

NEW YORK
state department of
HEALTH

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

Sue Kelly
Executive Deputy Commissioner

July 15, 2013

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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Joseph Bargellini, M.D.
1551 Kellum Place
Mineola, New York 11501

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

Dear Parties:

Enclosed please find the Determination and Order (No. 13-211) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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 handwritten signature in black ink that reads "James F. Horan". The signature is written in a cursive style with a large, looped initial "J".

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

Joseph Bargellini, 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. 13- 211

COPY

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

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

After a hearing below, a BPMC Committee found that the Respondent committed professional misconduct in statements the Respondent made to a patient and a co-worker and in the Respondent's application for medical privileges. The Committee voted to suspend the Respondent's License for three years, to stay the suspension in full and to place the Respondent on probation for three years under the terms that appear at Appendix II in the Committee's Determination. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c(4)(a)(McKinney 2013), both parties ask the ARB to nullify or modify that Determination. After reviewing the record below and the parties' review submissions, the ARB votes 5-0 to sustain the Committee's Determination on charges concerning the Respondent's statements to a patient and the Respondent's answer on an application. We vote 3-2 to overturn the Determination that the Respondent's statements to a co-worker constituted professional misconduct. We also vote 3-2 to sustain in full the Committee Determination to suspend the Respondent's License, stay the suspension in full and place the Respondent on probation for three years.

Committee Determination on the Charges

The Committee conducted a hearing into charges 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, REDACTED 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, REDACTED and to the Application. Following the hearing, the Committee rendered the Determination now under review.

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 REDACTED informed colleagues on August 7, 2008 that REDACTED was pregnant. The Respondent then stated that he was aware that REDACTED was pregnant because her breasts had grown. In answer to a question from REDACTED about why the Respondent was looking at REDACTED breasts, the Respondent stated that the breasts were hard to miss. The Respondent made additional remarks to REDACTED on August 15, 2008. The Respondent asked REDACTED whether her breasts were getting larger and if REDACTED needed to purchase new bras. Another co-employee, Craig Kaplan, REDACTED told the Respondent that he was asking inappropriate questions and REDACTED told the Respondent to stop. The Respondent continued his remarks, asking REDACTED whether her husband liked her breasts. REDACTED The Respondent also used the word "tits". Mr. Kaplan reported the incident between REDACTED 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 REDACTED 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 also directed the Respondent to enroll in and complete continuing education courses on patient boundary violations and on ethics. 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 will 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.

Review History and Issues

The Committee rendered their Determination on February 26, 2013. This proceeding commenced on March 14 & 15, 2013, when the ARB received the Petitioner's and the Respondent's Notices requesting Review. The record for review contained the Committee's

Determination, the hearing record, the Petitioner's brief and reply brief and the Respondent's brief and reply brief. The record closed when the ARB received the reply briefs on May 2, 2013.

The Petitioner characterizes the penalty the Committee imposed as inappropriate and inconsistent with the findings and conclusions. The Petitioner requests that the ARB impose a more serious sanction, more carefully crafted to the Respondent's offenses. The Petitioner contends that the stayed suspension allows the Respondent to practice immediately, even though the Committee expressed concern about the Respondent's interaction with patients and the Committee stated that verbal abuse can be traumatic for a vulnerable psychiatric patient and impede recovery. The Petitioner asks that the ARB revoke the Respondent's License. In the alternative, the Petitioner requests that the ARB impose an actual suspension, probation, continuing education and a fine.

The Respondent requests 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 argues that the Department's investigation was untrustworthy, that the Department's witnesses lacked credibility and that the Department failed to provide evidence to prove the charges relating to the Application. The Respondent contends that, if the ARB affirms the allegations relating to ^{REDACTED} , that the ARB should find that the statements fail to amount to misconduct because the conduct did not involve the practice of medicine. If the ARB sustains any charges, the Respondent argues that the ARB should restrict the penalty to a closed censure.

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 the 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 harassed Patient A and that the Respondent intentionally misrepresented facts on the Application. We affirm the Committee's Determination that the Respondent made inappropriate comments of a sexual nature to ^{REDACTED} but we vote 3-2 to dismiss the charge that the conduct evidenced moral unfitness in the practice of medicine. We vote 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 the Committee imposed, including practice monitoring and continuing education.

