



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Richard F. Daines, M.D.
Commissioner

Public

Wendy E. Saunders
Chief of Staff

August 4, 2009

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Michael D. Berger, M.D.
Redacted Address

Robert Bogan, Esq.
NYS Department of Health
Hedley Park Place
433 River Street – Suite 303
Troy, New York 12180

RE: In the Matter of Michael D. Berger, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 09-92) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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
Hedley Park Place
433 River Street-Fourth Floor
Troy, New York 12180

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 Signature

James F. Horan, Acting Director
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Michael D. Berger, 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. 09-92

COPY

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

For the Department of Health (Petitioner): Robert Bogan, Esq.
For the Respondent: Pro Se

The Respondent holds a medical license in California, in addition to the Respondent's license to practice medicine in New York State (License). In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2009), the ARB considers whether to take disciplinary action against the Respondent, after California placed the Respondent on probation for failure to provide care to a patient. After a hearing below, a Committee placed the Respondent's License on probation to run for the same time period as the probation in California (coterminous). The Petitioner then requested administrative review and asked that the ARB modify the probation terms that the Committee set. After reviewing the hearing record and the Petitioner's request, the ARB affirms the Committee's Determination that the Respondent engaged in conduct in California that made the Respondent liable for discipline against his License and the ARB affirms the Committee's Determination to place the Respondent on probation coterminous with his probation in California. The ARB modifies the terms on the New York probation.

Committee Determination on the Charges

The Committee conducted a hearing in this matter 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, California,

- 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 [Petitioner Exhibit 1] alleged that the Respondent's misconduct in California would constitute misconduct if committed in New York, under the following specifications:

- practicing medicine with negligence on more than one occasion, a violation under EL § 6530(3);
- practicing medicine with gross negligence, a violation under EL § 6530(3); and,
- failing to maintain accurate patient records, a violation under EL § 6530(32).

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 at hearing indicated that the Medical Board of the California Department of Consumer Affairs (California Board) revoked the Respondent's medical license in that state, stayed the revocation and placed the Respondent on probation for seven years, effective on May 19, 2008. The Respondent accepted the California Board's judgment by entering into a

stipulation in which the Respondent admitted to charges concerning the Respondent's treatment for a single patient. The charges stated that the Respondent failed to provide treatment to a patient whose symptoms and medical history dictated that the patient receive immediate treatment and that the Respondent failed to arrange for others to provide such treatment. The Respondent is now complying with the probation terms under the California Board Order.

The Respondent appeared at the Direct Referral Hearing. The Committee indicated that the Respondent impressed the Committee with his honesty and sense of responsibility and that the Respondent convinced the Committee that the incident was an abnormal and isolated occurrence. The Committee found the need for no penalty other than probation. The Order at pages 6-7 of the Committee's Determination provided some probation terms and requirements that the Respondent report to Office for Professional Medical Conduct (OPMC). The Committee's Order provided further that the bulk of the probation terms would be the same as those the California Board imposed and the Committee included the California Probation terms as Appendix 2 to the Committee's Determination. Appendix 2 requires that the Respondent comply with provisions of the California Health and Safety Code, the California Uniform Controlled Substances Act and the California Business and Professions Code. The Appendix also requires that the Respondent enroll in a clinical training and educational program similar to a program at the University of California-San Diego School of Medicine. The Committee's Order provided that the New York probation should be coterminous with the California probation, but the Committee's Order at paragraph 5 provided that the New York probation would be tolled, or suspended, during any period in which the Respondent is not engaged in active medical practice in the State of New York.

Review History and Issues

The Committee rendered their Determination on May 12, 2009. This proceeding commenced on May 22, 2009, 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 Petitioner's brief. The record closed when the ARB received the brief on June 22, 2009.

The Petitioner argues that the Committee's Determination and Order contain inconsistent provisions because at one point the Committee states that the New York probation should run coterminous with the California probation, but at another point the Committee states that the New York probation would be tolled at any time the Respondent is not practicing actively in New York State. The Petitioner argued further that the Committee inserted unenforceable probation terms by relying on portions of the California probation terms. The Petitioner requests that the ARB: a.) amend the Committee's Determination by deleting Appendix 2 and any reference to Appendix 2, b.) expand one provision in paragraph 4 of the Committee's Order, and c.) replace the current paragraph 5 in the Committee Order with an new paragraph that the Petitioner suggests.

The Respondent provided no response 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's conduct in California made the Respondent liable for disciplinary action against his License and the ARB affirms the Committee's Determination to place the Respondent on probation that would run coterminous with the

Respondent's probation in California. Neither party challenged those provisions in the Committee's Determination. The ARB grants the Petitioner's motion to overturn or modify provisions in the Committee's Determination, which are inconsistent and unenforceable.

