

August 13, 2013

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

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

Barlow Smith, M.D.  
1811A Highway 281 – Suite 8  
Marble Falls, Texas 78654

Barlow Smith, M.D.  
**REDACTED**

**RE: In the Matter of Barlow Smith, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 13-241) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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

Barlow Smith, 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. 13-241

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: Pro Se

The Respondent holds a license to practice medicine in the State of Texas, in addition to the Respondent's license to practice medicine in New York (License). Following a hearing below, a BPMC Committee revoked the Respondent's License after finding that the Texas disciplined the Respondent for engaging in sexual conduct with a patient. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2013), the Respondent asks the ARB to overturn the Committee's Determination. After reviewing the record below and the parties' review briefs, the ARB affirms the Committee's Determination in full.

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, Texas,

- 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 Texas would constitute misconduct if committed in New York, under the following specifications:

- practicing the profession with negligence on more than one occasion, a violation under EL § 6530(3);
- failing to maintain accurate patient records, a violation under EL § 6530(32); and,
- engaging in contact of a sexual nature with a patient, while practicing psychiatry, a violation under EL § 6530(44).

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 Committee determined that the Respondent entered into Agreed Orders with the Texas Medical Review Board (Texas Board) in May 2009 and August 2011. In the 2011 Order, the Texas Board found that the Respondent failed to delineate his thought process in medical

records and failed to maintain medical records to support the treatment regimen for four patients to whom the Respondent prescribed pain medication and stimulants. The Texas Board required that the Respondent complete at least eight hours continuing education in medical record keeping. In 2009, the Texas Board found that the Respondent, while practicing psychiatry, engaged in sexual contact with a patient, whom the Texas Board referred to by the initials "P.C.". The Texas Board reprimanded the Respondent for this conduct, ordered the Respondent to complete a professional boundaries course and ordered the Respondent to pay an administrative penalty amounting to \$3,000.00.

The Committee concluded that the conduct that resulted in the 2011 Agreed Order would have constituted misconduct, if committed in New York, as practicing with negligence on more than one occasion and failing to maintain accurate records. The Committee concluded further that the conduct that resulted in 2009 Agreed Order would have constituted misconduct if committed in New York as engaging in physical conduct of a sexual nature with a patient in the practice of psychiatry. The Respondent argued at hearing that the 2009 conduct provided no basis for disciplinary charges in New York because the conduct occurred with a former patient. The Committee rejected that argument and found that a patient went to the Respondent's office for his action on a form necessary so the patient could participate in a prescription assistance program. The Respondent engaged in sexual conduct with the patient during that office visit. The Committee found that the patient went to the Respondent for assistance that only he, the patient's treating physician, could provide, so the Respondent was still in a psychiatrist/patient relationship with the patient.

The Committee voted to revoke the Respondent's License. The Committee noted that Texas disciplined the Respondent twice, once for sexual impropriety with a psychiatric patient.

The Committee concluded that the Respondent was unwilling or unable to conform his behavior to the standards of the medical profession. The Committee noted that Texas had chosen against revoking the Respondent's license in that state, but the Committee cited their individual responsibility to take action against the Respondent's License. The Committee described the Respondent's conduct as a gross breach of his professional and moral obligations as a psychiatrist. The Committee found that the Respondent expressed no remorse for his conduct, but attempted to excuse his conduct with a legalistic argument that classified P.C. as a former patient.

#### Review History and Issues

The Committee rendered their Determination on June 5, 2013. This proceeding commenced on June 21, 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 Respondent's brief and the Petitioner's reply brief. The record closed when the ARB received the reply brief on July 8, 2013.

The Respondent argued that he had discharged P.C. as a patient by the time she came to his office for processing documents. The Respondent contended that signing a document for a former patient does not make P.C. the Respondent's patient again. The Respondent also argued that Texas specifically provides a sanction for sex with a former patient and New York does not.

The Petitioner replied that both the American Medical Association and the American Psychiatric Association specifically state that sex with a former patient is unethical. The Petitioner also notes that the Committee found that the Respondent remained in a

psychiatrist/patient relationship, because P.C. went to the Respondent for assistance which only the Respondent, as treating physician, could provide.

#### 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 that the findings in the 2009 and 2011 Texas Agreed Orders made the Respondent liable for disciplinary action under EL §§ 6530(9)(b) & 6530(9)(d). The ARB also affirms the Committee's Determination to revoke the Respondent's License.

The ARB rejects the Respondent's arguments that BPMC lacked jurisdiction to sanction the Respondent's License due to the sexual conduct with P.C. The New York Court of Appeals has sustained disciplinary action against a mental health care professional for sexual contact even with a former patient, on the grounds that the professional had exploited a relationship of trust and confidence he had developed with a patient prior to the patient's discharge from a mental health facility, Block v. Ambach, 73 N.Y.2d 323 (1989). In this case, the Committee rejected the Respondent argument that P.C. was a former patient and found that a psychiatrist/patient relationship continued between the Respondent and P.C. The ARB agrees with the Committee.

The 2009 Texas Agreed Order [Direct Referral Exhibit 5] found that the Department of Rehabilitative Services referred P.C. to the Respondent's practice for evaluation and medication management. The Respondent saw P.C. on June 24, 2007 and twice in August 2007. The Respondent adjusted medications for P.C. on a final treatment visit on November 5, 2007. On December 13, 2007, P.C. went to the Respondent's office so the Respondent could sign a form P.C. needed for the Prescription Assistance Program. The Respondent was at the office although the office was closed at the time. The Respondent invited P.C. into his office, P.C. began crying and the sexual contact followed. The Agreed Order stated that there were several more meetings which resulted in sexual contact and that the Respondent told P.C. about the importance of keeping the conduct a secret, because the Respondent was a psychiatrist.

The ARB concludes that the Respondent took advantage of the relationship of trust he had established with a vulnerable person who needed the Respondent's assistance with the Prescription Assistance Program. The Respondent was in a position to assist P.C. solely because of his medical licensure and his relationship as the treating psychiatrist for P.C.

The ARB also agrees with the Committee that the Respondent's conduct demonstrates his unfitness to practice medicine in New York. In addition to the gross misconduct with P.C., the Respondent committed misconduct again and he has failed to show remorse for his conduct. The ARB votes 5-0 to affirm the Committee's Determination to revoke the Respondent's License.

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 revoke 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 Barlow Smith, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Smith.

Dated: 8 August, 2013

~~REDACTED~~

Linda Prescott Wilson

In the Matter of Barlow Smith, M.D.

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

Dated: August 7, 2013

REDACTED

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Peter S. Koenig, Sr.

In the Matter of Barlow Smith, M.D.

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

Dated: 8 / 7, 2013

REDACTED

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Steven Grabiec, M.D.

In the Matter of Barlow Smith, M.D.

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

Dated: August, 2013

REDACTED

Richard D. Milone, M.D.

In the Matter of Barlow Smith, M.D.

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

Matter of Dr. Smith.

Dated: Aug 8, 2013

REDACTED

John A. D'Anna, M.D.