

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF HEALTH
BOARD OF MEDICAL LICENSURE AND DISCIPLINE
THREE CAPITOL HILL
PROVIDENCE, RHODE ISLAND 02908

IN THE MATTER OF:

Afshin Nasser, M.D.,

Respondent.

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BMLD Case File C16-1526

DECISION

I. INTRODUCTION

The above-entitled matter came before a hearing committee ("Committee")¹ of the Board of Medical Licensure and Discipline ("Board") pursuant to a Time and Notice of Hearing and a Specification of Charges² issued to Afshin Nasser, M.D. ("Respondent"). The Respondent holds a license ("License") as a physician pursuant to R.I. Gen. Laws § 5-37-1 *et seq.* A hearing was held on August 3, 2017 with both parties represented by counsel. The parties filed briefs by October 5, 2017. Oral argument was made before the Committee on October 30, 2017.

II. JURISDICTION

The Board has jurisdiction over this matter pursuant to R.I. Gen. Laws § 5-37-1 *et seq.*, R.I. Gen. Laws § 42-35-1 *et seq.*, *Rules and Regulations for the Licensure and Discipline of Physicians*, and *Rules and Regulations of the Department of Health Pertaining to Practices and Procedures Before the Department of Health*.

¹ On March 1, 2017, pursuant to R.I. Gen. Laws § 5-37-5.2, Nicole Alexander-Scott, M.D., Director of the Department of Health ("Department") designated three (3) members of the Board to act as the Committee for the purposes of adjudicating and issuing a final decision in this matter. The Committee members were Steven Blazar, M.D., Helen Drew, and David Kroessler, M.D. See Department's Exhibit Two (2).

² See Department's Exhibits One (1) (Notice and Time of Hearing dated July 5, 2017) and Three (3) (Specification of Charges).

III. ISSUE

Whether the Respondent violated R.I. Gen. Laws § 5-37-5.1(24) and if so, what is/are the appropriate sanction(s)?

IV. MATERIAL FACTS AND TESTIMONY

Prior to the summary suspension at issue in this matter, there were prior actions taken against the Respondent by the Board. On June 8, 2007, the Respondent signed a consent order voluntarily surrendering his License due to health issues. See Department's Exhibit Four (4). On October 10, 2007, the Respondent agreed to a reinstatement order which reinstated his License and provided for a five (5) year treatment and monitoring contract with the physician's health committee ("PHC") with quarterly health reports. See Department's Exhibit Five (5). On August 22, 2011, the Respondent's License was summarily suspended. Said summary suspension indicated that the reasons for the summary suspension included a recent patient complaint and failure to comply with the 2007 consent order (including the requirements of a mentor and practice manager and chaperone when he saw female patients). See Department's Exhibit Six (6).

To resolve that 2011 summary suspension, the Respondent on January 26, 2012 entered into a consent order with the Board that reinstated his License with certain conditions. See Department's Exhibit Seven (7). In that 2012 consent order, the Respondent admitted to violations in the administration of Midazolam to eleven (11) patients in his office including failure to have written consent and a recurring failure to have certain safety equipment in the office and keeping a controlled substance administration log. The Respondent admitted that the failure to have such equipment was a violation of R.I. Gen. Laws § 5-37-5.1(19)³ for failing to adhere to the minimum

³ R.I. Gen. Laws § 5-37-5.1(19) provides as follows:

Unprofessional conduct. – The term "unprofessional conduct" as used in this chapter includes, but is not limited to, the following items or any combination of these items and may be further defined by regulations established by the board with the prior approval of the director:

standard of acceptable practice of medicine. The Respondent further agreed to certain conditions on his License including that he complete an assessment by the Center for Personalized Education for Physicians ("CPEP") and that he retain Affiliated Monitors, Inc. ("AMI") for five (5) years for purpose of providing a program of chaperoning and practice monitoring. He further agreed not to perform any physical examinations of female patients without the documented and signed presence of an adult chaperone. He also agreed not to order, possess, or administer any injectable sedatives or hypnotics to his patients in his private medical office.

On November 28, 2012, the Respondent entered into an amended consent order in which the monitoring requirement on the Respondent's License was amended so that the Respondent could retain an employee with experience auditing patient medical records and providing chaperone practice monitoring services for five (5) years from January 26, 2012. See Department's Exhibit Eight (8). On July 20, 2015, in response to a patient complaint, the Respondent entered into a consent order in which he agreed to take a Board approved course, have a reprimand imposed on his License, and pay an administrative fee to the Board. See Department's Exhibit Nine (9).

