



Department of Health

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June 16, 2015

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Daniel F. Jung, D.O.



Thomas M. Gallo, PA, JD
865 Merrick Avenue – Suite 200 South
Westbury, New York 11590

Daniel F. Jung, D.O.



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

RE: In the Matter of Daniel F. Jung, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 15-150) 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.

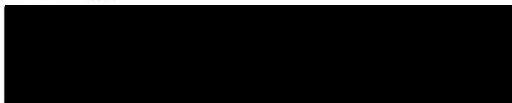
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if **said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate. Delivery shall be by either **certified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

Daniel F. Jung, 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. 15- 150

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): Paul Tsui, Esq.
For the Respondent: Thomas M. Gallo, Esq

The Respondent holds a medical license in Kentucky, in addition to his license to practice medicine in New York (License). Following a hearing below, a BPMC Committee found that the Respondent committed professional misconduct, due to the Respondent's criminal conviction and medical license suspension in Kentucky. The Committee voted to suspend the Respondent's License, stay the suspension and place the Respondent on probation for five years under the terms that the Committee specified in their Determination. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2015), the Petitioner asks the ARB to modify that Determination by suspending the Respondent's License for at least twelve months and by adding extensive additional probation terms. After considering the record below and the parties' review submissions, the ARB affirms the Committee Determination to suspend the Respondent's License and stay the suspension in full. We modify the probation terms to add two additional paragraphs.

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 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 criminal conviction in another state. The Statement of Charges alleged further that the Respondent committed professional misconduct under EL §6530(9)(d) by engaging in conduct that resulted in disciplinary action by another state, Kentucky, and that would have amounted to misconduct if committed in New York. The Petitioner charged that the Respondent's conduct in Kentucky would have constituted a violation under EL § 6530(8), for being a habitual abuser of alcohol or being a habitual user of drugs or having a psychiatric condition that impairs medical practice.

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 showed that the Respondent was arrested in January 2013 in Kentucky for Driving Under the Influence of Alcohol or Drugs and Failure to Notify the Department of Transportation concerning an address change. The Respondent entered a guilty plea to the reduced charge of Wanton Endangerment in the Second Degree and received a sentence of 30 days incarceration, two years supervision and was ordered to pay a \$709.00 fine. The Respondent entered the Metro Atlantic Recovery Residences (MARR) in March 2013 and

was diagnosed with Alcohol Dependence, Inhalant Abuse and Polysubstance Abuse. The Commonwealth of Kentucky, Board of Medical Licensure (Kentucky Board) issued an Emergency Order of Suspension, suspending the Respondent's Kentucky license to practice osteopathy in June 2013. The Kentucky Board issued an Agreed Order of Surrender in September 2013.

The Committee determined that the Respondent's conduct, if committed in New York, would have amounted to:

- being a habitual user of alcohol, or being dependent on or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects, a violation under EL § 6530(8); and,
- being convicted of committing an act constituting a crime under a law of another jurisdiction, which if committed in New York, would constitute a crime under New York Law, a violation under § 6530(9)(a)(iii).

The Committee concluded that the criminal conviction and the Kentucky Board action made the Respondent liable for disciplinary action against the Respondents' license under EL §§ 6530(9)(a)(iii) & 6530(9)(d).

The Committee wrote that the undisputed evidence established the Respondent's history of substance abuse, which the Respondent acknowledged at the hearing. The Respondent also testified that he has been sober for 18 months. The Committee found the Respondent's candor impressive and found that the Respondent was taking his recovery seriously. The Committee also found that the Respondent corroborated his hearing testimony with documentation from his treatment program at Willingway Hospital in Kentucky and a letter from the Director of the Kentucky Physician's Health Foundation. The Committee, however, found the Respondent's

sobriety span still brief. The Committee voted to suspend the Respondent's License, to stay the suspension and to place the Respondent on probation for five years under the terms that appear as Appendix 2 to the Committee's Determination.

Review History and Issues

The Committee rendered their Determination on February 5, 2015. This proceeding commenced on February 18, 2015, 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 March 30, 2015.

