



Public
STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

Richard F. Daines, M.D.
Commissioner

James W. Clyne, Jr.
Executive Deputy Commissioner

January 7, 2010

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Alberto Nanez-Hovos, P.A.
Redacted Address

Courtney Berry, Esq.
NYS Department of Health
90 Church Street- 4th Floor
New York, New York 10007

RE: In the Matter of Alberto Nanez-Hoyos, P.A.

Dear Parties:

Enclosed please find the Determination and Order (No. 09-167) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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

Alberto Nanez-Hoyos, P.A. (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. 09-167

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): Courtney Berry, Esq.
For the Respondent: Louis M. Freeman, Esq.

Following a hearing below, a BPMC Committee determined that the Respondent physician-assistant engaged in fraud in practice and willfully filed a false report, by altering a limited permit to practice in New York. The Committee voted to suspend the Respondent's license to practice, to stay the suspension and to place the Respondent on probation for three years, under terms that included a restriction to practice in an institutional setting. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2009), the Petitioner asks the ARB to overturn the Committee and to prohibit the issuance of any License to the Respondent or to modify the Determination to place restrictions on the Respondent should he ever obtain a license in New York as a physician assistant. The Respondent requests that the ARB remand this case for a full hearing. After considering the hearing record and the parties' review submissions, the ARB votes 5-0 to reject the remand request and to modify the Committee's Determination, to make restrictions effective against the Respondent at such time as the Respondent should ever obtain a license to practice as a physician assistant in New York State.

Committee Determination on the Charges

The Committee conducted a hearing on charges that the Respondent violated New York Education Law (EL) §§ 6530(2) & 6530(21)(McKinney 2009) by committing professional misconduct under the following specifications:

- practicing the profession fraudulently, and
- willfully making or filing a false report.

The Respondent failed to file a written answer to the charges prior to the hearing. Under the PHL § 230(10)(c), that failure constituted an admission to charges. The hearing proceeded to consider a penalty for the charges so admitted and the Committee rendered the Determination now on review.

The Respondent practiced in New York under a limited permit to practice that expired on September 1, 2006. The Committee found that the Respondent altered the limited permit to make it appear that the permit expired on September 1, 2008. At the hearing, the Respondent testified, denied the charges and described his struggles in coming to the United States from Columbia. The Committee found the testimony provided mitigation in considering a penalty, by showing the Respondent as passionate about his work but naïve in practice. The Committee found that the Respondent would benefit from practicing in the structured environment of an institutional setting. The Committee found that the institutional setting would provide the Respondent with an opportunity to enhance his understanding of practice as a physician assistant and of the business of medicine. The Committee voted to suspend the Respondent from practice for three years, to stay the suspension and to place the Respondent on probation under the terms that appear at Appendix B to the Committee's Determination. The terms include a restriction to practice in an institutional setting during the entire probation.

Review History and Issues

The Committee rendered their Determination on September 3, 2009. This proceeding commenced on September 17, 2009, 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 response brief. The Administrative Officer for the ARB granted an extension for the Respondent to file the reply brief. The record closed when the ARB received the reply brief on November 13, 2009.

The Petitioner argues that the Committee imposed a penalty without authorization in law, because the Respondent holds no license in New York State. The Petitioner contends that the Respondent worked as a physician assistant under a limited permit in New York from September 1, 2004 to September 1, 2006. The law permits no further extensions in the limited permit and the Respondent never received a license from the New York State Education Department, because the Respondent failed a licensure examination. The Petitioner asks that the ARB overturn the Committee and prohibit the future issuance of a license to the Respondent under PHL § 230-a(6). In the alternative, the Petitioner requests that the ARB modify the terms in the Committee's penalty so that the restrictions the Committee intended in their Order would become effective at such time as the Respondent obtains a license in New York.

The Respondent argues that he never received the opportunity to present a defense to the charges and that the Respondent suffered from trying to argue on his own behalf at the hearing. The Respondent denies any misconduct and accuses another of making accusations against the Respondent as retaliation. The Respondent requests that the ARB remand this case to the Committee so that the Respondent may present his defense.

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 Boedan 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 declines to remand the case for a further hearing. We modify the penalty the Committee imposed and we modify the terms in the probation the Committee imposed.

The Respondent received the opportunity to appear by counsel at his hearing and to submit a written answer to the charges. The Respondent chose against obtaining counsel until the time came to file the response brief on this review. With the failure to file an answer prior to hearing, provisions in PHL § 230(10)(c) deemed the charges admitted and the hearing focused on a possible penalty for altering the Respondent's limited permit. The Respondent seemed to have spoken well in his defense at the hearing, because the Committee found mitigating factors in the record and limited the penalty to a stayed suspension and three years on probation. The ARB sees no reason on this record to provide the Respondent a further hearing.

