

October 25, 2013

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Gustave Stephen Drivas, M.D.

REDACTED

Gustave Stephen Drivas, M.D.

3377 Richmond Avenue  
Staten Island, New York 10312Sidney Baumgarten, Esq.  
Law Offices of Devereaux & Baumgarten  
39 Broadway – Suite 910  
New York, New York 10006John Thomas Viti, Esq.  
NYS Department of Health  
90 Church Street – 4<sup>th</sup> Floor  
New York, New York 10007**RE: In the Matter of Gustave Stephen Drivas, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 13-351) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine if **said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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

Gustave Stephen Drivas, 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. 13- 351

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): John T. Viti, Esq.  
For the Respondent: Sidney Baumgarten, Esq.

Following a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct and the Committee voted to revoke 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 2013), the Respondent has filed motions requesting that the ARB extend the time for the Respondent to file a review brief and/or order a re-hearing because the Respondent failed to receive effective assistance of counsel at the hearing below (Motions). After reviewing the record below, the Motions and the Petitioner's reply opposing the Motions (Reply), the ARB denies the Motions, affirms the Committee's Determination on the charges and affirms the Committee's Determination to revoke the Respondent's License.

### Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(2), 6530(16) & 6530(21)(McKinney Supp. 2013) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- willful or grossly negligent failure to comply with substantial provisions of state law governing the practice of medicine, and,
- willfully making or filing a false report.

The charges involved documents that the Respondent filed with or submitted to the New York Department of State and the New York State Education Department. The charges alleged that the Respondent identified himself as the sole shareholder, director and officer in professional corporations (PC) and a professional limited liability corporation (PLLC), when in fact other, non-professionals owned and controlled the corporations.

The record before the Committee demonstrated that New York Business Corporation Law (BCL) § 1503(a) provides that individuals holding the same professional licenses in the State may organize a PC, for pecuniary profit, to render the same professional services. Under BCL § 1503(b)(McKinney Supp. 2013), the certificate of incorporation for the PC shall attach certification from the licensing authority that the proposed shareholders, directors and officers in the PC possess the authority to practice the profession that the PC will practice. New York Limited Liability Company Law (LLCL) § 1203(a) (McKinney Supp. 2013) permits licensed professionals to form a PLLC, for pecuniary profit, to render the professional services that the licensees hold licenses to practice. Under LLCL § 1203(b), the articles of authorization for the PLLC must attach certification that each PLLC member and manager holds authorization to practice the profession that the PLLC will practice. The Committee concluded that only a licensed professional may manage, direct and operate a PC or PLLC.

The Committee found that the Respondent filed or caused to be filed certificates of incorporation for eight PCs: Bay Medical Care, PC; Drivas Medical Care, PC; DSG Medical, PC; GSD Medical, PC; Roosevelt Medical, PC; Sutphin Best Medical Care, PC; Tri-State Medical Diagnostic, PC and Coney Island Medical Care, PC. The certificates listed the Respondent as the sole shareholder, director and officer for each PC. The Respondent filed documentation subsequently with the Department of State and/or the State Education Department in which the Respondent continued to represent himself as a shareholder, officer and or director in the entities. The Committee found further that the Respondent filed documentation with the Department of State in October 2001 indicating that the Respondent had become the Chief Executive Officer and President of Magna Medical, PC. The Respondent also filed a triennial statement to the Education Department concerning Magna. The Committee also found that the Respondent filed or caused to be filed articles of organization for SVS Wellcare, PLLC that listed the Respondent as the original member and manager at the PLLC. The Respondent subsequently filed a copy of the articles for SVS Wellcare, PLLC, with the State Education Department that listed the Respondent as the sole original member and manager in the entity.

The Respondent signed an affidavit in January 2007 (Affidavit) that an insurance company investigator had prepared [Hearing Exhibit 10]. In the Affidavit, the Respondent stated that although he was the identified director in the PCs, laypersons secretly owned and controlled the corporations. The Affidavit went on to state that profits from the PCs went to the laypersons through fees for management, billing and collection services, so that laypersons could profit illegally from medical services. The Affidavit listed all nine PCs at issue in this case and listed SVS Wellcare Medical, PLLC. The Respondent's answer in this action (Answer) admitted that he was still listed as a director, shareholder and officer in Bay Medical Care, PC, as of July 25, 2012 [Hearing Exhibit C]. The Answer also admitted, with one exception, all allegations in the charges concerning Drivas Medical Care, DSG Medical, GSD Medical, Roosevelt Medical, Sutphin Best Medical Care and Coney Island Medical Care. The exception for each PC was that the Respondent did not admit to still being listed as a shareholder, director and officer as of July 25, 2012. The evidence at hearing also included an April 24, 2001 letter from the Respondent to

the State Education Department [Hearing Exhibit 29]. The Committee concluded from Exhibit 29 that the Respondent was aware that, at least as of the date of the Exhibit, a non-professional could not serve as a director, shareholder or officer in a PC. All charges relating to seven of the PCs and the one PLLC concern conduct subsequent to April 24, 2001. The certificate of incorporation filings for Sutphin Best Medical Care and Magna Medical Care occurred prior to April 24, 2001. The Respondent submitted a letter to the Department of State in November 2002 that identified the Respondent as the Chief Executive Officer and President of Sutphin. The Respondent signed a statement to the Department of State in October 2001 that identified the Respondent as Chief Executive Officer and President of Magna.

