

NEW YORK

state department of

HEALTH

Nirav R. Shah, M.D., M.P.H.
Commissioner

Sue Kelly
Executive Deputy Commissioner

January 6, 2014

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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ESP-Corning Tower-Room 2512
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424 Main Street
Buffalo, New York 14202

Dham Gupta, M.D.

REDACTED

RE: In the Matter of Dham Gupta, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 14-02) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine if **said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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
Riverview Center
150 Broadway – Suite 355
Albany, New York 12204

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
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Dham Gupta, 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)

Corrected Determination and Order No. 14-02

COPY

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

For the Department of Health (Petitioner): Jeffrey Conklin, Esq.
For the Respondent: No Review Submission

After a hearing below, a BPMC Committee determined that the Respondent, a psychiatrist, requested that two patients assist the Respondent in obtaining sex partners. The Committee sustained charges that the Respondent committed professional misconduct and the Committee voted to suspend the Respondent's license to practice medicine in New York State (License) and to place the Respondent on probation. In the review proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2013), the Petitioner then requested that the ARB overturn the Committee and revoke the Respondent's License. The Respondent filed no reply to the Petitioner's request. After considering the record below and the Petitioner's review brief, the ARB affirmed the Committee's Determination that the Respondent committed professional misconduct but the ARB overturned the penalty that the Committee imposed. The ARB voted 5-0 to revoke the Respondent's License. The ARB then learned that the initial Determination contained a drafting error and the ARB conducted additional deliberations to assure that the ARB acted correctly in sustaining the misconduct finding and revoking the Respondent's License. The ARB amends one sentence in our prior Determination and we sustain our Determination to find misconduct and to revoke the Respondent's License.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(3-6), 6530(20) & 6530(32) (McKinney Supp. 2013) by committing professional misconduct under the following specifications:

- 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, and,
- failing to maintain accurate patient records.

The charges involved the Respondent's care for and/or contact with five persons (Patients A-E). The record refers to the Patients by letter to protect patient privacy. Following the hearing, the Committee rendered the Determination now under review.

The Committee dismissed all charges relating to Patient C-E and all charges alleging incompetence on more than one occasion or gross incompetence. There was no request for review from either party on the Committee's Determination concerning Patients C-E or concerning the incompetence charges.

The Committee sustained charges that the Respondent's contact with and/or care for Patients A and B amounted to practicing medicine with negligence on more than one occasion and gross negligence, engaging in conduct that evidences moral unfitness and failing to maintain accurate patient records.

The Respondent diagnosed Patient A with delusional disorder personality type, polysubstance abuse in remission, paranoid personality disorder, left eye blindness, diabetes, hypertension and arthritis. The Respondent described presenting problems in Patient B as depression, anxiety, chemical dependency and feeling hopeless, helpless and suicidal. The Committee found that the Respondent requested assistance from both Patients A and B in recruiting a white girl to have sex with the Respondent. In both cases, the Respondent called the Patients to follow up on his request. The Committee found that the Respondent failed to

document the conversations with Patients A and B. The Committee also found that the standard of care for treating Patients A and B required psychotherapy, medical management and maintaining appropriate boundaries to avoid contaminating the doctor-patient relationship with outside influences, which could undermine patient treatment.

In making their findings, the Committee found that Patients A and B made credible accusations concerning the Respondent's conduct. The Respondent testified at the hearing and admitted to asking Patients A and B for assistance in obtaining sex partners, but the Respondent claimed he made the requests in jest. The Committee found the Respondent evasive on cross-examination and the Committee found the Respondent had a clear interest in the result of the hearing. The Committee found the Respondent untrustworthy as a witness due to the evasiveness and the interest and the Committee rejected the Respondent's testimony that he made the request for assistance only in jest. The Committee also found the Department's expert witness, Harvey Berman, M.D., to be credible in his testimony concerning inappropriate behavior toward patients and general record keeping requirements. The Respondent presented no testimony other than his own.

The Committee concluded that the Respondent's conduct demonstrated an egregious deviation from the standard of care or gross negligence in practice. The Committee also concluded that the Respondent used his position of trust to coax vulnerable persons into helping the Respondent find sex partners. The Committee found that such conduct evidenced moral unfitness in practice. The Committee rejected the charges alleging incompetence because the Committee found that the Respondent's conduct did not result from a lack of knowledge about what conduct was proper.

The Committee voted to suspend the Respondent's License for one year and to place the Respondent on probation for five years following the suspension, under the terms that appear at the Appendix to the Committee's Determination. The terms included continuing medical education. The Committee also ruled that the Respondent would be unable to return to practice at the end of the suspension until the Respondent: a.) underwent a psychiatric evaluation by a psychiatrist acceptable to the Director of the Office for Professional Medical Conduct (OPMC)

and, b.) demonstrated compliance with all treatment recommendations before resuming practice.

The Committee rejected revocation as a penalty and noted that they concluded that the Respondent was suffering from some underlying pathology that resulted in the aberrant behavior.

Review History and Issues

The Committee rendered their Determination on June 28, 2013. This proceeding commenced on July 12, 2013, 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 August 9, 2013. The Respondent made no review submission.

The Petitioner's brief argued that the penalty the Committee imposed failed to protect the public. The Petitioner argued further that the Respondent failed to show remorse or present evidence in mitigation. The Petitioner also noted that the Committee rejected the Respondent's testimony that he had requested the assistance from the Patients only in jest.

The ARB rendered the initial Determination on October 16, 2013. The Committee's Administrative Officer, Administrative Law Judge Larry Storch, noted an error in the initial ARB Determination and Judge Storch called the error to the attention of the Administrative Officer for the ARB. Upon learning of the error, ARB decided to conduct additional deliberations in the case to assure that the error had no improper impact on the ARB's Determination.

