

NEW YORK
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HEALTH

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

Sue Kelly
Executive Deputy Commissioner

January 16, 2014

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Joel E. Ablove, Esq.
NYS Department of Health
Corning Tower Room 2512
Empire State Plaza
Albany, New York 12237

John M. Purcell, Jr., M.D.
REDACTED

Graig F. Zappia, Esq.
Tully Rinckey, PLLC
441 New Karner Road
Albany, New York 12205

RE: In the Matter of John M. Purcell, Jr., M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 14-16) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine if **said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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

John M. Purcell, 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. 14-16

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): Joel E. Abelove, Esq.
For the Respondent: Graig F. Zappia, Esq.

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct by engaging in conduct that resulted in the Respondent's criminal conviction under New York Law. The Committee voted to censure and reprimand the Respondent and the Committee directed the Respondent to continue and complete successfully an individual recovery program agreement that the Respondent entered voluntarily. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2013), the Petitioner asks the ARB to nullify the Committee's direction concerning the recovery agreement because there is no authorization for such direction under the list of sanctions for misconduct that appear at PHL § 230-a. The Petitioner asks that the ARB place the Respondent on probation for two years and the Respondent asks that the ARB affirm the Committee's Determination in full. After considering the record below and the parties review submissions, the ARB overturns the Committee and we place the Respondent on probation for two years, under the condition that we specify in this Determination.

Committee Determination on the Charges

Pursuant to PHL § 230 *et seq.*, BPMC and its Committees function as a duly authorized professional disciplinary agency of the State of New York. The BPMC Committee in this case conducted a hearing 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)(a)(i)(McKinney Supp. 2013) by engaging in acts that resulted in the Respondent's criminal conviction under New York State Law. 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 before the Committee showed that the Respondent entered a guilty plea in Justice Court in the Town of Colonie, New York on August 2, 2010 to Driving While Intoxicated (DWI), Aggravated DWI, DWI with a blood alcohol content (BAC) exceeding .08 of 1%, Failure to Keep Right and a Traffic Device Violation under New York Vehicle and Traffic Law (VTL) §§ 1192.2, 1192.3, 1192.2-AA, 1120 & 1111. The three convictions under VTL § 1192 constituted Class U misdemeanors. In sentencing the Respondent on May 10, 2011, the Court revoked the Respondent's driver's license for six months and ordered the Respondent to pay a \$2,700.00 fine and \$1,370.00 in surcharges.

The Committee found that, following the conviction, the Respondent entered into a voluntary five year contract with the Committee for Physician Health (CPH), a Division of the Medical Society of the State of New York. The CPH established an individual recovery program for the Respondent that included treatment, therapy, mutual self-help and a variety of monitoring activities, including random-observed urine assays. In a July 22, 2013 letter, CPH indicated that

the Respondent was a participant and in full compliance with all conditions for participation in CPH [Respondent's Hearing Exhibit D].

The Committee concluded that the Respondent should receive a censure and reprimand, in full satisfaction of the charges. The Committee considered that the conviction was the Respondent's first offense, although a serious offense. The Committee noted that the Respondent acknowledged his responsibility for his actions and the risk of harm he presented to others and the Committee gave great weight to the Respondent's voluntary entrance into the CPH contract and the Respondent's compliance with the participation terms. The Committee rejected a request by the Petitioner that the Committee impose a fine on the Respondent and that the Committee place the Respondent on probation with monitoring for five years. The Committee found the fine inappropriate because the Respondent's offense involved no unjust enrichment. The Committee rejected the probation on the grounds that the Respondent had already "substantially" completed the five year CPH contract. The Committee found additional monitoring unnecessary and voted to require that the Respondent complete the CPH contract successfully.

Review History and Issues

The Committee rendered their Determination on August 20, 2013. This proceeding commenced on September 5, 2013, 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 September 16, 2013.

The Petitioner argued that the Committee imposed a penalty without authorization under PHL § 230-a by requiring the Respondent to fulfill the remainder of his CPH contract. The

Petitioner contended that the only way to require the Respondent to complete the contract legally would be to make the requirement a condition of probation under PHL § 230-a(9). The Petitioner asked that the ARB place the Respondent on probation for two years and require the Respondent to complete the CPH contract successfully as a condition of probation.

The Respondent requests that the ARB affirm the penalty the Committee imposed. The Respondent argues that the New York Court of Appeals has held that a BPMC Committee is not limited strictly by the penalty provisions in PHL § 230-a, Matter of Caselnova v. New York State Department of Health, 91 N.Y.2d 441 (1998). The Respondent notes that PHL provisions other than 230-a provide options for actions such as orders for: medical or psychiatric examinations [PHL § 230(7)], discontinuing dangerous practices [PHL § 230(12)(a)], suspension following a felony [PHL § 230(12)(b)] and physician monitoring [PHL § 230(17)]. The Respondent contends that the Petitioner's request for probation would create a duplicitous sanction considering the Respondent's voluntary contract with CPH.