The Committee concluded that the Respondent practiced fraudulently, willfully made or filed false reports and failed to comply with substantial provisions of State law that govern the practice of medicine. In making their findings, the Committee noted that the Department called only one witness at the hearing: the insurance investigator who prepared the Affidavit. The Committee found that the investigator, Nicole Matthews, answered all questions honestly and to the best of her knowledge. The Committee found Ms. Matthews' testimony credible. The Respondent provided no testimony on his own behalf. The Committee found that the Respondent failed to explain anything and the Committee drew an adverse inference from the Respondent's failure to testify, Matter of Steiner v. DeBuono, 239 A.D.2d 708, 657 N.Y.S.2d 485 (3<sup>rd</sup> Dept. 1997).

The Committee voted to revoke the Respondent's License. The Committee concluded that the Respondent knew that the PCs and the PLLC were being misused, participated in fraud and took no action to end the fraud for many years. The Committee found that the Respondent basically continued to lend his credentials to fraudulent business organizations until he was caught.

#### Review History and Issues

The Committee rendered their Determination on July 9, 2013. This proceeding commenced on July 15, 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 Motions and the Petitioner's Reply. The record closed when the ARB received the Reply on September 18, 2013.

The Respondent moved for an extension in time to file a full brief, and/or a re-hearing due to ineffective assistance of counsel at the hearing below. The Respondent requested the extension because the Respondent's counsel is currently representing the Respondent in a criminal matter that is occupying a great deal of time. The Respondent argued further that the preparation in the criminal matter uncovered documents that bear on the charges before the Committee. The Respondent attached that documentation to the Motions as Attachments A-C. The Respondent alleged error by the Respondent's hearing counsel for advising the Respondent against testifying at hearing and for other decisions by the hearing counsel.

In reply, the Petitioner asked that the ARB deny the request for an extension because the Respondent already received an extension in the time to file a brief and failed to file the brief in a timely manner. The Petitioner argued that the ARB should deny the request for rehearing because ineffective assistance of counsel provides no grounds on which to overturn a decision in an administrative proceeding, Matter of Rattray v. Novello, 46 A.D. 3d 953, 847 N.Y.S. 2d (3<sup>rd</sup> Dept. 2007). The Petitioner argued further that the Committee could not consider any documents in the Motions' Attachments because the information came from outside the hearing record.

#### 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 deny the Motion for any further filing extension. We also decline to remand this matter for further proceedings. The ARB votes unanimously to sustain the Committee's Determination that the Respondent committed professional misconduct and to sustain the Determination to revoke the Respondent's License.

The Respondent has already received extensions in the time period to file a review brief. When a party requests administrative review, the Administrative Officer for the ARB sends the parties a letter to set the date for filing briefs. In this case, the Administrative Officer set the date as August 15, 2013. The Administrative Officer extended that briefing date twice and refused a further extension request because the extension would have interfered with the date that the ARB set for reviewing this case. The ARB declines a further extension.

The Respondent also requested a re-hearing due to ineffective assistance of counsel. Under PHL § 230-c(4)(b), the ARB may remand a case to the hearing committee for reconsideration or further proceedings. The ARB declines to remand this case. As the Petitioner's brief points out, ineffective assistance of counsel provides no grounds on which to overturn a decision in an administrative proceeding, Matter of Rattray v. Novello, 46 A.D. 3d 953, 847 N.Y.S. 2d (3<sup>rd</sup> Dept. 2007). A licensee may be represented by an attorney during a proceeding before BPMC and the Respondent had legal representation during the hearing below.

The Respondent also argued that the investigation in the criminal case uncovered documents that would be relevant on the charges in this case. Those documents, however, were not before the Committee and the Petitioner had no opportunity to object to or challenge those documents at hearing. The Respondent attached the three documents to the Motions and the

Petitioner's Reply objected to the Motions' three attachments because PHL § 230-c limits reviews to the record below and the parties' briefs. The ARB declines to review the attachments because the attachments came from outside the hearing record. Under PHL § 230(10)(q), a licensee may request that the Director of the Office for Professional Medical Conduct vacate a hearing decision due to new and material evidence. The ARB plays no part in that process.

The evidence before the Committee revealed that the Respondent knew that non-physicians could not operate a physician PC or PLLC. The Respondent, however, formed physician PCs and a physician PLLC and he provided ongoing submissions to the Department of State and the State Education Department that stated falsely that the Respondent controlled these professional entities. The Respondent used his License in a deliberate, illegal scheme to funnel payments for medical services to non-physicians and to enable non-physicians to control entities that provided medical services. The ARB agrees with the Committee that the Respondent's conduct amounted to fraud in practice, willfully filing false reports and failing to comply with substantial provisions of law that govern the practice of medicine. The ARB also agrees with 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 denies the motion to remand the case and the motion for a further extension to file a brief.
3. 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 Gustave Stephen Drivas, M.D.

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

Dated: 22 October 2013

REDACTED

Linda Prescott Wilson

In the Matter of Gustave Stephen Drivas, M.D.

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

Dated: October 20, 2013

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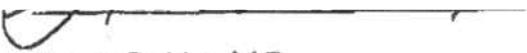
  
Peter S. Koenig, Sr. ↙

In the Matter of Gustave Stephen Drivas, M.D.

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

Dated: 10/18/ 2013

REDACTED

  
Steven Grabiec, M.D.

In the Matter of Gustave Stephen Drivas, M.D.

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

Dated: October 18, 2013

REDACTED

Richard D. Milone, M.D.

In the Matter of Gustave Stephen Drivas, M.D.

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

Dated: OCT 21, 2013

REDACTED

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John A. D'Anna, M.D.