



ANDREW M. CUOMO
Governor

Department
of Health

Public

HOWARD A. ZUCKER, M.D., J.D.
Acting Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

April 21, 2015

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Frank M. Lobacz, D.O. #720068-053
FCI Butner Low Federal Correctional Institution
P.O. Box 999
Butner, North Carolina 27509

John F. Kaley, Esq.
Doar, Rieck, Kaley & Mack
Astor Building
217 Broadway
New York, New York 10007

Nathaniel White, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2512
Albany, New York 12237

RE: In the Matter of Frank M. Lobacz, D.O.

Dear Parties:

Enclosed please find the Determination and Order (No. 15-094) 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.

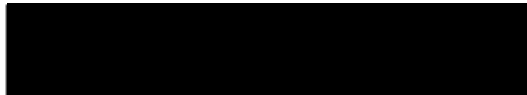
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate. Delivery shall be by either **certified 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,



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

Frank M. Lobacz, D.O. (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. 15-094

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): Nathaniel White, Esq.
For the Respondent: John F. Kaley, Esq.

In this proceeding pursuant to New York Public Health Law (PHL) § 230-c
(4)(a)(McKinney 2015), the ARB considers whether to take disciplinary action against the
Respondent's license to practice medicine in New York State (License) following the
Respondent's Federal felony conviction for conspiracy to commit health care fraud. Following a
hearing below, a BPMC Committee voted to revoke the Respondent's License. In this
proceeding, pursuant to PHL § 230-c, the Respondent asks the ARB to modify the sanction the
Committee imposed. After reviewing the hearing record and the parties' review submissions, the
ARB votes 5-0 to affirm the Committee's Determination to revoke the Respondent's License.

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'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 2015) by engaging in conduct that resulted in a conviction under Federal Law. The action against the Respondent began with an order from the Executive Deputy Commissioner of Health suspending the Respondent's License summarily (Summary Suspension) pursuant to PHL § 230(12)(b). The Summary Suspension became effective December 27, 2013. 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, 89 N.Y.2d 250 (1996). Following the Direct Referral Hearing, the Committee rendered the Determination now on review.

The evidence before the Committee indicated that the Respondent was found guilty in United States District Court for the Eastern District of New York for:

- Conspiracy to Commit Health Care Fraud, a violation under Title 18 United States Code §§ 1347 and 1349;
- Health Care Fraud, a violation under Title 18 United States Code § 1347;
- Filing a False Annual Report of an Employee Benefit Plan, a violation under Title 26 United States Code § 7206(1); and,
- Income Tax Evasion, three counts, violations under Title 26 United States Code § 7201.

All the charges were felonies. The Court sentenced the Respondent to sixty-five months imprisonment and three years of supervised release. The Court also ordered the Respondent to pay \$3,613,935.03 in restitution, \$17,500.00 in fines and a \$600.00 assessment.

The Committee determined that the Respondent committed professional misconduct under EL §6530(9)(a)(ii) by engaging in the conduct that resulted in the Respondent's Federal

criminal conviction. The Committee voted to revoke the Respondent's License. The Respondent argued his innocence at the hearing and indicated that he expected to prevail on his still pending Federal appeal. The Committee found that the Respondent's Federal conviction was still in effect and that the conviction provided the grounds to revoke the Respondent's License. The Committee informed the Respondent at the hearing that, if an appeal overturned the Respondent's conviction, the Committee's decision would be annulled.

Review History and Issues

The Committee rendered their Determination on January 26, 2015. This proceeding commenced on February 3, 2015, when the ARB received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's reply brief. The record closed when the ARB received the reply brief on March 11, 2015.

The Respondent argued that there was no need to revoke the Respondent's License because the Respondent is currently incarcerated and unable to practice medicine. The Respondent's brief proposed that the ARB continue in place the Summary Suspension against the Respondent's License and stay this proceeding pending a determination on the Federal appeal.

The Petitioner replied that the Respondent's criminal conviction demonstrates that the Respondent used his License to defraud public and private insurance companies. The Petitioner argued that fraud in medical practice provides the grounds for revocation.

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 and we agree with the Committee's reasoning. The Respondent stands convicted for using his License to commit large scale fraud. Such conduct provides the grounds to revoke the Respondent's License. If an appeals court invalidates all the Respondent's convictions, the basis for revocation would no longer exist and the Respondent could regain his License. If an appeals court upholds the convictions, then BPMC has acted appropriately and no further proceedings will be necessary.

The Respondent had requested that the ARB continue in effect the Summary Suspension. The ARB lacks any authority to act in that manner. Under PHL sec 230(12)(b), a Summary Suspension ends when a Committee renders a final determination in a case. At that point, if a Committee has sustained charges, the Committee may impose one of the penalties available under PHL § 230-a. Nothing in PHL § 230-a permits a Committee or the ARB to impose a new Summary Suspension and to stay an action. Under PHL § 230-a, a Committee does have the authority to revoke a medical license and the ARB noted above that the Committee in this case acted appropriately in revoking 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 affirms the Committee's Determination to revoke 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.

In the Matter of Frank Lobacz, D.O.

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

Dated: 20 April, 2015



Linda Prescott Wilson

In the Matter of Frank Lobacz, D.O.

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

Dated: April 17, 2015

A large black rectangular redaction box covers the signature of Peter S. Koenig, Sr. The box is positioned above a horizontal line that serves as a separator between the signature and the name.

Peter S. Koenig, Sr.

In the Matter of Frank Lobacz, D.O.

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

Dated: 9/17 / 2015




Steven Grabiec, M.D.

In the Matter of Frank Lobacz, D.O.

Richard D. Milone, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Lobacz.

Dated: April 16, 2015



Richard D. Milone, M.D.

In the Matter of Frank Lobacz, D.O.

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

Dated: April 12, 2015



John A. D'Anna, M.D.