



Department of Health

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

November 19, 2015

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Anna Lewis, Esq.
NYS Department of Health
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1551 Kellum Place
Mineola, New York 11501

Joseph Bargellini, M.D.


RE: In the Matter of Joseph Bargellini, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 15-278) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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,

A solid black rectangular box redacting the signature of James F. Horan.

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

COPY

In the Matter of

Joseph Bargellini, 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. 15-278

Before ARB Members D'Anna, Koenig, Wilson and Milone¹
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Anna R. Lewis, Esq.
For the Respondent: Timothy Kilgannon, Esq.

After a prior disciplinary proceeding, a BPMC Committee (Bargellini I Committee) found that the Respondent committed professional misconduct and the Committee voted to suspend the Respondent's license to practice medicine in New York State (License), to stay the suspension and to place the Respondent on probation for three years. In the current proceeding, another BPMC Committee (Probation Committee) sustained charges that the Respondent violated the Bargellini I probation and voted to limit the Respondent's License permanently, suspend the License until the Respondent satisfied certain conditions and then to place the Respondent on probation. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2015), both parties seek review and modification of the Probation Committee's Determination. After considering the record and the parties' review submissions, the ARB votes 4-0 to affirm the Determination that the Respondent violated probation. We vote 4-0 to overturn the penalty the Committee imposed and 4-0 to revoke the Respondent's License.

¹ Steven Grabiec, M.D. was unable to participate in the deliberations. The ARB proceeded to review the record with a four-member quorum, see Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

Bargellini I Proceeding

The Petitioner charged originally that the Respondent violated New York Education Law (EL) §§ 6530(2), 6530(14), 6530(20-21) & 6530(31-32) (McKinney Supp. 2013) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- violating the provisions in PHL § 2805-k that require physicians to verify prior employment history in seeking employment or privileges at a hospital,
- engaging in conduct that evidences moral unfitness,
- willfully filing a false report,
- willfully harassing, abusing or intimidating a patient, and,
- failing to maintain accurate patient records.

The charges against the Respondent arose from the Respondent's treatment for one person, Patient A, the medical record for Patient A, the Respondent's statements to a co-employee, LC, and the Respondent's application for privileges at Queens Hospital Center (Application). The abuse and records charges related to Patient A. The fraud, false report and 2805-k charges related to the Application. The moral unfitness charges related to incidents with Patient A, LC and to the Application.

The Committee found that the Respondent worked at the Pederson-Krag Center (PKC), an out-patient mental health facility in Huntington, New York, from February to August 2008. The Respondent saw Patient A, a female, on July 17 and August 7, 2008. The Committee concluded that, in the course of psychiatric and medication evaluations, the Respondent asked Patient A inappropriate questions of a sexual nature and made inappropriate comments of a sexual nature, for other than a legitimate medical reason. At the July 17th evaluation, the Respondent asked the Patient whether she experienced any problems taking the medication, Paxil, and noted that men can have a problem with the drug. The Patient responded that she had no problem with her sex life, but the Respondent continued to ask the Patient questions, including a question about how long it took the Patient to have an orgasm. During an evaluation on August 7th, the Respondent repeated questions about the medication and the Patient's sex life.

The Patient found the questioning inappropriate, intimidating and very uncomfortable.

The Committee sustained the charge that the Respondent's conduct during the treatment amounted to willful abuse, harassment or mistreatment of Patient A. The Committee voted 2-1 to dismiss the charge that the Respondent's conduct evidenced moral unfitness. The majority found that the conduct did not rise to the level of moral unfitness because the Respondent made no physical advances on the Patient.

The Committee also dismissed the charge that the Respondent's failure to list a history of drug abuse and kidney damage for Patient A amounted to failure to maintain accurate records. The Committee found that the Patient sought treatment for a gambling problem only and the Committee found nothing to support the records charge.

The Committee found that LC informed colleagues on August 7, 2008 that LC was pregnant. The Respondent then stated that he was aware that LC was pregnant because her breasts had grown. In answer to a question from LC about why the Respondent was looking at LC's breasts, the Respondent stated that the breasts were hard to miss. The Respondent made additional remarks to LC on August 15, 2008. The Respondent asked LC whether her breasts were getting larger and if LC needed to purchase new bras. Another co-employee, Craig Kaplan, told the Respondent that he was asking inappropriate questions and LC told the Respondent to stop. The Respondent continued his remarks, asking LC whether her husband liked her breasts. The Respondent also used the word "tits." Mr. Kaplan reported the incident between LC and the Respondent to Dr. Roger Kallhovd, M.D., the PKC Medical Director. Dr. Kallhovd terminated the Respondent's employment at PKC on August 28, 2008.