The Committee found that the Respondent willfully harassed, abused or intimidated a patient by making repeated, unwelcome and sexually inappropriate comments to Patient A. The Respondent challenged that argument at Point II in the Respondent's Brief and argued that inconsistent statements from Patient A that appear in a chart made Patient A non-believable as a witness. The ARB finds no ground to overturn the Committee. The Committee heard the Patient's testimony and found the Patient credible as a witness. The Committee's Determination at page 12 stated that the Committee found no reason for Patient A to fabricate testimony, that the Patient reported her complaint promptly and that the Patient's social worker acknowledged the complaint in the Patient's medical record. The Respondent failed to testify concerning the allegations about Patient A and the Committee drew an adverse inference from the failure to

testify [Committee Determination, page 14]. Even without the adverse inference, the Respondent's failure to testify left the Patient's testimony unchallenged. The ARB defers to the Committee as the fact-finder in their findings on credibility, Richstone v. Novello, 284 A.D.2d 737, 726 N.Y.S.2d 188 (3rd Dept. 2001).

The Committee found the Respondent made sexually inappropriate comments to ^{REDACTED} another employee at PKC. The Committee made those findings from testimony by ^{REDACTED} and from corroborating testimony from the Respondent's witness, Craig Kaplan. From those findings, the Committee sustained the only charge relating to ^{REDACTED} that the Respondent's comments evidenced moral unfitness in the practice of medicine. The Respondent's Brief, at Point VI, asked that the ARB overrule the Committee because the Respondent's conduct occurred outside the practice of medicine and provided no basis for professional misconduct charges. A majority of the ARB agrees with the Respondent.

The ARB votes 3-2 to overrule the Committee and dismiss the moral unfitness charge relating to the statements to ^{REDACTED}. The majority holds that the statements occurred outside the practice of medicine. The Respondent made the statements to a co-worker rather than a patient, such as Patient A. A physician holds a position of trust with a patient, due to the physician's licensure. Also, there was no finding by the Committee that the Respondent held any supervisory authority over ^{REDACTED} due to the Respondent's licensure, in the way a physician would supervise a nurse, physician assistant or medical technician. The majority believes that the Respondent's statements were certainly inappropriate in the workplace, but the conduct was an issue for the Respondent's employer, rather than for BPMC. The two members in dissent would sustain the moral unfitness charge because the Respondent worked at PKC due to his licensure as a

physician and was thus subject to the moral standards of the medical profession in all his dealings at PKC.

The Committee found that the Respondent submitted the Application to Queens Hospital in July 2009, in which the Respondent denied being terminated from any institutional affiliation [Committee Finding of Fact (FF) 18; Hearing Exhibit 5]. The Committee found further that two institutions, PKC and North Shore, terminated the Respondent in August 2008 [FF 19, Hearing Exhibits 4 and 6]. The Committee concluded that the Respondent made false statements in the Application knowingly and with the intent to mislead and the Committee sustained charges that the Respondent practiced fraudulently, willfully filed a false report, engaged in conduct that evidenced moral unfitness and violated PHL § 2805-k. Point III in the Respondent's brief argued that the Department failed to offer proof on the charge. The Petitioner replied that Hearing Exhibits 4-6 provided proof and that the Committee drew an adverse inference from the Respondent's failure to testify.

In order to sustain a charge that a licensee practiced medicine fraudulently, a hearing committee must find that (1) a licensee made a false representation, whether by words, conduct or by concealing that which the licensee should have disclosed, (2) the licensee knew the representation was false, and (3) the licensee intended to mislead through the false representation, Sherman v. Board of Regents, 24 A.D.2d 315, 266 N.Y.S.2d 39 (Third Dept. 1966), aff'd, 19 N.Y.2d 679, 278 N.Y.S.2d 870 (1967). A committee may infer the licensee's knowledge and intent properly from facts that such committee finds, but the committee must state specifically the inferences it draws regarding knowledge and intent, Choudhry v. Sobol, 170 A.D.2d 893, 566 N.Y.S.2d 723 (Third Dept. 1991). To prove willfully filing a false report, a committee must establish that a licensee made or filed a false statement willfully, which requires

a knowing or deliberate act, Matter of Brestin v. Comm. of Educ., 116 A.D.2d 357, 501 N.Y.S.2d 923 (Third Dept. 1986). Merely making or filing a false report, without intent or knowledge about the falsity fails to constitute professional misconduct, Matter of Brestin v. Comm. of Educ., (supra). A committee may reject a licensee's explanation for erroneous reports (such as resulting from inadvertence or carelessness) and draw the inference that the licensee intended or was aware of the misrepresentation, with other evidence as the basis, Matter of Brestin v. Comm. of Educ., (supra).

