



STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

Richard F. Daines, M.D.
Commissioner

Public

James W. Clyne, Jr.
Executive Deputy Commissioner

November 12, 2010

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Dianne Abeloff, Esq.
NYS Department of Health
90 Church Street – 4th Floor
New York, New York 10007

Anthony Z. Scher, Esq.
Wood & Scher
222 Bloomingdale Road – Suite 311
White Plains, New York 10605

Nancy Joachim, M.D.

REDACTED

RE: In the Matter of Nancy Joachim, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 10-135) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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

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

Nancy Joachim, 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. 10-135

COPY

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

For the Department of Health (Petitioner): Dianne Abeloff, Esq.
For the Respondent: Anthony Z. Scher, Esq.

Following a hearing below, a BPMC Committee determined that the Respondent suffers from a condition that impairs her ability to practice medicine. The Committee suspended the Respondent's license to practice medicine in New York State (License) until the Respondent completes successfully therapy and/or treatment that would enable the Respondent to return to practice safely. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2010), the Respondent asks the ARB to overturn that Determination and the Petitioner asks the ARB to modify the penalty the Committee imposed. After reviewing the record below and the parties' review submissions, the ARB votes to affirm the Committee's Determination that the Respondent suffers a condition that impairs her ability to practice. The ARB affirms the Determination to suspend the Respondent's License during therapy/treatment, but the ARB modifies the terms of the suspension, limits the Respondent's License permanently to practice in a facility and places the Respondent on probation, with the probation to run concurrently with the License limitation.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(8) (McKinney 2010) by practicing medicine while suffering from a psychiatric condition that impairs her ability to practice. The Respondent denied any such impairment and both sides presented witnesses and other evidence. Following the hearing, the Committee rendered the Determination now on review. The Committee sustained the charge.

The Committee found that Otto Kernberg, M.D., a psychiatrist, examined the Respondent on three occasions between January 27 and February 23, 2009. Dr. Kernberg determined that the Respondent displayed symptoms that reflected a psychiatric illness, which Dr. Kernberg diagnosed tentatively as paranoid schizophrenia. Dr. Kernberg also recommended a neurological evaluation to rule out an organic cause. Pursuant to a BPMC Order, the Respondent submitted to an examination by Arnold E. Merriam, M.D. Dr. Merriam determined that the Respondent suffered from a psychiatric condition and that she responded to internal stimuli in a way that impaired her ability to practice medicine safely. Testimony at the hearing established that the Respondent:

- believed she was hearing the voice of God,
- accused colleagues of conspiring against her,
- failed to report suspected child-abuse because she believed God told her to take personal responsibility for the matter, and,
- became sick and unable to care for herself.

The Committee found Dr. Kernberg and Dr. Merriam credible witnesses. The Committee also found credible testimony in the record from three former colleagues of the Respondent: Clarice Kestenbaum, M.D., Adriana Notarfrancesco, M.D. and Douglas Dieterich, M.D. Those three physicians related information about the Respondent acting suspiciously and discussing her hallucinations and about patients raising concerns over the Respondent's actions. The Respondent presented no expert witness, but she testified herself. The Committee found the Respondent rambled and that the Respondent appeared unable to respond directly to questions. The Respondent denied suffering any impairment. The Committee concluded that the

Respondent lacked insight into her psychiatric condition. The Committee noted that the Respondent presented testimony by five non-patients who knew the Respondent. The Committee found that testimony showed infrequent and limited contacts with the Respondent since Autumn 2008 and provided little evidence concerning the Respondent's psychiatric condition and whether the condition impaired the Respondent's ability to practice.

The Committee rejected the Respondent's request that the Committee dismiss the charge because there was no offer into evidence of a definitive diagnosis for the Respondent's condition. The Committee found that the Petitioner's expert witnesses established that the Respondent was psychotic and that she continued to suffer impairment in her ability to practice medicine safely. The Committee also rejected the Respondent's contention that the case against her represents psychiatry's rejection of religion. The Committee found that the expert testimony in the record pointed reasonably to statements and behaviors by the Respondent apart from the Respondent's stated religious experiences that formed the basis for the experts' opinions.

The Committee voted to suspend the Respondent from practice until the Respondent completes successfully a course of psychiatric treatment and the Respondent's treating psychiatrist reports in writing to the Director of the Office for Professional Medical Conduct (Director) that the Respondent has complied with treatment recommendations and that there is no longer any impairment of the Respondent's ability to practice medicine. The provisions on terminating the suspension appear at page 14 in the Committee's Determination and at paragraph 3 in the Committee's Order.

Review History and Issues

The Committee rendered their Determination on July 30, 2010. This proceeding commenced on August 16, 2010, 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 brief. The record closed when the ARB received the briefs on September 13, 2010.