The ARB holds that the Petitioner argued correctly that the Committee imposed a suspension and probation in this case against a non-existent license. The Respondent holds no license as a physician assistant in New York. The ARB finds that the Committee intended to place restrictions on any practice by the Respondent for a three-year period to enhance the Respondent's understanding of practice and the business of medicine. The ARB agrees with the Committee's intent and we conclude that, to assure that the Respondent will practice with such restrictions if he ever obtains a license, the ARB must modify the penalty. The ARB amends the Committee's Order to provide that the suspension, stay and probation that the Committee

intended shall commence at such time as the Respondent receives a license to practice as a physician assistant in New York State.

The ARB also agrees with the Petitioner concerning the necessity for modifying certain terms in the probation the Committee imposed, so the ARB substitutes the probation terms that appear as the Appendix to this Determination. At paragraph 4 in the probation terms, the Committee restricted the Respondent to an "institutional setting", but the Committee failed to define or identify what they considered an institutional setting. The ARB limits the Respondent to practice in a facility holding a license under PHL Article 28. Such facilities would include general hospitals, nursing homes and clinics as defined in Article 28. The Committee also provided at paragraph 5 in the probation terms that the Respondent should practice "successfully" in the institutional setting and that if the Respondent failed to practice successfully, he would be suspended. The probation terms contained no definition for "successfully" and contained no detail on who would make the judgment concerning whether the Respondent had practiced successfully. The ARB strikes the provision concerning successful practice from the probation, because any violation by the Respondent against the probation would make the Respondent liable for disciplinary action in a probation violation hearing. Under PHL § 230(19), a BPMC Committee would conduct a probation violation hearing and make the Determination whether a violation occurred. The Committee's probation terms at paragraph 6 contained a requirement on the level of malpractice insurance the Respondent must maintain. The Petitioner argued that such coverage applies for physicians practicing with a monitor and asked the ARB to set that paragraph aside. The ARB agrees that the Committee imposed no monitor over the Respondent and the ARB finds no monitor necessary. As the Petitioner's brief pointed out, a physician assistant must practice under a physician's supervision and the probation

also limits the Respondent to practice in a supervised setting in an Article 28 facility. The ARB concludes that the revised probation terms will guarantee proper oversight over the Respondent's practice during the probation.

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 modifies the Committee's Determination to provide that, as such time as the Respondent obtains a license to practice as a physician assistant in New York State, the Respondent's license shall be suspended for three years, the suspension shall be stayed in full and the Respondent shall practice on probation for three years.
3. The ARB modifies the probation terms that the Committee imposed and the ARB substitutes the terms that appear as the Appendix to this Determination.

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

In the Matter of Alberto Nanez-Hoyos, P.A.

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

Dated: 28 December, 2009

Redacted Signature

Linda Prescott Wilson

In the Matter of Alberto Nanez-Hoyos, P.A.

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

Dated: 10/23, 2009

Redacted Signature

Thea Graves Pellman

In the Matter of Alberto Narez-Hoyos, P.A.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the
Matter of Dr. Narez-Hoyos.

Dated: 12/28/ 2009

Redacted Signature

~~_____~~
Datta G. Wagle, M.D.

In the Matter of Alberto Nanez-Hoyos, P.A.

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

Matter of Dr. Nanez-Hoyos.

Dated December 12, 2009

Redacted Signature

Richard D. Milone, M.D.

In the Matter of Alberto Nanez-Hoyos, P.A.

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

Dated: 12-29-09, 2009

Redacted Signature

John A. D'Anna, M.D.

Appendix
Terms of Probation

1. During the probation period the Respondent may practice only in a facility holding a license under PHL Article 28.
2. The Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct imposed by law and by his profession.
3. The Respondent shall comply with all federal, state and local laws, rules and regulations governing practice as a physician assistant in New York State.
4. The Respondent shall submit written notification to the Board, addressed to the Director, Office of Professional Medical Conduct ("OPMC"), 433 River Street, Suite 303, Troy, New York 12180-2299 regarding any change in employment, practice, address, (residence or professional) telephone numbers, and facility affiliations within or without New York State, within 30 days of such change.
5. The Respondent shall submit written notification to OPMC of any and all investigations, charges, convictions or disciplinary actions taken by any local, state or federal agency, institution or facility, within 30 days of each charge or action.
6. The period of probation shall be tolled during periods in which the Respondent is not engaged in active practice of his profession in New York State. The Respondent shall notify the Director of OPMC in writing, if the Respondent is not currently engaged in or intends to leave the active practice in New York State for a period of thirty (30) consecutive days or more. Respondent shall then notify the Director again prior to any change in that status. The period of

probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon Respondent's return to practice in New York State.

7. The Respondent 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 this Order. The Respondent shall meet with a person designated by the Director of OPMC as requested by the Director.

8. The Director of OPMC may review the Respondent's professional performance. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with the Respondent at his practice locations or OPMC offices.

9. The Respondent shall comply with all terms, conditions, restrictions, and penalties to which he is subject pursuant to the Order of the Board. A violation of any of these terms of probation shall be considered professional misconduct. On receipt of evidence of non-compliance or any other violation of the terms of probation, a violation of probation proceeding and/or such other proceedings as may be warranted, may be initiated against the Respondent pursuant to New York Public Health Law §230(19) or any other applicable laws.