The ARB holds that the evidence at Hearing Exhibits 4-6 showed that the Respondent was terminated from institutional affiliations, that he knew about the terminations and that he answered falsely on the Application. The Exhibits provide the basis for the inference that the Respondent withheld information on the terminations deliberately because he thought that a truthful answer would harm the Respondent's chances to obtain privileges at Queens Hospital. Once again, by failing to testify, the Respondent left the Department's evidence unchallenged. The ARB affirms the Committee's Determination that the Respondent practiced fraudulently, willfully filed a false report, engaged in conduct that evidenced moral unfitness and violated PHL § 2805-k.

The Respondent's Brief at Points I, IV and V challenged testimony by the Department Investigator Sondra Stoss, the failure to admit notes by Ms. Stoss into evidence and the Department's conduct in bringing unfounded charges. Testimony by Ms. Stoss related to Factual Allegation A.2 that charged the Respondent with failure to maintain accurate records. The Committee dismissed that charge and found Ms. Stoss non-credible as a witness. The Petitioner made no request for review on the Committee's ruling on Allegation A.2. The ARB affirms the Committee's Determination. As to the argument about the notes from Ms. Stoss, the Petitioner

turned over those notes to the Respondent and the Respondent had those notes for use in cross-examining Ms. Stoss. Finally, the Respondent argued that the Committee's finding about the credibility of Ms. Stoss taints all the evidence in the hearing. The Committee, however, sustained charges against the Respondent in reliance on other evidence such as the testimony by Patient A and Hearing Exhibits 4-6. As we noted above, we found that evidence proved the charges relating to Patient A and to the Application.

The Committee voted to suspend the Respondent's License, to stay the suspension and to place the Respondent on probation under the terms that appear at Appendix II to the Committee's Determination. The probation terms include a practice monitor and continuing education. The Petitioner argued that the penalty fails to protect the public and asked that the ARB revoke the Respondent's License, or in the alternative, that the ARB add an actual suspension and a fine to the Committee's penalty. At Point VII, the Respondent's brief argued that the Respondent should receive no penalty more severe than a closed censure. At Point VIII, the Respondent's Brief states that no one at PKC reported the Respondent for misconduct. The Respondent argues that if those at PKC, the closest to the events at issue, saw no reason to report the Respondent for misconduct, then the Committee should have concluded that this situation requires no punishment. The Petitioner replied that the Respondent never raised that issue before the Committee and that the source of any complaint against a physician is confidential.

The ARB votes 3-2 to affirm the Committee's Determination to suspend the Respondent's License for three years, to stay the suspension and to place the Respondent on probation for three years under the terms that appear at Appendix II to the Committee's Determination. The members in dissent would revoke the Respondent's License. The majority rejects revocation as a penalty because the case involved inappropriate comments to a single

patient, with no physical advances. The ARB majority agrees with the Committee that the Respondent's comments to Patient A raise concerns that we must address. The probation mandates monitoring that will review the Respondent's practice and requires the Respondent to complete continuing education courses in patient boundary violations and ethics. The majority sees no reason to reduce the sanction, even though we have overturned the charge relating to LC. The majority finds that a need continues for oversight through probation and monitoring due to the harassment of Patient A and the false answers on the Application. For the same reasons, we find that the need remains for continuing education courses on patient boundary violations and ethics. We reject the Respondent's argument that we should limit the penalty to a closed censure. No such sanction appears at the list of possible penalties for misconduct at PHL § 230-a. We also reject the Respondent's argument about whether anyone at PKC filed the complaint against the Respondent. In making our assessment as to the proper sanction, we found the complaint's source irrelevant.

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 willfully harassed Patient A and that the Respondent's false answer on the Application constituted fraud in practice, willfully filing a false report, engaging in conduct that evidences moral unfitness and violating PHL § 2805-k.
2. The ARB overturns the Committee's Determination that statements the Respondent made to LC evidenced moral unfitness in practice.
3. The ARB affirms the Committee's Determination to suspend the Respondent's License for three years, to stay the suspension in full and to place the Respondent on probation for three years under the terms that appear at Appendix II to the Committee's Determination.

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

In the Matter of Joseph Bargellini, M.D.

Linda Prescott Wilson, an ARB Member affirms that she participated in the deliberations
in the Matter of Dr. Bargellini.

Dated: 11 July, 2013

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: July 9, 2013

REDACTED

Peter S. Koenig, Sr.

In the Matter of Joseph Bargellini, M.D.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Bargellini.

Dated: July 9th, 2013

REDACTED

Datta G. Wagle, M.D. /

In the Matter of Joseph Bargellini, M.D.

Richard D. Milone, an ARB Member affirms that he participated in the deliberations in
the Matter of Dr. Bargellini.

Dated: July 9, 2013

REDACTED

Richard D. Milone, M.D.

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: Sept, 12, 2013

REDACTED

John A. D'Anna, M.D.