The error appeared in the first sentence in the first full paragraph on page 3 of the initial Determination. That sentence stated that the Hearing Committee found that Patients A and B testified credibly. That statement constituted an error because neither Patient testified at hearing. Each Patient did make an accusation about the Respondent's conduct and the Committee found

the accusations credible, because the Respondent admitted that he requested the Patients' assistance. This corrected Determination has removed the erroneous language about the Patients testifying and substituted a sentence stating that the Committee found the Patients' accusations credible.

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 considered the record and the Petitioner's brief in both our initial and subsequent deliberations. The ARB affirmed the Committee's Determination that the Respondent committed professional misconduct by engaging two vulnerable psychiatric patients to assist the Respondent in recruiting a female for sex. The ARB voted 5-0 to overturn the penalty the Committee imposed and to revoke the Respondent's License.

The ARB concluded that the Committee selected a penalty inconsistent with the Committee's findings and conclusions. The probation terms included a requirement that the Respondent complete a continuing medical education course on ethics. The ARB noted that continuing education can provide an appropriate sanction to address a finding of incompetence (a lack of knowledge or skills necessary to practice medicine safely). In this case, however, the Committee dismissed incompetence charges and found that the Respondent's conduct did not result from a lack of knowledge of what was proper. The Committee also rejected revocation as a

penalty, despite finding the Respondent untrustworthy as a witness, finding that the Respondent demonstrated egregious deviation from the standard of care, finding that the Respondent breached the trust that society places in physicians and finding that the Respondent callously manipulated extremely vulnerable patients for the Respondent's benefit and the patients' detriment.

The ARB also found the penalty the Committee approved inappropriate and outside the list of sanctions available to the Committee under PHL §230-a. The Committee's main ground for rejecting revocation as a penalty seemed to stem from the Committee's conclusion that the Respondent suffers from some underlying pathology that caused the aberrant behavior. The Committee voted to require that the Respondent undergo a thorough psychiatric evaluation and comply with all treatment recommendations. The Committee failed to cite to any evidence from the record that supported their conclusion about underlying pathology. The Respondent did not raise illness as a defense and the Petitioner made no allegation that the Respondent suffered from any illness that impaired the Respondent's ability to practice. The Committee also failed to cite the legal authority for ordering an evaluation and compliance with treatment. Under PHL § 230-a(2)(a), a Committee may suspend a licensee from practice until the licensee completes a course of treatment prescribed by BPMC. In this case, the Committee prescribed no treatment, but instead delegated that authority to whatever physician would perform the evaluation. Under PHL § 230(7)(a), a BPMC Committee may order a licensee to undergo a psychiatric examination, if the Committee has reason to believe a licensee may be impaired by mental disability. The Committee may only make such an order, however, on notice to the licensee and OPMC and after offering those parties an opportunity to be heard. The results of any examination would then go to the Committee, the licensee and OPMC and the licensee would have the opportunity to find

another physician to perform an examination, the results of which would also go to the Committee. This Committee's order on the examination failed to provide notice to the parties, failed to provide for the Committee to receive the ordered evaluation and failed to provide the Respondent the opportunity to submit a separate evaluation.

For the reasons stated above, the ARB found that grounds existed to overturn the Committee and to substitute the ARB's judgment in determining a penalty. The ARB concluded that the evidence before the Committee demonstrated the Respondent's unfitness to practice medicine in New York State. No sanction which the Committee imposed could correct moral unfitness. The Respondent manipulated fragile, damaged patients and betrayed the trust that society places in the medical profession. The Respondent displayed no realization about the seriousness of his misconduct, showed no remorse and provided no evidence in mitigation. The ARB concluded that the Respondent remained at risk to repeat his misconduct as long as the Respondent retained his License. The ARB voted to revoke the Respondent's License.

After conducting additional deliberations in the matter to correct the error in the initial Determination, the ARB affirms our prior Determination to find that the Respondent engaged in professional misconduct and to revoke the Respondent's License.

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 overturns the Committee's Determination to suspend the Respondent's License for one year, to order a psychiatric evaluation and to place the Respondent on probation for five years following the probation.
3. The ARB revokes the Respondent's License.

Peter S. Koenig, Sr.
Steven Grabiec, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

To:

Jeffrey Conklin, Esq.
NYS Dept. of Health
Rm. 2512 Corning Tower - ESP
Albany, NY 12237

Dham Gupta, M.D.
REDACTED

Mark R. Affronti, Esq.
Roach, Brown, McCarthy & Gruber, P.C.
424 Main Street
Buffalo, NY 14202

In the Matter of Dham Gupta, M.D.

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

Dated: _November 27, 2013

REDACTED


Peter S. Koenig, Sr.

In the Matter of Dham Gupta, M.D.

Steven Grabiec, M.D., an ARB Member, concurs in the Determination and Order in the Matter of Dr. Gupta.

Dated: 27 Nov., 2013

REDACTED


Steven Grabiec, M.D.

In the Matter of Dham Gupta, M.D.

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

Matter of Dr. Gupta.

Date: December 27, 2013

REDACTED

Richard D. Milone, M.D.

In the Matter of Dham Gupta, M.D.

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

Dated: Nov, 27, 2013

REDACTED

John A. D'Anna, M.D.

In the Matter of Dham Gupta, M.D.

Linda Prescott Wilson, an ARB Member, concurs in the Determination and Order in the
Matter of Dr. Gupta
Dated: 3/10/13, 2013

REDACTED

Linda Prescott Wilson