The Committee sustained the charge that the Respondent's repeated remarks to LC evidenced moral unfitness in the practice of medicine.

The Committee found that, in addition to PKC, the Respondent also worked at North Shore Child and Family Guidance Center (North Shore), that North Shore terminated the Respondent's employment on August 1, 2008 and that North Shore sent the Respondent a termination letter on August 8, 2008. The Respondent applied for staff privileges at Queens Hospital Center on July 20, 2009. The Application asked whether the Respondent had ever been

terminated from an institutional affiliation. The Respondent answered that question in the negative. The Committee concluded that the Respondent answered the question knowingly and with the intent to mislead.

The Committee determined that the Respondent's answer on the Application amounted to practicing fraudulently, willfully filing a false report, violating PHL § 2805-k and engaging in conduct that evidences moral unfitness.

The Committee voted to suspend the Respondent's License for three years, to stay the suspension and to place the Respondent on probation, with a practice monitor. The probation terms (Terms) also directed the Respondent to enroll in and complete continuing education courses on patient boundary violations and on ethics. In addition, the Terms also required the Respondent to maintain malpractice insurance within certain limits.

The Committee expressed concern over the Respondent's interaction with patients and with staff, his crossing a professional boundary with LC and his lie on the Application. The Committee felt that the practice monitor would subject the Respondent's practice to closer scrutiny without violating patient confidentiality. The Committee stated that the continuing education on boundary issues would assist the Respondent to improve sensitivity to patient and office staff communications. The Committee stated further that they rejected revocation as a penalty because the charges involved two instances of boundary violations and a falsified document. The Respondent did not testify at the hearing. The Committee indicated that the Respondent's failure to testify left the Committee unable to consider any mitigation for the Respondent's benefit.

The Committee rendered their Determination on February 26, 2013. Both parties then requested administrative review. The Petitioner requested that the ARB revoke the Respondent's License, or in the alternative, that the ARB impose an actual suspension, probation, continuing education and a fine. The Respondent requested that the ARB overturn the Committee's findings sustaining charges or that in the alternative, that the ARB reduce the penalty against the Respondent. The Respondent contended that, if the ARB affirmed the allegations relating to LC, that the ARB should find that the statements failed to amount to misconduct because the conduct

did not involve the practice of medicine. The Respondent also argued that the ARB should restrict any penalty to a closed censure.

Upon review, the ARB affirmed the Committee's Determination that the Respondent harassed Patient A and that the Respondent intentionally misrepresented facts on the Application. The ARB also affirmed the Committee's Determination that the Respondent made inappropriate comments of a sexual nature to LC, but the ARB voted 3-2 to dismiss the charge that the conduct evidenced moral unfitness in the practice of medicine. The ARB also voted 3-2 to sustain the Committee's Determination to suspend the Respondent's License, to stay the suspension and to place the Respondent on probation under the Terms, including practice monitoring and continuing education.

The Probation Proceeding

The Director of the Office for Professional Medical Conduct (OPMC Director) charged that the Respondent violated probation under the Terms by practicing without a monitor, by practicing without malpractice insurance at sufficient levels and by failing to complete a course on boundary violations within the specified time limit. The Respondent denied the allegations and a hearing followed before a BPMC Committee, pursuant to PHL § 230(19). Following the hearing, the Probation Committee rendered the Determination now under review.

The Committee determined that the Respondent practiced without a monitor from August 22 to December 13, 2013 and from October 26, 2014 to January 6, 2015. The Committee found further that the Respondent violated probation by practicing without malpractice insurance with limits at no less than \$2,000,000.00 per occurrence and \$6,000,000.00 per policy year. In

addition, the Committee determined that the Respondent failed to enroll in and complete a course covering boundary violations within the first six months of probation. In making their findings, the Committee found that the Respondent's testimony on cross-examination showed attempts to evade, delay and confound the efforts by OPMC to ensure the Respondent's compliance with the probation terms. The Committee also stated that they found the Respondent's testimony non-credible due to the Respondent's continued attempts to shift responsibility for non-compliance from the Respondent to others.

The Probation Committee voted to suspend the Respondent's License until such time as the Respondent has an approved monitor in place, obtains the required level of malpractice insurance and completes the course on boundary violations. The Committee voted to increase the supervisory level on the probation to follow the suspension. The Committee voted to restrict the Respondent to practice in a facility licensed under PHL Article 28 for three years. Both parties then requested review.