On July 28, 2016, in response to a patient complaint, the Respondent entered into a consent order. See Department's Exhibit Eleven (11). The Respondent agreed that he would not practice medicine beginning on the date of the Board's acceptance of the consent order for 30 days and he would have an independent monitoring program for his medical practice for three (3) years. The Respondent agreed he would retain an independent company to provide oversight of the chaperone program for his practice and that he would not see any female patients without a chaperone.

(19) Incompetent, negligent, or willful misconduct in the practice of medicine which includes the rendering of medically unnecessary services, and any departure from, or the failure to conform to, the minimal standards of acceptable and prevailing medical practice in his or her area of expertise as is determined by the board. The board does not need to establish actual injury to the patient in order to adjudge a physician or limited registrant guilty of the unacceptable medical practice in this subdivision.

On December 23, 2016, AMI informed the Department that it had been retained by the Respondent pursuant to the 2016 consent order. See Department's Exhibit 12. On February 2, 2017, the Respondent was summarily suspended by the Department because he had resumed his practice of medicine prior to obtaining an independent company to provide a chaperone program. See Department's Exhibit 13. It is undisputed by the parties that the Respondent resumed the practice of medicine prior to obtaining an independent monitoring company

On examination by his attorney, the Respondent testified regarding the 2016 consent order. He testified that the 2016 consent order arose from a patient complaint about a 2014 visit, but the patient had previously been satisfied with his treatment. See Respondent's Exhibit A (2015 letter from patient to Respondent). He testified that at the 2014 visit, the patient had not wanted to be seen with a chaperone and she agreed to have a chaperone outside the examining room. He testified that the 2016 consent order required that he obtain an independent monitoring company, but he already had an internal chaperoning program that was in place in 2014 at the time he saw said patient up until time his License was suspended. He testified that the 2016 consent order required that he voluntarily not practice medicine for 30 days from the date the consent order was ratified [July 10, 2016], but his attorney worked out with Dr. McDonald,⁴ the timing of the 30 days that he did not practice. He testified that he did not practice between August 17, 2016 and September 19, 2016. See Respondent's Exhibits C and D (emails between Dr. McDonald and Respondent's attorney regarding start of when Respondent would not practice). The Respondent testified that he knew it was his responsibility to put the chaperone program in place and while the consent order called for an independent company, the only company that met the criteria was AMI. He testified that his attorney was attempting to engage AMI and as they had not heard back from

⁴ James McDonald, M.D., Chief Administrative Officer of the Board.

AMI, he called Dr. McDonald on November 14 or 16, 2016. He testified that Dr. McDonald did not tell him to stop practicing and did not tell him that he could not practice until he had the monitoring in place. The Respondent testified that he was out of the country between November 18 and December 5, 2016. He testified that he had his own internal medicine practice and gave up his practice when his License was suspended.

On examination by the Board, the Respondent testified that the 2014 complaint involved a patient that he saw without a chaperone in the room as required by the 2012 consent order.

James McDonald, M.D. ("McDonald"), Chief Administrative Officer for the Board, testified on behalf of the Respondent. He testified that he forwarded the 2016 consent order to the Respondent's attorney and by email on August 10, 2016 told him that there was no exception to the chaperone requirement. See Respondent's Exhibit D. He testified that AMI was in place on December 23, 2016 and provided the Department with verification. He testified that when the Respondent called him in November, he called the Respondent's attorney and the attorney told him about the problems contacting AMI. He testified that he did not tell the Respondent when he spoke to him nor the Respondent's attorney that the Respondent had to stop practicing right away. He testified that the Respondent told him that he was having internal chaperones when he saw female patients.

On cross-examination, McDonald testified that he did not tell the Respondent not to practice medicine as he, McDonald, is not the Director of the Department and the Respondent was represented by counsel so he called the Respondent's attorney to let him know about the Respondent's telephone call. He testified that he then initiated the Department's internal complaint process against Respondent as he wanted to give the Respondent due process. He testified that he told the Respondent's attorney that Respondent was in violation of the 2016

consent order and that a complaint would be opened against the Respondent. McDonald testified that when he spoke to the Respondent, the Respondent told him that his practice was still open even though he did not have the independent monitoring in place. He testified that the Respondent did not ask to change the 2016 consent order.

It was agreed by the parties that the Respondent had internal chaperones who were trained for seeing female patients in compliance with the pre-2016 consent order.

V. DISCUSSION

A. Arguments

The Board argued that the Respondent has a history of noncompliance with his statutory obligations as evidenced by the various consent orders entered into by the Respondent and the summary suspensions also issued against him. The Board argued that this history of noncompliance by the Respondent justifies the revocation of the License.