The Respondent argued that the record from the hearing failed to prove that the Respondent suffers from a specific psychiatric condition and that the record contained no credible evidence of impairment. The Respondent argued that Dr. Merriam was unable to testify about a diagnosis for the Respondent's condition and that Dr. Merriam based his conclusions largely on hearsay statements about patient encounters with the Respondent. The Respondent contended that the Committee instead interpreted the Respondent's uplifting religious/spiritual experiences as psychotic and impaired.

The Petitioner argued that the Committee selected a penalty that failed to impose sufficient safeguards and procedures to ensure that the Respondent will be fit to return to practice and failed to provide adequate monitoring for the Respondent's return to practice. The Petitioner argued further that the Committee delegated to the Respondent's treating psychiatrist, a person outside BPMC and the Office for Professional Medical Conduct (OPMC) the authority to determine the Respondent's fitness to return to practice. The Petitioner contended that a BPMC Committee should make such a Determination and the Petitioner asked that the ARB modify the Committee's Determination to create a "Modification Proceeding" under a model that the Petitioner provided as Exhibit B in the Petitioner's brief. The provisions in Exhibit B also mandate that the Respondent practice under probation, following the suspension, under terms the Petitioner included in Exhibit B.

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 suffers a condition that impairs her ability to practice and we affirm the Committee's Determination to suspend the Respondent License until she completes successfully a course of therapy and treatment that will enable the Respondent to return to practice safely. The ARB modifies the Committee's Determination at Paragraph 3 in the Committee's Order concerning the standards for the suspension and we modify the Determination to limit the Respondent's License and to place the Respondent on probation permanently following the suspension.

The evidence before the Committee included the diagnosis by Dr. Kernberg that the Respondent's symptoms reflected psychotic illness and the diagnosis and testimony by Dr. Merriam that the Respondent suffered a condition that impaired her ability to practice. The Committee also heard from the Respondent and found her testimony rambling and at times unresponsive. The Committee also noted that the Respondent presented no expert testimony and that the witnesses, whom the Respondent did present, provided little evidence concerning the Respondent's psychiatric condition and whether the condition impaired the Respondent's ability to practice.

The Respondent challenged the diagnosis by Dr. Merriam because Dr. Merriam relied on hearsay statements from some of the Respondent's patients, which Dr. Kestenbaum and Dr. Notarfrancesco reported. The Committee conclusions at page 9 in their Determination set out the reasons the Committee found those statements credible. The Committee found the patient statements consistent with testimony from the Respondent and found no reasons for the reporting

physicians to fabricate information concerning conversations with the patients. The ARB notes that physicians often rely on reports from other physicians in making diagnoses. The Respondent argued that the Petitioner failed to offer a definitive diagnosis concerning the Respondent's condition into the record. The ARB agrees with the Committee that the testimony by Dr. Merriam establishes that the Respondent was psychotic and that she continues to suffer from a psychiatric condition that impairs her ability to practice. The ARB finds such evidence provides the grounds for disciplinary actions under EL § 6530(8). The Respondent also challenged the Committee's Determination as a rejection of religion. The ARB agrees with the Committee that, although the diagnoses by Dr. Kernberg included mention of religious delusion and auditory hallucinations, the diagnoses also cited hypochondriacal delusions and angry and distrustful mood. Dr. Merriam based his diagnosis on both psychiatric evaluation and neurological testing. The Respondent also testified and the Committee found her rambling and sometimes unresponsive. The Respondent offered no expert testimony from another examining physician to counter Dr. Kernberg or Dr. Merriam.

The evidence the Committee found credible indicated that the Respondent suffers a condition that impairs her ability to practice medicine safely and that the Respondent lacks insight into her condition. The ARB concludes that an appropriate penalty must remove the Respondent from practice to assure protection of the public. The Committee voted to suspend the Respondent from practice pursuant to PHL § 230-a(2)(c) until such time as the Respondent completes a course of treatment or therapy. The Committee provided that the Respondent should receive the therapy from a board-certified psychiatrist, whom the Respondent shall propose and the Director must approve. The ARB defers to the Committee's judgment that the Respondent could return to practice after completing successfully therapy and/or treatment. We note that,

without the provisions for suspension with therapy in §230-a(2)(c), the only alternative in this case would be to revoke the Respondent's License.

In Paragraph 3 in their Order, the Committee provided that the suspension would terminate when the treating psychiatrist reports to the Director that a.) the psychiatrist reviewed the hearing record, 2.) the Respondent complied with treatment recommendations and 3.) the psychiatrist concludes that the Respondent is no longer impaired from practice. The Petitioner sought modifications to Paragraph 3 and argued that the Committee delegated improperly the authority to terminate the suspension outside BPMC and OPMC, without any review by BPMC. The Petitioner's brief proposed that the ARB order a "Modification Proceeding" under procedures that the brief lays out at Exhibit B. The Petitioner also requested that the ARB place the Respondent on probation after the suspension under terms that the Petitioner set out in Exhibit B.