The Petitioner contended that, given the Respondent's admitted history of substance abuse, a five-year stayed suspension with general probation terms is an insufficient penalty to ensure that the Respondent completes treatment and continues under supervision. The Petitioner's Brief notes that nothing in the Committee's Order would require the Respondent to contact the New York Committee for Physician's Health (CPH) should the Respondent return to New York to practice. The Petitioner asked that the ARB modify the Committee's Determination to impose an indefinite suspension of no less than twelve months and to modify the terms of probation to include requirements that appear in a seven-page addendum to the Petitioner's Brief.

The Respondent replied that he accepted the Committee's Determination and Order, but requested that he be allowed to continue practice without any additional and redundant restrictions. The Respondent indicated that he will continue with counselling and support for the rest of his life and that he is considering a new job in Addiction Medicine. The Respondent

assured the ARB that he never harmed a patient and he noted that the Kentucky Board has now reinstated the Respondent's Kentucky License.

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 Respondent committed professional misconduct. Neither party challenged the Committee's Determination on the charges. The ARB affirms the Committee's Determination to suspend the Respondent's License, stay the suspension and place the Respondent on probation for five years, if the Respondent returns to practice in New York. We reject the request that we impose an actual suspension of the Respondent's License for at least twelve months. The ARB sees nothing in this record to warrant an actual suspension. The ARB also rejects the request that we modify the probation terms to include the extensive terms that appear as the addendum to the Petitioner's brief. We modify the probation terms that appear under Appendix 2 to the Committee's Determination, to add two requirements.

We agree with the Petitioner that nothing in the Committee's Determination requires the Respondent to enroll in CPH, if the Respondent returns to practice in New York. We add an additional term to the Probation to read as follows:

"The Respondent shall enroll in the Committee for Physicians' Health (CPH) and engage in a contract with CPH that fully describes the terms, conditions and duration of a recovery program. The Licensee will comply with that contract and shall provide CPH with a written authorization to provide the Director of OPMC with any and all information and documentation that OPMC requests to determine whether the Respondent remains in compliance with the contract, including full access to the records that CPH maintains with respect to the Respondent. The Respondent shall also cause CPH to report to OPMC promptly if the Respondent refuses to comply with the contract, if the Respondent refuses to submit to treatment or if the Respondent's impairment is not substantially alleviated by treatment. The Respondent shall cause CPH to report to OPMC immediately if CPH regards the Respondent at any time to be an imminent danger to the public."

This requirement will become Paragraph 8 in the terms of probation.

Further, the ARB notes our concern over the amount of time the Respondent spent away from practice due to suspension in Kentucky. The Committee's Determination indicated that the Respondent's specialty was in vascular surgery. The Respondent's Reply indicated that the Respondent was considering taking a job in Addiction Medicine. The ARB adds an additional requirement as Paragraph 9 in the terms of probation, to read:

"Should the Respondent return to New York to practice vascular surgery, the Respondent shall be responsible to cause the hospital, at which the Respondent will practice vascular surgery, to advise OPMC in writing that the hospital has determined that the Respondent remains competent to practice vascular surgery."

The ARB will impose no additional requirements if the Respondent will be practicing Addiction Medicine, should the Respondent choose to return to practice in New York.

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, to stay the suspension in full and to place the Respondent on probation for five years, under the terms that appear as Appendix 2 to the Committee's Determination.
3. The ARB modifies the terms as we discussed in the Determination.

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 Daniel F. Jung, D.O.

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

Dated: June 11, 2015

A solid black rectangular box redacting the signature of Peter S. Koenig, Sr.

Peter S. Koenig, Sr.

In the Matter of Daniel F. Jung, D.O.

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

Dated: 6/15/ 2015



Steven Grabiec, M.D.

In the Matter of Daniel F. Jung, D.O.

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

the Matter of Dr. Jung.

Dated June 15, 2015



Richard D. Milone, M.D.

In the Matter of Daniel F. Jung, D.O.

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

Dated: 15 June, 2015




Linda Prescott Wilson

In the Matter of Daniel F. Jung, D.O.

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

Dated: June 10, 2015


John A. D'Anna, M.D.