

NEW YORK
state department of
HEALTH

Public

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

Sue Kelly
Executive Deputy Commissioner

August 15, 2011

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Joel E. Ablove, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2512
Albany, New York 12237-0032

Richard Paul Kulak, D.O.

REDACTED

Richard Paul Kulak, D.O.
REDACTED

Michael J. McDermott, Esq.
5860 South Bay Road
Cicero, New York 13039

RE: In the Matter of Richard Paul Kulak, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 11-113) 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

HEALTH.NY.GOV
facebook.com/NYSDOH
twitter.com/HealthNYGov

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, 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

Richard Paul Kulak, 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. 11-113

COPY

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

For the Department of Health (Petitioner): Joel Abelove, Esq.
For the Respondent: Michael J. McDermott, Esq.

After a hearing below, a BPMC Committee determined that the Respondent's New York criminal conviction, for attempted dissemination of indecent material to a minor, made the Respondent liable for disciplinary action against the Respondent's license to practice medicine in New York State (License). The Committee voted to revoke the Respondent's License. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2011), the Respondent asks the ARB to modify that Determination to a temporary License suspension and probation. After considering the hearing record and the parties' review submissions, the ARB sustains the Committee's Determination in full.

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's Statement of Charges [Hearing Exhibit 1] alleged that the Respondent committed professional misconduct under the definition in N. Y. Education Law (EL) §6530(9)(a)(i) (McKinney 2009) by engaging

in conduct that resulted in a felony conviction under New York State Law. In the Direct Referral Hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996). Following the Direct Referral Hearing, the Committee rendered the Determination now on review.

The evidence before the Committee indicated that the Respondent entered a guilty plea in New York State Supreme Court for Onondaga County to attempted dissemination of indecent material to a minor in the first degree, a Class E Felony under New York Penal Law §§ 110 & 235.22. The Court placed the Respondent on probation for ten years, classified the Respondent as a Level 1 Sex Offender, issued an Order of Protection and assessed surcharges and fees amounting to \$1,425.00. The case involved the Respondent's interaction with a 16 year old youth, whom the Respondent had treated for mood disorder and for "an extreme case of social anxiety."

The Committee determined that the Respondent's actions amounted to professional misconduct that made the Respondent liable for disciplinary action against the Respondent's License. The Committee voted to revoke the Respondent's License. The Committee expressed concern that the 16 year old victim and his mother had both been patients of the Respondent and found that those circumstances compounded the already serious transgression that the criminal act represented. The Committee also noted that the Respondent chose not to testify and thus denied the Committee a chance to hear from and directly evaluate the Respondent's explanation.

Review History and Issues

The Committee rendered their Determination on May 11, 2011. This proceeding commenced on May 23, 2011, 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 or about June 27, 2011.

The Respondent asked that the ARB reduce the penalty against the Respondent to a temporary suspension and probation. The Respondent argued that the hearing record contained hearsay statements concerning a sexual relationship between the Respondent and the youth, but that the Committee should have restricted its review to only the criminal conviction and to the plea in the criminal case involving inappropriate text messaging only. The Respondent noted that the Committee's Determination made reference to a sexual relationship between the Respondent and the youth and that the Committee's Determination implied that the Respondent treated the youth in his capacity as medical director for the Syracuse City School District. The Respondent argued that he no longer provided medical care to the youth at the time of the interaction that the criminal charges involved and that the Respondent never treated the youth in the Respondent's role as the medical director for the Syracuse City School District. The Respondent argued that he did not exploit the physician-patient relationship and that no evidence in the record indicated that the Respondent provided negligent or inadequate medical care. The Respondent also noted that the hearing record contained testimony and written support from medical professionals and patients to identify the Respondent as a caring, compassionate, skillful and dedicated physician. The Respondent noted further that he had undergone treatment and counseling with a

psychologist and psychiatrist, who both indicated that the Respondent could return to practice safely, with a carefully crafted practice plan.

The Petitioner answered that nothing in the Respondent's brief indicated that the Committee acted inappropriately in making their Determination. The Petitioner argued that, no matter when the Respondent treated the youth, the youth had been the Respondent's patient. The Petitioner contended that the Committee considered and found irrelevant that the Respondent provided appropriate care to the youth and that the Respondent had demonstrated skill, compassion, dedication and clinical ability. The Petitioner argued that the Respondent's criminal conduct outweighed the evidence the Respondent offered in his defense.

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's criminal conviction made the Respondent liable for disciplinary action against his License. Neither party challenged the Committee's Determination on the charges. We also affirm the Committee's Determination to revoke the Respondent's License.

The Respondent engaged in criminal conduct with a minor, whom the Respondent had treated previously. The Respondent's criminal conduct has resulted in his classification as a Level 1 Sex Offender. The Respondent failed to testify at the BPMC hearing that would

determine the action to take on the Respondent's License. Instead, the Respondent relied upon testimonials and psychological and psychiatric evaluations. The Committee found that the Respondent's failure to testify denied the Committee the chance to evaluate the Respondent. The ARB finds that the Respondent's failure to testify presented an aggravating factor that outweighed the evidence the Respondent offered in mitigation. The ARB finds the Respondent's criminal conduct with a minor and former patient deeply troubling. We conclude that the Committee acted appropriately and consistently with the record in revoking 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.
Datta G. Wagle, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

In the Matter of Richard Paul Kulak, M.D.

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

Dated: 11 August, 2011

REDACTED

Linda Prescott Wilson

In the Matter of Richard Paul Kulak, M.D.

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

Dated: 08/06, 2011

REDACTED

Peter S. Koenig, Sr.

In the Matter of Richard Paul Kulak, M.D.

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

Matter of Dr. Kulak.

Dated: 8/9/ 2011

REDACTED

~~_____~~
Datta G. Wagle, M.D.

In the Matter of Richard Paul Kulak, M.D.

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

Matter of Dr. Kulak.

Dated: August 12, 2011

REDACTED

Richard D. Milone, M.D.

In the Matter of Richard Paul Kulak, M.D.

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

Matter of Dr. Kulak.

Dated: Aug 27, 2011

REDACTED

John A. D'Anna, M.D.