



STATE OF NEW YORK DEPARTMENT OF HEALTH

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

Richard F. Daines, M.D.
Commissioner

James W. Clyne, Jr.
Executive Deputy Commissioner

September 25, 2009

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Reed Craig Moskowitz, M.D.

Redacted Address

Michael S. Kelton, Esq.
Abrams, Fensterman
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New York, New York 10017

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NYS Department of Health
90 Church Street – 4th Floor
New York, New York 10007

RE: In the Matter of Reed Craig Moskowitz, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 09-21) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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

Reed Craig Moskowitz, 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. 09-21

(COPY)

Before ARB Members Pellman, Wagle, Wilson and Milone¹
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Ann Gayle, Esq.
For the Respondent: Peter Chavkin, Esq.

Following a hearing below, a BPMC Committee found that the Respondent committed professional misconduct by engaging in sexual contact with two patients and by submitting false information. The Committee voted to revoke the Respondent's license to practice medicine in New York State. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2009), the Respondent asks the ARB to nullify that Determination or to remand for the Committee to receive additional information. After reviewing the hearing record and the parties' review submissions, the ARB rejects the request for a remand, the ARB affirms the Committee's Determination on the charges and the ARB affirms the Committee's Determination to revoke the Respondent's License.

¹ ARB Member John A. D'Anna, M.D. did not participate in this case. The ARB proceeded to consider the case with a four-member quorum, Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

Committee Determination on the Charges

The Committee conducted a hearing on charges that the Respondent committed professional misconduct by violating New York Education Law (EL) §§ 6530(2-4), 6530(20), 6530(31) & 6530(44) (McKinney 2009) under the following specifications:

- practicing medicine fraudulently;
- practicing medicine with negligence on more than one occasion;
- practicing medicine with gross negligence;
- engaging in conduct that evidences moral unfitness in the practice of medicine;
- willfully harassing, abusing or intimidating a patient; and,
- engaging in conduct of a sexual nature with a patient.

The fraud charge involved applications the Respondent submitted to New York University Medical Center and a document the Respondent submitted to BPMC. The other charges related to the Respondent's conduct towards two persons, Patients A and B. The record refers to the Patients by initials to protect patient privacy. The Respondent denied the charges. Following the hearing, the Committee rendered the Determination now on review.

The Committee found that the Respondent provided psychiatric treatment to both Patients A and B. The Committee found that the Respondent engaged in physical contact of a sexual nature with Patient A, during the course of treatment, which included hugs, kisses, fondling, sexual intercourse and oral sex. The Committee found that the Respondent engaged in physical contact of a sexual nature with Patient B, during the course of treatment, which included kissing, hugging, fondling and sexual intercourse. The Committee found further that the Respondent submitted hospital credentialing applications to NYU Hospital Center in 2005 and 2007 (NYU Applications), which the Respondent knew to contain false information. The Committee also found that the Respondent submitted intentionally altered information to BPMC. The Committee concluded that the Respondent engaged in physical conduct of a sexual nature with a patient, practiced with gross negligence and negligence on more than one occasion, engaged in conduct in practice that evidenced moral unfitness, abused a patient and practiced medicine fraudulently.

In making their findings, the Committee found Patients A and B credible in their testimony that the patients engaged in sexual relationships with the Respondent. The Committee found that both patients provided detailed accounts and the Committee found the Respondent's testimony to the contrary evasive and less than forthright. The Committee noted that the Respondent provided evidence that he suffered from melanosis, which caused areas of dark pigmentation on the Respondent's penis. Neither patient noted that characteristic in her testimony, but the Committee found the testimony credible nonetheless. The Respondent presented testimony by a psychologist, Dr. Martin Williams, concerning borderline personalities, fantasies and false accusations. The Committee found the testimony by Dr. Williams superfluous, because Dr. Williams never met the patients and could not state whether either patient suffered borderline personality disorder. The Committee found that both patients' subsequent treating psychiatrists testified that the patients are truthful.

