

Public

**STATE OF NEW YORK : DEPARTMENT OF HEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT**

In the Matter of

Harvey Philip Insler, 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. 05-176

COPY

**Before ARB Members Grossman, Lynch, Pellman, Wagle and Briber
Administrative Law Judge James F. Horan drafted the Determination**

**For the Department of Health (Petitioner):
For the Respondent:**

**Ann Gayle, Esq.
Anthony Z. Scher, Esq.**

After a hearing below, a BPMC Committee found that the Respondent practiced with negligence on more than one occasion in treating one patient and that the Respondent failed to maintain an accurate medical record for that patient. The Committee voted to censure and reprimand the Respondent and to place him on probation for five years under the terms that appear at Appendix A to the Committee's Determination. In this proceeding pursuant to N.Y. Pub. Health Law (PHL) § 230-c (4)(a)(McKinney 2005), the Respondent asks the ARB to nullify that Determination or to reduce the penalty.

We affirm the Determination that the Respondent practiced with negligence on more than one occasion and failed to maintain accurate records. We affirm the Committee's Determination to censure and reprimand the Respondent and to place the Respondent on probation, with a practice monitor, but we reduce the period for probation from five years to three years.

Committee Determination on the Charges

The Committee conducted a hearing pursuant to PHL § 230(10)(e) into charges alleging that the Respondent violated N. Y. Educ. Law (EL) §§ 6530(3-5) & 6530(32)(McKinney Supp. 2005) by committing professional misconduct under the following specifications:

- practicing medicine with negligence on more than one occasion,

, and,

- failing to maintain accurate patient records.

The charges related to the care the Respondent provided to one person, Patient A. The record refers to the Patient by an initial to protect privacy. The Committee conducted a three-day hearing on the charges and then rendered the Determination now on review.

As relevant on this review, the Committee found that the Respondent assumed responsibility for providing orthopedic care to Patient A at Lincoln Hospital on the weekend of October 6-7, 2001. The Respondent's company, Signature Health Care, provided all orthopedic services at Lincoln. The Committee found that another Signature physician, Frank Butera, M.D., provided care to Patient A before Patient A became the Respondent's responsibility. The Committee found that an ulceration on the Patient's right lower extremity required irrigation and debridement (I&D) at least every forty-eight hours following surgery on October 4, 2005. In an I&D, a physician opens a wound, removes necrotic tissue and irrigates the wound. The Committee determined that the Respondent failed to comply with the minimum care standard by failing to perform the required I&D procedures or otherwise document acceptable medical reasons for not performing the procedures. The Committee found that the Respondent's failure to perform the procedures amounted to negligence. The Committee found further that the Respondent practiced below minimum care standards by failing to evaluate Patient A before surgery on October 10, 2001 and by failing to document the examination or by failing to document the reasons that made such an examination unfeasible. The Committee found

such conduct amounted practicing with negligence on more than one occasion and failing to maintain accurate records.

The Committee voted to censure and reprimand the Respondent and to place the Respondent on probation for five years, under the terms that appear as Appendix A to the Committee's Determination. The probation terms include the requirement that a practice monitor review the Respondent's records quarterly.

Review History and Issues

The Committee rendered their Determination on August 18, 2005. This proceeding commenced on September 6, 2005, 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 response brief. The Administrative Officer for the ARB denied the Respondent's request to file an additional brief. The record closed when the ARB received the Petitioner's response brief on or about October 20, 2005.

The Respondent asks the ARB to overturn the Committee's Determination, or in the alternative, to reduce the penalty that the Committee imposed. The Respondent argues that the Committee erred in making the factual findings by crediting testimony by Dr. Butera concerning the Respondent's role in treating Patient A. The Respondent argues that Dr. Butera's testimony constituted an attempt to place blame on the Respondent for omissions by Dr. Butera.

The Respondent also argues that the Committee imposed an overly harsh penalty concerning the care for one Patient four years ago.

In reply, the Department argues that the hearing evidence supports the Committee's Determination on the charges and on the penalty and the Department asks the ARB to affirm the Committee.

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 practiced with negligence on more than one occasion and that the Respondent failed to maintain accurate records.

We affirm the Determination to censure and reprimand the Respondent and to place him on probation. We reduce the probation period from five years to three years.

We affirm the Committee Determination that the Respondent assumed the care for Patient A prior to the weekend of October 6-7, 2001 and that the Respondent was responsible for evaluating the Patient for the surgery on October 10, 2001. In addition to testimony by Dr. Butera to support those findings, the Committee found corroborating evidence in Dr. Butera's practice of countersigning physician notes for Patient A's care during the time in which Dr. Butera was the attending physician. The absence of Dr. Butera's countersignature for care from

October 6th onward supported the Committee's Determination that Dr. Butera has transferred care for Patient A and the Respondent had assumed care for Patient A from October 6 onward. The Committee also found corroboration for their findings on the pre-surgery consent form for the October 10th surgery. The ARB defers to the Committee in their judgment on what constituted the credible evidence from the hearing.

We hold that the Respondent's care for Patient A on the dates at issue in this proceeding amounted to negligence on more than one occasion and failure to maintain accurate records.

We find appropriate the Committee's Determination to censure and reprimand the Respondent and to place the Respondent on probation, with a practice monitor to perform quarterly reviews on the Respondent's records. We conclude, however, that five years represents an excessive period on probation for these practice deficiencies concerning care for a single Patient four years ago. We limit the probation period to three years.

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 practiced with negligence on more than one occasion and failed to maintain accurate records.

3. The ARB affirms the Committee's Determination to place the Respondent on probation, under the terms at Appendix A in the Committee's Determination.

4. The ARB reduces the period for the probation from five years to three years.

Robert M. Briber
Thea Graves Pellman
Datta G. Wagle, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.