The Respondent argued that the first summary suspension and first consent order relate to the Respondent's health so are not relevant. The Respondent argued that the Board is wrong to argue that the Respondent does not follow the rules and that he did know it was his responsibility to obtain a monitor. The Respondent argued that previously he had been able to amend a consent order. In addition, the Respondent argued that there were serious and salacious allegations made in patient complaints against him, but those were never proved and there are no facts substantiating any of those types of allegations in any of the consent orders. Instead, he argued that the issue is only about the Respondent's delay in obtaining AMI to monitor his practice despite his efforts to obtain AMI earlier. The Respondent argued that he still had his internal chaperone program in place after the 2016 consent order and that AMI is the only independent monitoring service

available and the consent order was not strictly construed in terms of the timing of his non-practice so there are no grounds for revocation of his License.

B. Standard of Review for an Administrative Hearing

It is well settled that in formal or informal adjudications modeled on the Federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, *Administrative Law Treatise* § 10.7 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* See *Lyons v. Rhode Island Pub. Employees Council* 94, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the “normal” standard in civil cases). This means that for each element to be proven, the fact-finder must believe that the facts asserted by the proponent are more probably true than false. *Id.* When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87 (R.I. 2006).

C. Relevant Statute

R.I. Gen. Laws § 5-37-6.3 provides that the Board may impose a variety of discipline on a physician’s license for “unprofessional conduct.” R.I. Gen. Laws § 5-37-5.1 defines “unprofessional conduct” to include as follows:

Unprofessional conduct. – The term “unprofessional conduct” as used in this chapter includes, but is not limited to, the following items or any combination of these items and may be further defined by regulations established by the board with the prior approval of the director:

(24) Violating any provision or provisions of this chapter or the rules and regulations of the board or any rules or regulations promulgated by the director or of an action, stipulation, or agreement of the board

D. Whether Respondent Violated R.I. Gen. Laws § 5-37-5.1(24)

The 2016 consent order required that an independent company provide chaperoning services and Respondent's practice was subject to this requirement. It was undisputed that the Respondent continued to practice medicine despite not having obtained the services of an independent monitoring company. Thus, the Respondent violated the terms of said consent order

E. What Sanction Should be Imposed for the Violation of R.I. Gen. Laws § 5-37-5.1(24)

The June, 2007 consent order where the Respondent surrendered his License was not a disciplinary action; however, the October, 2007 reinstatement order included certain requirements that the Respondent had to meet for his License to be reinstated. These included a five (5) year monitoring contract with the PHC. While the exact requirements of the PHC contract were not detailed in the reinstatement order, the 2011 summary suspension referenced the failure of the Respondent to abide by the chaperone requirement in the room for the examination of female patients as required by said 2007 reinstatement order. The 2011 summary suspension was also based on issues related to the use of Midazolam by the Respondent at his office and in the 2012 consent order the Respondent admitted to violations related to the use of that drug. The Respondent's License was suspended for approximately five (5) months between the 2011 summary suspension and the 2012 reinstatement. The chaperone requirement was explicitly required in the 2012 consent order that reinstated the Respondent's License after the 2011 summary suspension (though the 2012 consent order did not include a finding regarding a violation of the 2007 reinstatement order regarding chaperoning, the chaperone requirement is included specifically in the 2012 consent order). The 2012 consent order required five (5) years of monitoring by an independent company which was later amended to allow for internal monitoring and chaperoning. In 2015, the Respondent entered into a consent order to resolve a patient

complaint and agreed to take a Board approved course and for a reprimand to be imposed on his License. In 2016, the Respondent entered into a consent order as a result of a patient complaint that provided for his voluntary non-practice of medicine for 30 days and for an independent monitoring program to be in place in order to practice medicine. The Respondent continued to practice medicine after his non-practice ended on September 19, 2016 without the required independent monitoring. The Respondent contacted McDonald in November, 2016 but continued practicing until his License was suspended. AMI was retained around December 23, 2016.

There is no dispute that the Respondent violated the 2016 consent order by practicing medicine without an independent monitoring company. Thus, the issue is what is the appropriate sanction to be imposed on the Respondent.

Under the *Rocha vs. Public Utilities Commission*, 694 A.2d 722 (R.I. 1997), a court cannot substitute its judgment for what should be an appropriate sanction but instead the Court will determine if there was legally competent evidence to support an agency's decision. Thus, in *Rocha*, the Court upheld the revocation of license as there was legally competent evidence to support the finding of the violation that was a basis for revocation under the statute.