The Committee's findings concerning the NYU Applications and the altered document came in large part from documents in evidence. As to the NYU Applications, the Committee found that the Respondent denied on the NYU Applications that there was an investigation pending against the Respondent by the Office for Professional Medical Conduct (OPMC), but that the Respondent knew at the time he answered the Applications that the Respondent was under investigation. The Respondent contended that he made the false answers as oversights rather than as deliberate false submissions. The Respondent submitted malpractice insurance applications from 2006 and 2007 to BPMC in an attempt to show that the Respondent answered correctly on the malpractice insurance applications concerning whether he was under investigation by OPMC. The Committee noted that the 2006 malpractice insurance application (2006 Application) appeared to have been crossed-out, altered with white out or rewritten by hand. The Committee found that a copy of the 2006 Application, which the Petitioner obtained, indicated that the Respondent answered "no" to the question about whether the Respondent was under investigation. The Committee found that the Respondent altered the copy of the 2006 Application, which the Respondent submitted to BPMC. The Committee also found the

Respondent non-credible in his testimony to the Committee denying that the Respondent altered the 2006 Application.

The Committee determined that the Respondent violated the public trust in the medical profession and the Committee voted to revoke the Respondent's License.

Review History and Issues

The Committee rendered their Determination on February 19, 2009. This proceeding commenced on February 25, 2009, 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 Respondent also requested permission to submit a brief in response the Petitioner's reply brief.

The Respondent alleges error by the Committee because the Committee relied on testimony from Patients A and B and rejected testimony by the Respondent in making the Committee's findings. The Respondent submitted attachments with his review brief from outside the hearing record and asked that the ARB consider the attachments in reviewing the case, or that the ARB remand the case to the Committee for a further hearing to review the attachments. The Respondent also argued that he failed to receive effective assistance of counsel at the hearing and he questioned whether that should provide grounds to invalidate the findings from the hearing.

The Petitioner asks that the ARB disregard the submissions from outside the hearing record. The Petitioner notes that PHL § 230(10)(q) authorizes the Director of the Office for Professional Medical Conduct (OPMC) to vacate or modify a BPMC Committee determination in instances in which a licensee presents evidence that is new or was unavailable during a hearing. The Petitioner argues that the matters in the Respondent's brief from outside the hearing record were neither new nor unavailable during the hearing in the Respondent's case.

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. The ARB declines the Respondent's request that the ARB review documents from outside the hearing record, which the Respondent attached to his brief and the ARB declines the request to remand the case to the Committee to consider such documents. The ARB affirms the Committee's Determination on the charges and we affirm the Committee's Determination to revoke the Respondent's License.

The Respondent requested to submit an additional brief beyond what PHL § 230-c permits. The statute allows a party seeking review to submit a brief and then allows the other party to submit a reply brief. The reply brief closes the hearing record. The Respondent submitted a review brief and then submitted a brief in response to the Petitioner's reply. When the Petitioner objected to the extra submission, the Respondent argued that the Petitioner's reply brief misstated the record. The ARB reviewed the Respondent's extra submission and found the document essentially restated the arguments in the Respondent's brief. The ARB also notes that we can determine ourselves whether either party makes misstatements concerning the hearing record.

The Respondent's main brief contained numerous attachments from outside the hearing record, even though PHL § 230-c specifies that an ARB review will consider only the hearing

record below. The ARB considered no material from outside the record. The attempt to introduce documents post-hearing denies the adverse party the opportunity to test that information, Ramos v. DeBuono, 243 A.D.2d 847, 666 N.Y.S.2d 361 (3rd Dept. 1997).

The Respondent asked that the ARB remand this case to the Committee for further proceedings so the Committee could consider the additional material. The Petitioner objected to the remand because the Respondent made no argument that the additional material was new or unavailable to the Respondent at the time of the hearing. Under PHL § 230-c(10)(q), newly discovered material can provide the grounds to reconsider a prior determination. The Respondent argued instead that his prior counsel had erred by failing to offer the extra material at the hearing and the Respondent alleged that the failure amounted to the denial of effective assistance of counsel. The Respondent's brief contended that the failure to receive effective assistance of counsel amounts to a grounds for overturning a criminal conviction and questioned whether such a denial should not also amount to the grounds for a new hearing before BPMC. The courts have answered that allegations about effective assistance of counsel do not provide the grounds for a new administrative hearing in cases involving professional licenses, Dannenberg v. Board of Regents, 77 A.D.2d 707, 430 N.Y.S.2d 700 (3rd Dept. 1989). The ARB reviewed the hearing record and determined that the Respondent received every opportunity to provide a defense to the charges against him. The ARB finds no grounds to remand this case for further proceedings.