The Petitioner argued that the Committee imposed an inappropriate sanction. The Petitioner's Brief noted that PHL § 230(19) states that, in determining the appropriate penalty for a probation violation, a committee should consider both the violation and the prior adjudication of misconduct. The Petitioner noted that the Respondent practiced fraudulently, abused a patient, evidenced moral unfitness, filed a false report and committed a violation under PHL § 2805-k. Despite findings that the Respondent committed such serious misconduct, the Bargellini I Committee and the ARB entrusted the Respondent with an opportunity to preserve his privilege to practice and constructed a penalty to verify that the trust was well placed. The Petitioner contended that now, after the Probation Committee found the Respondent has violated probation, the Probation Committee has imposed a sanction that makes only slight adjustments to the

corrective action the Bargellini I Committee imposed. The Petitioner argued further that the Probation Committee found the Respondent untruthful, evasive and disinterested in complying with the probation. The Petitioner asked the ARB to revoke the Respondent's License.

The Respondent requested review on the Committee's findings and sanction. The Respondent argued that the Respondent was not in willful violation of probation because:

- the Department withheld exculpatory evidence;
- the Department made a false claim that the Respondent had no practice monitor in place;
- the Respondent attempted to obtain approval for certain continuing education courses, but the Department misled the Respondent or kept the Respondent "in the dark" about such courses;
- the Respondent held adequate insurance coverage; and,
- the Department's allegations are based on findings and determination of the Hearing Committee and ARB that will be overturned and should never have been leveled.

In reply to the Petitioner, the Respondent argued that no additional penalty would be appropriate, because the Probation Committee increased the penalty which the Bargellini I Committee imposed by suspending the Respondent's License, limiting the Respondent's practice and imposing three years on probation to follow the actual suspension.

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 to sustain charges that the Respondent violated probation. The ARB overturns the Committee's Determination to suspend the Respondent's License, to place the Respondent on probation thereafter and to limit the Respondent's License. The ARB votes 4-0 to revoke the Respondent's License.

The Respondent argued that the Department withheld exculpatory information which would have showed that the Respondent had a practice monitor in place and which would have contradicted testimony by a Department witness. The Respondent raised that argument at hearing and the Probation Committee found that the Respondent was aware that Dr. Alan Stempler had been approved to act as the Respondent's practice monitor. The Committee found, therefore, that the information did not prove the Respondent's innocence and was not exculpatory [Committee Determination page 4, footnote 1].

Under PHL § 230-c(4)(b), the ARB may remand a case to a Committee for further proceedings. The ARB sees no grounds for a remand in this case. If at hearing, the Respondent had been unaware that Dr. Stempler had been approved as monitor, then there could have been a ground for remand so the Respondent could have raised the information with the Committee. The Committee's Determination, however, shows that the Respondent was aware of the information during the hearing and made argument to the Committee based on the information.

The Respondent argued next that the Department claimed falsely that the Respondent had no practice monitor in place, even though the Department had approved Dr. Stempler as monitor. The Petitioner actually charged that the Respondent violated probation by practicing without a monitor. The Terms concerning the monitor required more than just having a monitor in place. The monitoring terms also required that the Respondent make available any and all records the

monitor requested, that the Respondent be solely responsible for all monitoring expenses, including the monitor's fee, and that the Respondent cause the monitor to report quarterly in writing to the OPMC Director [Terms paragraph 7a, 7b and 7c].

The Committee found that Dr. Stempler never monitored the Respondent's practice and that the Respondent practiced without such monitoring from August 21, 2013 until December 16, 2013. The Committee found further that the OPMC Director approved Dr. Ronald Rosenberg to monitor the Respondent's practice on December 13, 2013. The Committee found further that Dr. Rosenberg went to see the Respondent on October 25, 2014, November 25, 2014 and December 29, 2014, but the Respondent was not present for any of these visits, that no patient records were available and that Dr. Rosenberg received no response from the Respondent to phone calls on January 4, 2015 and January 5, 2015 and to an e-mail on January 13, 2015. The Committee found that the Respondent practiced without a monitor on October 27, 2014, October 29, 2014, November 8, 2014 and January 6, 2015.

In addition, the Respondent argued that the Respondent never took the continuing education courses that the Terms required, because the Department kept the Respondent in the dark about approved classes. The Committee found that the Terms required the Respondent to complete a course on boundary violations by January 22, 2014 and that the Respondent never completed such a course. The Committee noted that the Respondent admitted in his testimony that there were approved courses in California and Chicago, but the Respondent refused to travel for the courses. The Committee also found that the Respondent was aware on the record in January 2015 that the Department approved routinely courses by Professional Boundaries, Inc. (PBI), but that the Respondent made no effort to take a PBI course.