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. We affirm the Committee's Determination that the conduct that resulted in the Respondent's criminal conviction amounted to professional misconduct under EL § 6530(9)(a)(i). Neither party challenged the Committee's Determination on the charges. We overturn the penalty the Committee imposed because we find

the provision concerning compliance with the CPH contract unenforceable. We place the Respondent on probation for two years and as the sole probation term, we order that the Respondent enter into an individual recovery program that will include treatment, therapy, mutual self-help and monitoring activities, including random, observed urine screens. The Respondent shall choose the program, subject to the approval by the Director of the Office for Professional Medical Conduct (OPMC). We stay the probation for so long as the Respondent remains compliant with the participation conditions under the CPH contract. In the event that CPH advises OPMC that the Respondent has completed the contract successfully, then the probation is stayed in full.

The ARB agrees with the Petitioner that the requirement under the Committee's sanction is unenforceable, because the Committee was directing the Respondent to comply with a voluntary agreement and because there was no penalty in the event that the Respondent chose to abandon the CPH contract. Under the penalty we impose, the Respondent would still face probation if the Respondent were to abandon the CPH contract, so there is the assurance that the Respondent will remain subject to testing and treatment. The ARB concludes that there must be a sanction for the failure to complete treatment due to the serious nature of the Respondent's offense and the danger to the public if the Respondent repeats his misconduct. The Respondent's offense involved aggravated DWI with a BAC that exceeded .18. Further, the Respondent indicated in the testimony before the Committee that he had left a friend's house after drinking to return to a bar to retrieve his wallet. The Respondent indicated that he had driven about twenty miles from the friend's home at the point that the police stopped the Respondent [Hearing Transcript page 21]. The Respondent also indicated that he keeps beer in his house for friends, despite being in recovery [Hearing Transcript 29].

The record indicates that the Respondent has complied with the CPH contract since he entered the contract voluntarily. The ARB agrees with the Committee that in a situation in which a licensee needs treatment and recovery and the licensee is participating successfully already in a treatment and recovery program, a Committee and the ARB should do everything possible to assure that the licensee remains in that program. The Respondent testified that he provides care at the Veteran's Administration Hospital (VA) in Albany and he would like to continue to do so, but he worries that he could lose his position at the VA if he must participate in a mandatory treatment program [Hearing Transcript page 13]. The ARB finds that the penalty we have imposed leaves the Respondent in a voluntary program, so long as the Respondent complies with the CPH contract.

The ARB saw no alternative to using probation as the means to assure that the Respondent will continue to comply with the CPH contract. The Respondent's reply brief stated that the New York Court of Appeals decision in Matter of Caselnova v. New York State Department of Health, (supra) recognized that BPMC Committees have wide discretion in determining penalties beyond the provisions in PHL § 230-a and the Respondent argued that four PHL provisions, §§ 230(7), 230(12)(a), 230(12)(b) and 230(17), provided examples of options that Committees could exercise in addition to imposing sanctions under § 230-a. The ARB disagrees that the four provisions that the Respondent mentioned would provide options for the Committee or the ARB in this case. The provisions at PHL § 230(7) involve orders for medical examinations or evaluations for persons who may be impaired from practicing safely due to mental illness, substance abuse, alcoholism or incompetence. Neither party introduced evidence in this case to show the Respondent may be impaired in practice. The provisions at PHL §§ 230(12)(a) and 230(12)(b) provide grounds for summary suspension of a license, but only the

Commissioner of Health may issue the summary orders. Finally, the provision at PHL § 230(17) applies to practice monitoring that the OPMC Director may impose and § 230(17)(a) limits the monitoring to those cases in which there is insufficient evidence that the matter would constitute misconduct under one of the subsections of EL § 6530. In this case, the Committee found that the Respondent's conduct constituted a violation under EL § 6530(9)(a)(i). The ARB also notes that in Caselnova, the Court of Appeals reviewed what conditions BPMC may impose on a physician placed on probation for misconduct. The Court ruled that BPMC may place a physician on probation with another physician as a monitor and may place conditions on the monitoring arrangement beyond the specific penalties that appear in PHL § 230-a.

In this case, the ARB concludes that we have imposed an enforceable penalty that will also provide the Respondent an opportunity to continue in and complete the voluntary contract with CPH that has aided and monitored the Respondent's recovery to this point.

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 censure and reprimand the Respondent.
3. The ARB places the Respondent on probation for two years under the condition that we specified in this Determination.

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

To: Joel Abeloff, Esq.
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John M. Purcell, M.D.
REDACTED

In the Matter of John M. Purcell, M.D.

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

Dated: 11 Dec. 2013

REDACTED


Linda Prescott Wilson

In the Matter of John M. Purcell, M.D.

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

Dated: December 11, 2013

REDACTED

Peter S. Koenig, Sr.

In the Matter of John M. Purcell, M.D.

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

Dated: 12/11, 2013

~~REDACTED~~

Steven Grabiec, M.D.

In the Matter of John M. Purcell, M.D.

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

Matter of Dr. Purcell.

Dated December 12, 2013

REDACTED

~~Richard D. Milone, M.D.~~

In the Matter of John M. Purcell, M.D.

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

Dated: 1-15-14, 2013

REDACTED

John A. D'Anna, M.D.