The main arguments in the Respondent's brief allege error by the Committee for rejecting the Respondent's testimony and explanations for his actions and in finding Patients A and B credible witnesses. The ARB defers to the Committee in the Committee's judgment on credibility, because the Committee saw the testimony from the witnesses. The Respondent alleged error by the Committee for finding Patients A and B credible, even though neither patient

testified concerning the Respondent's melanosis. The Committee, however, addressed the melanosis evidence in the Committee's Determination and the Committee noted that they found other evidence in the record more compelling in making the Committee's judgment on credibility. The Respondent also contended that the Committee accepted improperly testimony from subsequent treating psychiatrists concerning the truthfulness of Patients A and B. The Respondent argued that judgment about truth telling was the sole province of the Committee and that the introduction of expert testimony on truthfulness would constitute reversible error in a criminal case [Respondent's Brief page 41]. In the next section of the Respondent's brief, however, the Respondent faulted the Committee for failing to accept Dr. White's testimony concerning borderline personalities and fantasy. The ARB rejects the argument that the Committee delegated any of their authority on credibility judgments to the subsequent treating psychiatrists. The Committee based their judgment on credibility on the testimony by Patients A and B and the Committee gave specific citations to the testimony that they found reliable. The Committee also made their judgment on credibility by rejecting the Respondent as a credible witness. The Committee again gave specific reasons for their judgment. In rejecting the Respondent's explanations for false answers on the NYU Applications and the alteration on the 2006 Application, the Committee also noted the inferences they drew to conclude that the Respondent made willful misrepresentations on all the Applications. A Committee is entitled to resolve issues of witness credibility concerning whether a physician engaged in a sexual relationship with a patients, Lugo v. N.Y.S. Dept. of Health, 306 A.D.2d 766, 762 N.Y.S.2d 660 (3rd Dept. 2006) A committee may also reject a licensee's explanation for erroneous reports (such as resulting from inadvertence or carelessness) and draw the inference that the licensee intended or was aware of the misrepresentation, with other evidence as the basis, Matter of Brestin v.

Comm. of Educ., 116 A.D.2d 357, 501 N.Y.S.2d 923 (3rd Dept. 1986). The ARB concludes that the Committee acted appropriately in making their credibility findings in this case.

The ARB concludes that the evidence the Committee found credible demonstrated that the Respondent made willful misrepresentations on the NYU Applications and that the Respondent altered the 2006 Application. Such conduct amounted to fraud in practice. The testimony by Patients A and B established that the Respondent engaged in sexual relationships with those patients during treatment. That conduct amounted to practicing with negligence on more than one occasion, practicing with gross negligence, engaging in sexual conduct with a patient, abusing a patient and engaging in conduct in the practice of medicine that evidences moral unfitness.

The Respondent alleged bias against him by the Committee. To nullify a decision for bias, the party alleging bias must establish bias by more than just speculation and must show that the result in the hearing came from bias alone, Kabnick v. Chassin, 223 A.D.2d 935, 636 N.Y.S.2d 920 (3rd Dept. 1996). The ARB has already concluded that testimony and documentary evidence in the record provided the basis for the Committee's Determination, so ARB rejects the conclusion that the Committee's Determination resulted from bias alone.

The Respondent's fraudulent conduct in submitting the NYU Applications and the 2006 Application, standing alone, provides sufficient reason to revoke the Respondent's License. The Committee found further that the Respondent engaged in sexual relationships with two psychiatric patients. The ARB agrees with the Committee that the Respondent's conduct violated trust in the medical profession and demonstrated the Respondent's unfitness to practice medicine in New York.

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.

Thea Graves Pellman
Datta G. Wagle, M.D.
Linda Prescott Wilson
Richard D. Milone, M.D.

In the Matter of Reed Craig Moskowitz, M.D.

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

Dated 24 September 2009

Redacted Signature

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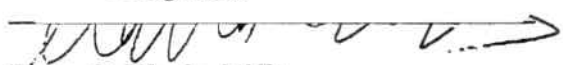
Linda Prescott Wilson

In the Matter of Reed Craig Moskowitz, M.D.

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

Dated: 9/19/, 2009

Redacted Signature


Datta G. Wagle, M.D.

In the Matter of Reed Craig Moskowitz, M.D.

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

Dated: 9-18, 2009

(Redacted Signature

Thea Graves Pellman

In the Matter of Reed Craig Moskowitz, M.D.

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

Dated: September 17, 2009

Redacted Signature

Richard D. Milone, M.D.

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