Further, the Respondent stated that he maintained sufficient insurance coverage and argued that the costs would have been astronomical to comply with the malpractice insurance limits that the Terms required. The Committee left the record open to allow the Respondent to submit proof concerning insurance coverage. The Committee found that the Respondent's submission failed to indicate that the Respondent obtained the required coverage [Committee Determination page 5, footnote 2].

The Committee sustained the charges that the Respondent violated probation by practicing without a monitor, by failing to obtain malpractice coverage in the required amounts and by failing to take a course on boundary violations. In making their Determination on evidence credibility, the Committee found the Respondent lacked credibility in his testimony and that the Respondent attempted to evade, delay and confound the Department's efforts to ensure the Respondent's compliance with the Terms. The Committee also found the Respondent untruthful about certain representations the Respondent made to the Department. The record also showed that the Bargellini I Committee found that the Respondent practiced fraudulently, filed a false report and engaged in conduct that evidenced moral unfitness. The ARB defers to the Probation Committee in their findings on credibility and finds extensive evidence in this record to support the Probation Committee's Determination that the Respondent lacked credibility. The ARB concludes that the evidence the Committee found credible proved that the Respondent violated probation.

Under PHL § 230(19), a committee determining a sanction for a probation violation must consider both the violation and the prior adjudication of misconduct. The Petitioner argued that the Committee imposed an inappropriate penalty because the Committee failed to give due consideration to the prior, very serious misconduct. The Petitioner argued that no basis existed to

increase the sanction the Probation Committee imposed, because the Probation Committee already increased the penalty that the Bargellini I Committee imposed.

Under PHL § 230-c, the ARB must consider whether a committee imposed a penalty consistent with the committee's findings and conclusions and whether a penalty is appropriate and within the scope of penalties under PHL § 230-a. The ARB finds the Probation Committee imposed a penalty inconsistent with the Committee's findings and conclusions.

The Bargellini I Committee found that the Respondent abused a patient, practiced fraudulently, willfully filed a false report and engaged in conduct that evidenced moral unfitness. These offenses constituted serious misconduct and the Committee and the ARB imposed a sanction to address the misconduct and ensure protection for the public. The penalty included practicing with a monitor during probation and completing a continuing education course on boundary violations. The Respondent violated that probation. The Committee found that the Respondent attempted to evade, delay and confound the Department's efforts and attempted to shift the responsibility for the Respondent's non-compliance to others. The Committee also found that the Respondent provided untruthful information to the Department, with the intent to mislead. The Probation Committee suspended the Respondent and limited his License, but the Committee retained probation as a central component in the penalty.

The ARB finds the Probation Committee's penalty inconsistent with the findings concerning the Respondent's willful non-compliance. Further, the Respondent's repeated misleading and deceitful conduct has proven the Respondent untrustworthy. Violating the probation a hearing committee has imposed provides sufficient grounds for revoking a medical license, Kite v. DeBuono, 233 A.D.2d 783, 650 N.Y.S.2d 384 (3rd Dept. 1996). In addition to the

probation violation, the Bargellini I Committee found that the Respondent abused a patient and practiced fraudulently. The ARB votes 4-0 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 violated probation.
2. The ARB overturns the Committee's Determination to suspend the Respondent's License, to limit the Respondent's License and to place the Respondent on probation.
3. The ARB revokes the Respondent's License.

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

[Redacted]

In the Matter of Joseph Bargellini, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination in the Matter of

Dr. Bargellini.

Dated: 12 November, 2015

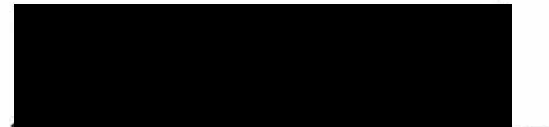
[Redacted]

Linda Prescott Wilson

In the Matter of Joseph Bargellini, M.D.

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

Dated: November 6, 2015



Peter S. Koenig, Sr.

Peter S. Koenig, Sr.

[Redacted]

In the Matter of Joseph Bargellini, M.D.

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

Bargellini.

Date: November 17, 2015

[Redacted]

Richard D. Milone, M.D.

[REDACTED]

In the Matter of Joseph Bargellini, M.D.

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

Matter of Dr. Bargellini.

Dated: Nov 9, 2015

[REDACTED]

John A. D'Anna, M.D.