, other health care professional or program designated by the Director of the Office for Professional Medical Conduct (OPMC). The Petitioner contends that CPH does not provide the kind of assessment, which the Committee sought in their Determination. The Petitioner also asks that the ARB extend the probation to five years in duration.

The Respondent concedes that his conduct warrants a severe sanction, but the Respondent argues that he has already received a severe sanction in the sentence from the United States District Court and in the actual License suspension from the Committee. The Respondent argues that his sincere remorse and the psychologist's assessment demonstrate that the Respondent will not repeat his behavior. The Respondent also notes that there have been no allegations relating to the Respondent's clinical skills or his dedication to patients. The Respondent contends that the penalty the Committee imposed will provide sufficient protection to the public.

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. The ARB affirms the Committee's Determination that the Respondent's Federal felony conviction constituted grounds for disciplinary action against his License pursuant to EL §§ 6530(9)(a)(ii). The ARB rejects the Petitioner's request that the ARB revoke the Respondent's License. The ARB affirms the Committee's Determination to suspend the Respondent's License, to stay the suspension in part, to place the Respondent on probation, to order the Respondent to complete CME and to order that the Respondent submit to an Evaluation. The ARB modifies the CME provision in the sanction to require that the Respondent complete 150 hours CME rather than 100. The ARB modifies the Determination concerning probation to extend the period of probation from two and

one-half years to five years and to modify the probation terms. The ARB also modifies the conditions for the Evaluation on the Respondent to remove CPH as the party to perform such Evaluation.

The ARB agrees with the Petitioner that the Respondent's conduct warrants a severe sanction. The Respondent has already received a heavy penalty from the courts and, under the Commissioner's Summary Order and penalty the Committee imposed, the Respondent will spend at least one year and three months on actual suspension from practice. The record reveals no allegations against the Respondent for improper conduct towards patients and a large number of people attested to the Respondent's personal character and competence as a physician. The Evaluation we order, the probation and the CME will assure the Respondent's fitness to return to practice. We conclude the penalty the Committee imposed, with the modifications we set out below, will provide protection to the public as well as a severe sanction.

The ARB modifies the Evaluation terms to provide that a board certified psychiatrist only may conduct the Evaluation. We agree with the Petitioner that CPH is an inappropriate evaluator, because participation in that program is voluntary only. The ARB also extends the time for probation from two and one-half years to five years, because we conclude that two and one-half years provides too short a period to observe the Respondent's practice. We agree with the Committee that the Respondent should complete CME, due to the time the Respondent has spent away from active practice since December 2006. We conclude that the Respondent should complete 150 hours CME rather than the 100 hours that the Committee ordered. We also modify the CME provision to require that the Respondent complete the CME over first three years under probation rather than prior to returning to practice. The ARB adds two paragraphs to the Probation Terms to become paragraphs 7 and 8, as we set out below.

“ 7. The Respondent shall enroll in and complete fifty hours of continuing medical education courses in each of the first three years under probation (one hundred fifty hours total) subject to written approval by the OPMC Director.

“ 8. The Respondent shall adhere to Federal and State guidelines and professional standards of care with respect to infection control practices. The Respondent shall ensure education, training and oversight of all office personnel involved in medical care, with respect to these practices.”

The current paragraph 7 in the Committee’s Probation terms is renumbered to become Paragraph 9.

ORDER

NOW, with this Determination as our basis, the ARB renders the following ORDER:

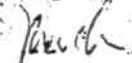
1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to continue the suspension of the Respondent's License until December 31, 2011.
3. The ARB affirms the Committee's Determination to stay the suspension from July 1, 2009 until December 31, 2011, on condition that the Respondent complies with paragraph 4 in this Order by July 1, 2009. If the Respondent fails to comply with paragraph 4 in this Order by July 1, 2009, then the stay will begin at such time as the Respondent complies with paragraph 4.
4. Prior to returning to the active practice of medicine in the State of New York, the Respondent shall submit to an evaluation by a Board Certified Psychiatrist (Evaluator) designated by the Director of OPMC. The Respondent shall provide the Evaluator with a copy of the Determination and Order and with all treatment records and OPMC, at its discretion, may provide information and documentation from its investigative files concerning Respondent to the Evaluator. The Evaluator shall report to the Director regarding the Respondent's condition and fitness or incapacity to practice medicine. The Respondent shall comply with all treatment recommendations from the Evaluation as a condition on the Respondent's License.
5. The ARB affirms the Committee's Determination to place the Respondent on probation under the terms that appear as the Appendix to the Committee's Determination, but the

ARB extends the probation term to five years and the ARB modifies the probation terms as we provide in our Determination.

Thea Graves Pellman
Datta G. Wagle, M.D.
Linda Prescott Wilson
Therese G. Lynch, M.D.

In the Matter of Herbert Gaston, M.D.

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

Dated:  2009

Redacted Signature

Linda Prescott Wilson

Herbert Gaston, M.D.

Member of the ARB

Linda Prescott Wilson

In the Matter of Herbert Gaston, M.D.

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

Dated: March, 2009

Redacted Signature

Thea Graves Pellman

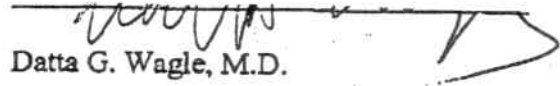
In the Matter of Herbert Gaston, M.D.

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

Matter of Dr. Gaston.

Dated: 2/28, 2009

Redacted Signature


Datta G. Wagle, M.D.

In the Matter of Herbert Gaston, M.D.

Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Gaston.

Dated: February 28, 2009

Redacted Signature

Therese G. Lynch, M.D.