

Public

**NEW YORK**  
*state department of*  
**HEALTH**

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

Sue Kelly  
Executive Deputy Commissioner

August 13, 2013

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

David Granoff, D.O.  
**REDACTED**

Jude B. Mulvey, Esq.  
NYS Department of Health  
ESP-Corning Tower-Room 2512  
Albany, New York 12237-0032

Timothy J. Fennell, Esq.  
Amdursky, Pelky, Fennell & Wallen, P.C.  
26 East Oneida Street  
Oswego, New York 13126

**RE: In the Matter of David Granoff, D.O.**

Dear Parties:

Enclosed please find the Determination and Order (No. 13-240) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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

David Granoff, D.O. (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. 13- 240

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): Jude B. Mulvey, Esq.  
For the Respondent: Timothy J. Fennell, Esq.

After a hearing below, a BPMC Committee dismissed the charge that the Respondent practiced medicine with a suspended New York medical license (License). In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2013), the Petitioner asks the ARB to overturn the Committee and find that evidence at the hearing proved that the Respondent practiced during his suspension. After reviewing the record below and the parties' review submissions, the ARB affirms the Committee's Determination.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(12) (McKinney Supp. 2013) by committing professional misconduct under the following specification: practicing the profession while his License was suspended or inactive. The Department's Statement of Charges stated that the Respondent surrendered his License due to incapacitation from alcohol abuse in January 2008. The Department charged that the Respondent practiced while suspended in the spring of 2009 in the vicinity of Oswego, New York by providing care to approximately thirty patients and/or providing consultation services to another physician.

The evidence at the hearing revealed the Respondent's criminal conviction for driving under the influence of alcohol (DUI) in Pennsylvania in January 2007. That conviction resulted in the requirement that the Respondent complete a community service project. The Respondent surrendered his License in January 2008 with the admission that he was presently incapacitated for the active practice of medicine due to alcohol abuse. The Respondent approached Michael Nupuf, M.D. for assistance in completing the community service program necessary under the Pennsylvania DUI conviction. Dr. Nupuf sent a letter in March 2009 indicating that the Respondent had completed the community program and thereafter Pennsylvania expunged the DUI conviction. The Respondent sought restoration of his License in a restoration proceeding before a BPMC Committee (Restoration Committee) in July 2011. The Respondent and Dr. Nupuf both testified before the Restoration Committee. The Restoration Committee denied restoration and the Restoration Committee raised concerns about whether the Respondent's activities in the community service project amounted to the practice of medicine. The Office for Professional Medical Conduct (OPMC) conducted an investigation in response to the Restoration Committee's concerns and that investigation resulted in the charge against the Respondent.

The separate BPMC Committee who conducted the hearing into the practicing while suspended charge (Hearing Committee) dismissed the charge. The Respondent, Dr. Nupuf, Ruth Hart, M.D., an expert witness for the Petitioner, and two OPMC Investigators, Annette Palk and Janet Robins, testified before the Hearing Committee. Ms. Palk testified about the Restoration Committee hearing and Ms. Robins testified about interviewing Dr. Nupuf. The Hearing Committee found both witnesses credible, but found neither helpful in resolving the charge against the Respondent. Dr. Hart testified concerning the definition for the practice of medicine. A majority of the Hearing Committee found Dr. Hart's testimony failed to establish clearly a useful definition of the practice of medicine as applied to this case. The Committee noted that Dr. Hart engaged in repeated verbal fencing with the Respondent's counsel on cross-examination. The majority gave Dr. Hart's testimony little weight to support the charge. The majority of the Hearing Committee also disqualified Dr. Nupuf as a credible witness due to inconsistencies in his testimony before the Restoration Committee and before the Hearing

Committee. The entire Hearing Committee disqualified the Respondent as a witness due to inconsistent statements before the Restoration Committee and the Hearing Committee.

A majority of the Hearing Committee found insufficient proof in the record to sustain the charge that the Respondent practiced while his License was suspended. The majority noted that no credible witness appeared who placed the Respondent and Dr. Nupuf together at Oswego Hospital.

#### Review History and Issues

The Committee rendered their Determination on June 3, 2013. This proceeding commenced on June 10, 2013, when the ARB received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and the Respondent's reply brief. The record closed when the ARB received the reply brief on July 22, 2013.

The Petitioner argued that the Respondent practiced medicine in violation of a temporary surrender by accompanying Dr. Nupuf on rounds at Oswego Hospital in 2009 or by providing input by telephone regarding issues that arose in patient care. The Petitioner contends that the evidence before the Committee supported the charge and asks that the ARB overturn the Committee and sustain the charge. The Petitioner then requests that the ARB revoke the Respondent's License and prohibit the Respondent from seeking re-licensure.

The Respondent replied that the Hearing Committee alone determines the weight to assign to evidence. The Respondent argued that the Petitioner failed to produce any evidence that the Respondent treated a patient at Oswego Hospital, other than the contradictory testimony from Dr. Nupuf.

### 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 (3<sup>rd</sup> 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 (3<sup>rd</sup> Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3<sup>rd</sup> 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 (3<sup>rd</sup> 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 dismiss the charge. Under PHL §§ 230(10)(g)(1) and 230-c(4)(b), BPMC Committees make findings of fact and the ARB reviews those findings, if a party requests a review. The Petitioner argued that the Respondent practiced medicine at Oswego Hospital in 2009, but the Petitioner fails to cite any finding of fact by the Hearing Committee to support a determination that the Respondent practiced while on suspension. In this review, the Petitioner is in effect asking the ARB to make findings to support the charge. The ARB rejects that request to act beyond our authority.

The ARB agrees with the Committee that the evidence failed to prove the charge. The only witnesses who testified before the Committee and who knew what happened during the community service program were the Respondent and Dr. Nupuf. The Committee disqualified both as witnesses due to their inconsistent testimony before the Restoration Committee and the Hearing Committee. The ARB defers to the Committee as the fact finders in their judgment on witness credibility.

In reviewing this matter, the ARB Members were concerned over the inconsistent testimony under oath before the Restoration Committee in 2011 and before the Hearing Committee, at Menands, New York, in Albany County, in 2013. During deliberations, the ARB discussed how we should proceed in a case if it appears that witnesses may have committed a

crime in testimony during BPMC hearings. The ARB directs that a copy of this Determination go to the Albany County District Attorney for that official's review.

ORDER

NOW, with this Determination as our basis, the ARB renders the following ORDER:

The ARB affirms the Committee's Determination to dismiss the charge against the Respondent.

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 David Granoff, D.O.

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

Dated: 8 August 2013

REDACTED

Linda Prescott Wilson

In the Matter of David Granoff, D.O.

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

Dated: August 8, 2013

REDACTED

Peter S. Koenig, Sr. /

In the Matter of David Granoff, D.O.

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

Dated: 8/8, 2013

REDACTED

Steven Grabiec, M.D.

In the Matter of David Granoff, D.O.

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

Matter of Dr. Granoff.

Date: August 8, 2013

REDACTED

Richard D. Milone, M.D.

In the Matter of David Granoff, D.O.

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

Dated: Aug 8, 2013

REDACTED

John A. D'Anna, M.D.