The ARB agrees with the Committee that the Respondent's misconduct in California amounted to an isolated occurrence and that the appropriate sanction for that misconduct would place the Respondent on probation coterminous with the probation that the Respondent serves under the California Board's Order. The coterminous probation period will encourage the Respondent to remain in California to continue abiding by the probation terms in that state, because there would be no advantage to return to practice in New York, where the Respondent would face the same probation period. The ARB agrees with the Petitioner that the Committee's Order at paragraph 5 contains a provision inconsistent with a coterminous probation. Paragraph 5 in the Committee's Order would toll, or suspend, the running of the New York probation, for any time period during which the Respondent is not practicing in New York. The toll would apply then to the time that Respondent resides currently in California under the California probation terms. The ARB modifies the Committee's Order to remove the current paragraph 5 and the tolling provision.

The ARB also agrees with the Petitioner that the Committee created unenforceable probation terms by adopting the entire California terms of probation as Appendix 2 to the Committee's Determination. The California terms refer to provisions of California statutes that New York would be unable to enforce against one of our licensees. The ARB overturns the Committee and deletes the provisions in Appendix 2 as probation terms. The ARB also amends paragraph 1 in the Committee's Order to delete reference to Appendix 2. The ARB grants the

Petitioner's request that the ARB expand the language at paragraph 4 in the Committee's Order to read:

" 4. The Respondent must comply with the terms and conditions of his California Order and any extensions and/or modifications thereof and shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of the Respondent's compliance with the terms of his Order and shall personally meet with a person designated by OPMC when so requested. The Respondent shall authorize the California Board to provide OPMC with any and all documentation that OPMC requests regarding the Respondent's compliance with the California Order. "

The ARB also adds a new paragraph 5 to replace the former paragraph 5, to read:

"5. Should the Respondent return to New York State to practice medicine, prior to the termination of his probation in the State of California, the Respondent shall provide 90 days advance written notice to the New York State Department of Health, addressed to the Director OPMC, Hedley Park Place, 433 River Street, Suite 303, Troy, NY 12180-2299, of his intention to return; said notice must include the Respondent's current mailing address and telephone number(s); a letter from the California Board reporting the status of the Respondent's Order of May 18, 2008 and any extension or modification thereof (California Order); certified documentation from the California Board regarding the Respondent's compliance with the California Order; a certified copy of the University of California-San Diego Physician Assessment and Clinical Education Program (PACE) report regarding the assessment and examination of the Respondent's competency and physical and mental health as well as compliance with any recommendations; certified documentation from the California Impaired Physician's Program attesting to the Respondent's compliance with the terms of his contract.

- a. At the request of OPMC, the Respondent shall be required to appear in person at the offices of OPMC, to meet with a person or persons designated by the Director of OPMC, to meet with a person or persons designated by OPMC, in order for the Respondent to discuss his practice plan, plan for continuing medical education, plan for continued recovery from alcohol and/or substance abuse and the status of his California Order.*
- b. The Director of OPMC may at his discretion determine what terms, conditions and/or limitations to impose upon the Respondent's proposed practice in New York State.*
- c. The Respondent will be required to comply with all terms, conditions and limitations imposed by the Director of OPMC. "*

The ARB affirms all other probations terms that appear in the Committee's Order.

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 place the Respondent on probation.
3. The ARB modifies the terms under the probation as we discussed in our Determination.

Thea Graves Pellman
Datta G. Wagle, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

In the Matter of Michael D. Berger, M.D.

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

Dated: 27 July 2009

Redacted Signature

Linda Prescott Wilson

In the Matter of Michael D. Berger, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Berger.

Dated: July 27, 2009

Redacted Signature

Thea Graves Pellman

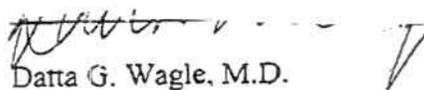
In the Matter of Michael D. Berger, M.D.

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

Matter of Dr. Berger.

Dated: 7/26/ 2009

Redacted Signature


Datta G. Wagle, M.D.

In the Matter of Michael D. Berger, M.D.

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

Matter of Dr. Berger.

Dated: August 4, 2009

Redacted Signature

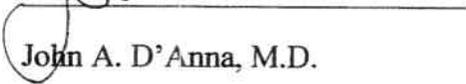
Richard D. Milone, M.D.

In the Matter of Michael D. Berger, M.D.

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

Dated: July 27, 2009

Redacted Signature

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John A. D'Anna, M.D.