The ARB agrees that BPMC must exercise greater control over the Respondent's treatment and we agree with the necessity for oversight of the Respondent following therapy. We reject the request to order the "Modification Proceeding" because there is no provision in PHL § 230-a for such a proceeding. There was some reference in the Petitioner's Exhibit B to the provisions for a license restoration proceeding under PHL § 230(13)(a), which follows a voluntary and temporary surrender due to incapacity. The ARB finds those provisions inapplicable in this case because there was no voluntary surrender. The Committee found here that the Respondent lacked insight into her condition. The ARB also rejects the request for the "Modification Proceeding" because the provisions in PHL § 230-a provide sufficient authority for BPMC both to provide the conditions for the suspension and to provide oversight following the suspension.

The ARB suspends the Respondent from practice pursuant to PHL § 230-a(2)(c) until such time as the Respondent completes successfully a course for therapy or treatment as prescribed by BPMC. The ARB modifies Paragraph 3 in the Committee's Determination to remove the provision that allows the Respondent to propose the treating psychiatrist. The Director, on behalf of BPMC, shall set the conditions for treatment and name the treating psychiatrist.

Following the Respondent's suspension, the ARB limits the Respondent to practice in a medical facility operated by the government (such as the United States Veteran's Administration or Public Health Service) or licensed by the government (such as under PHL Article 28 or New York Mental Hygiene Law [MHL] Article 31) for the remainder of the Respondent's career and the ARB places the Respondent on probation to run concurrently with the limitation. The ARB or a Committee may restrict a licensee permanently to practice in a facility, Novendstern v. Administrative Review Board for Professional Medical Conduct, 15 A.D.3d 701, 788 N.Y.S.2d 729 (3rd Dept. 2005). Under PHL § 230-a(9), the ARB or a Committee may include probation with the imposition of any other penalty.

The provisions in PHL Article 28 set the licensing requirements for medical facilities such as general hospitals, nursing homes and diagnostic and treatment centers. The ARB has approved a limitation to practice to such a setting in the past for licensee's requiring supervision and oversight. A medical facility holding government licensure must comply with certain standards for supervision and such a facility is subject to government inspections. We have found such settings preferable to a private practice setting that lacks definite lines of supervision and which does not undergo regular inspections. The ARB has also approved limitations to government operated facilities such as hospitals or facilities operated by the United States

Veteran's Administration or Public Health Service or to facilities holding other government licensure, such as psychiatric facilities that hold licensure under MHL Article 31. The ARB finds such oversight appropriate in this case because other physicians practicing with the Respondent in an institutional setting were the first to become aware of and report the Respondent's impairment, at a time when the Respondent denied any impairment. The ARB finds that an institutional setting will help assure that the Respondent continues to practice safely.

The ARB also places the Respondent on probation under such terms as the Director may set pursuant to the Director's authority under PHL § 230(18). That authority includes requiring the licensee to undergo further therapy or treatment under PHL § 230(18)(viii). The ARB leaves the terms to the Director so the Director can respond to future problems or to recommendations from the treating psychiatrist who oversees the treatment/therapy during the suspension.

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 suspend the Respondent's License until the Respondent completes successfully a course of psychiatric treatment.
3. The ARB modifies the provisions at Paragraph 3 in the Committee's Order to authorize the Director to prescribe the treatment/therapy and to select the treating psychiatrist.
4. Following the suspension and treatment, the Respondent shall practice in a supervised setting and on probation under the conditions the ARB set out in our Determination.

Peter S. Koenig, Sr.
Datta G. Wagle, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

In the Matter of Nancy Joachim, M.D.

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

Dated: 7 November, 2010

REDACTED

Linda Prescott Wilson

In the Matter of Nancy Joachim, M.D.

Peter S. Koenig, Sr., an ARB Member concurs in the Determination and Order in the
Matter of Dr. Joachim.

Dated: 11/25, 2010

REDACTED

Peter S. Koenig, Sr.

In the Matter of Nancy Joachim, M.D.

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

Matter of Dr. Joachim.

Dated: 8/11/2010

REDACTED

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

In the Matter of Nancy Joachim, M.D.

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

Matter of Dr. Joachim.

Dated: November 9, 2010

REDACTED

Richard D. Milone, M.D.

In the Matter of Nancy Joachim, M.D.

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

Dated: Nov 8 2010

REDACTED


John A. D'Anna, M.D.