A Superior Court decision, *Jake and Ella's Inc. v. Department of Business Regulation*, 2002 R.I. Super. LEXIS 46 discussed *Rocha's* holding that as long as there is an evidentiary basis for an agency's finding, a court cannot overturn a sanction because it disagrees with the sanction. But the Court found that "[t]here are times when the sanction imposed by an agency, while permitted by law, is so arbitrary and extreme that it constitutes a clear abuse of discretion" so that under the arbitrary and capricious Administrative Procedures Act standard, the Court can reverse the lower court's decision. *Jake and Ella's* at 5. The Court went on to find there are two (2) components to an administrative decision: 1) a determination of the merits of the case; and 2)

determination of the sanction and while the former is mainly factual, the latter not only involves ascertainment of factual circumstances but the application of administrative judgment and discretion. The Court found that, “[t]he prevailing view, however, is that review of the sanction imposed is not a review do novo but rather an arbitrary and capricious review, which requires that the penalty be upheld unless unwarranted in law or without justification in fact. . . . [u]nder the arbitrary and capricious standard, the mere unevenness in the application of the sanction does not render its application unwarranted in law; however, an excessive variance, something more striking, would be evidence of action that was arbitrary and capricious.” *Jake and Ella’s* at 5. See also *Fontaine v. Board of Pharmacy*, 1985 R.I. Super. LEXIS 74.

Jake and Ella’s concluded that the facts to be considered in weighing the severity of the violation should include the frequency of the violations, the real or potential danger to the public posed by the violation, the nature of any previous violations and sanctions, and any other facts deemed relevant to fashioning an effective and appropriate sanction.

Therefore, in determining the appropriate sanction for the Respondent’s violations, it is relevant to consider the Respondent’s own disciplinary history and the severity of his violations as well as what would be an effective and appropriate sanction. Indeed, a recent Superior Court decision remanded an agency decision back to the agency so that the agency could contextualize and develop the record below regarding a licensee’s previous discipline so that it could be determined whether the licensee committed intermittent technical violations or had a pattern of an inability to comply with substantive agency policies. *John Hope Settlement House, Inc. v. DCYF*, 2017 R.I. Super. LEXIS 76.

In this matter, the Respondent voluntarily surrendered his License in 2007 and later that year had it reinstated with certain conditions. Respondent then had his License summarily

suspended in 2011. It was reinstated five (5) months later after the Respondent agreed that he committed many violations regarding the use of Midazolam and agreed to certain conditions on his practice of medicine including independent (and then internal) monitoring and chaperoning. In 2015, the Respondent had his License reprimanded. In 2016, the Respondent agreed to 30 days of not practicing and to have an independent monitoring company for his practice. Despite agreeing to the independent monitoring company, the Respondent continued to practice medicine without it. While the Respondent testified that he tried to obtain the company, it was his responsibility to obtain such a monitoring company and from September 19, 2016 to approximately December 23, 2016, he did not have the independent company in place.

While the Respondent had his internal monitoring in place, the 2016 consent order required an independent monitoring company. This was not the first time the Respondent entered into a consent order with the Department. He previously lost his License for five (5) months in 2011. His License has been reprimanded in 2015. He agreed to not practice for 30 days in 2016. He agreed to certain restrictions on his License prior to 2016 and again in 2016. His violations regarding the administration of Midazolam were extremely serious (administering in office setting, lacking safety equipment, no written consents, no separate controlled substance administration logs) and the Respondent admitted to a violation of R.I. Gen. Laws § 5-37-5.1(19). In addition, the Respondent has been subject to an ongoing monitoring and chaperoning program, first external then internal, and then in the 2016 consent order to be an external program again. Rather than comply with the consent order and not practice until an independent program was in place, the Respondent continued to practice medicine without it. The Respondent's prior violations are serious relating to patient safety. Over the years, he has been subjected to a variety of discipline including suspension

and non-practice of medicine for these serious violations. His current violation involves patient safety as he disregarded a required monitoring program for patient safety.

In light of the Respondent's past violations and discipline, the Respondent's current violation merits a lengthy suspension and conditions on any future practice of medicine.

VI. FINDING OF FACTS

1. Pursuant to R.I. Gen. Laws § 5-37-1 *et seq.*, the Respondent is licensed as a physician in the State of Rhode Island and was at the time of said incident.

2. On July 5, 2017, a Time and Notice of Hearing was issued to the Respondent by the Board. A corresponding Specification of Charges was also issued by the Board against the Respondent.

3. A full hearing on this matter was held on August 3, 2017. Briefs were timely filed by October 5, 2017. Oral arguments were made on October 30, 2017.

4. The facts contained in Section IV and V are reincorporated by reference herein.

VII. ORDER

Based on the forgoing, the Committee found that the Respondent violated R.I. Gen. Laws § 5-37-5.1(24).

