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Executive Deputy Commissioner

June 16, 2015

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mark D. Forte, M.D.
[redacted]

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

RE: In the Matter of Mark D. Forte, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 15-152) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered,** together with the registration certificate.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

Mark D. Forte, 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. 15-152

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: No Submission

The Respondent holds a medical license in Colorado, in addition to his license to practice medicine in New York (License). 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 after Colorado suspended summarily the Respondent's license to practice in that state. After a hearing below, a BPMC Committee found that the conduct that resulted in the Colorado suspension would constitute professional misconduct in New York and the Committee voted to suspend the Respondent's License until the Colorado suspension ends and the Respondent then demonstrates to the Director of the Office of Professional Medical Conduct (OPMC Director) the Respondent's fitness to practice in New York. The Petitioner then requested administrative review and asked in this proceeding that the ARB overturn the Committee and revoke the Respondent's License. The Respondent made no review submission. After considering the record and the Petitioner's Brief, the ARB votes 5-0 to overturn the Committee and 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 charged that the Respondent violated New York Education Law (EL) §§ 6530(9)(b) & 6530(9)(d) by committing professional misconduct, because the duly authorized professional disciplinary agency from another state, Colorado,

- found the Respondent guilty for improper professional conduct [6530(9)(b)], and/or,
- took disciplinary action against the Respondent's medical license in that state [6530(9)(d)],

for conduct that would constitute professional misconduct, if the Respondent had committed such conduct in New York. The Petitioner's Statement of Charges [Direct Referral Hearing Exhibit 1] alleged that the Respondent's misconduct in Colorado would constitute misconduct if committed in New York, under the following specification:

- violating any term of probation or condition or limitation imposed on the licensee, a violation under EL § 6530(29).

The Appellant failed to appear at the Direct Referral Proceeding. 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 demonstrated that the Respondent and the Colorado Medical Board (Colorado Board) entered into an Interim Cessation of Practice Agreement (Colorado Agreement) in December 2009, in which the Respondent agreed to perform no act that

required a license issued by the Colorado Board. The Colorado Agreement followed a report from the Colorado Physician Health Program (CPHP), which indicated that the Respondent suffered physical or mental illnesses or conditions that rendered the Respondent unsafe to practice medicine pending further evaluation and investigation. The Colorado Board suspended the Respondent's License summarily in November 2013 after the Respondent failed to comply with the requirements from the Colorado Board.

The record showed further that the Respondent had a troubled history with mental illness and substance abuse. Under the conditions in the Colorado Agreement, the Colorado Board ordered the Respondent, in January 2013, to report to CPHP for an evaluation to determine whether the Respondent suffered a physical or mental illness or condition that might impact his ability to practice. The February 2013 Order required the Respondent to schedule an appointment with CPHP, to cooperate fully with CPHP in a timely manner and to comply with any and all requests or recommendations that CPHP deemed appropriate. In October 2013, CPHP issued a report stating that, although the Respondent continued to maintain contact with CPHP, the Respondent struggled to comply with CPHP requirements. The summary suspension by the Colorado Board followed.

The Committee concluded that the Respondent's conduct in Colorado would amount to misconduct in New York as violating terms of probation or conditions or limitations imposed on a licensee. The Committee found further that the Respondent's conduct and the Colorado Board's action made the Respondent liable for disciplinary action against his License under both EL §§ 6530(9)(b) & 6530(9)(d).

The Committee voted to suspend the Respondent's License indefinitely until the Respondent complies with all conditions in Colorado, such that the Respondent regains a full

Colorado license, and thereafter, until the Respondent satisfies the OPMC Director concerning the Respondent's current competency to practice medicine in New York.

Review History and Issues

The Committee rendered their Determination on February 25, 2015. This proceeding commenced on March 4, 2015, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record and the Department's Brief. The Respondent filed no submission with the ARB. The record closed when the ARB received the Brief on April 2, 2015.

The Petitioner's Brief argued that the Committee imposed too lenient a penalty. The Petitioner asked that the ARB modify the Committee's Determination and revoke the Respondent's License. In the alternative, the Petitioner requested that the ARB modify the conditions for the New York suspension, as the Petitioner suggested at Appendix 2 to the Petitioner's Brief.

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 Petitioner's brief. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct. The ARB

overturns the Committee's Determination to suspend the Respondent's License. The ARB votes 5-0 to revoke.

The ARB finds no mitigating factors in this case and no basis to believe that a suspension provides the appropriate penalty in this case. The Respondent failed to appear in New York and failed to send any communication to the Committee or the ARB. Nothing in the record indicates whether the Respondent is cooperating now with the Colorado Board or CPHP. The Colorado Board and CPHP determined that the Respondent suffers from conditions that could impair his practice. The Respondent has failed to meet the requirements that the Colorado Board established to protect patients in that state. The ARB sees no alternative to revocation in this case.

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 suspend the Respondent's License.
3. The ARB revokes 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 Mark D. Forte, M.D.

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

Dated: 8 June, 2015

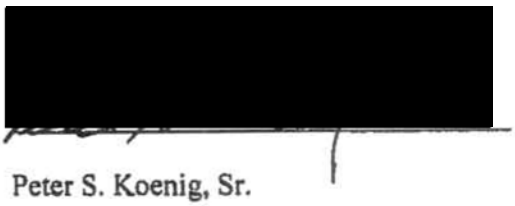
[redacted]

Linda Prescott Wilson

In the Matter of Mark D. Forte, M.D.

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

Dated: June 8, 2015



Peter S. Koenig, Sr.

In the Matter of Mark D. Forte, M.D.

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

Dated: 6/16, 2015

[redacted]

Steven Grabiec, M.D.

In the Matter of Mark D. Forte, M.D.

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

Dated: June 8, 2015

[redacted]

Richard D. Milone, M.D.

In the Matter of Mark D. Forte, M.D.

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

Dated: June 9, 2015

[redacted]

John A. D'Anna, M.D.

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