Based on the forgoing, the Committee makes the following order:

The Respondent's License shall be suspended for two (2) years from the date of the 2017 summary suspension so he shall be eligible for reinstatement on February 4, 2019.

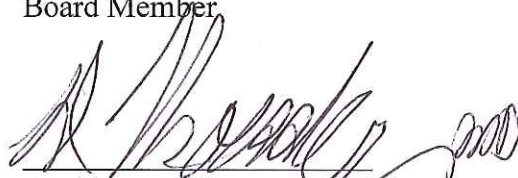
The Respondent must apply for reinstatement and be subject to the following conditions for continuing his practice of medicine upon reinstatement: (a) Respondent shall retain an independent company that will provide oversight of Respondent's chaperoning program for a period of five (5) years; (b) there shall be no modification of the requirement of an independent company to provide oversight of the chaperoning program; (c) there shall be no internal

monitoring; (d) the independent chaperoning company shall keep all documentation of every chaperoned encounter and shall provide the Board with a monthly summary of same; (e) the chaperone shall provide Respondent with a copy of all records, reports, or other documentation that it generates; and (f) Respondent shall not perform any physical examination of female patients without the documented and signed presence of an adult chaperone.

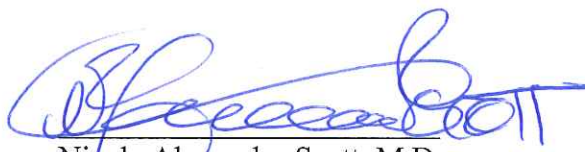
Entered this 2ND day of ~~December~~ ^{FEBRUARY, 2018} 5M


Steven Blazar, M.D.
Board Member

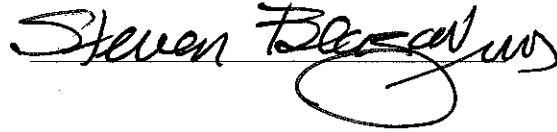

Helen Drew
Board Member


David Kroessler, M.D.
Board Member

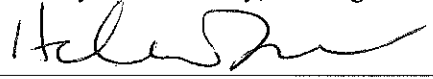
Ratified and approved by the Director of the Department of Health:


Nicole Alexander-Scott, M.D.

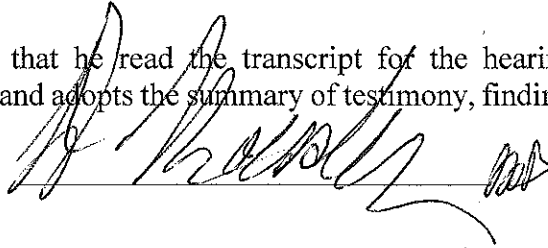
Steven Blazar, M.D., hereby represents that he read the transcript for the hearing, reviewed the evidence in the administrative record, and adopts the summary of testimony, findings of facts, and Conclusions of Law as his own.



Helen Drew hereby represents that she read the transcript for the hearing, reviewed the evidence in the administrative record, and adopts the summary of testimony, findings of facts, and Conclusions of Law as her own.



David Kroessler, M.D. hereby represents that he read the transcript for the hearing, reviewed the evidence in the administrative record, and adopts the summary of testimony, findings of facts, and Conclusions of Law as his own.



NOTICE OF APPELLATE RIGHTS

PURSUANT TO R.I. GEN. LAWS § 5-37-7, THIS DECISION MAY BE APPEALED TO THE SUPERIOR COURT WITHIN THIRTY (30) DAYS AFTER THE DECISION OF THE DIRECTOR BY SERVING THE DIRECTOR WITH A NOTICE OF APPEAL AND FILING SUCH NOTICE IN SUPERIOR COURT. APPEALS ARE GOVERNED BY THE ADMINISTRATIVE PROCEDURES ACT, R.I. GEN. LAWS § 42-35-1 *et seq.*

CERTIFICATION

I hereby certify on this _____ day of December, 2017 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail, postage prepaid to Kevin Bristow, Esquire, 950 Turks Head Building, Providence, R.I. 02903 and Stephen Zubiago, Esquire, Nixon Peabody LLP, One Citizens Plaza, Providence, R.I. 02905 and by hand-delivery to Stephen Morris, Esquire, Department of Health, Three Capitol Hill, Providence, RI 02908.

CERTIFICATION

I hereby certify that on the 5th day of February 2018 the undersigned provided a copy of the Decision in the Matter of Afshin, M.D., BMLD Case File C16-1526 dated February 2, 2018 to Attorney Stephen Zubiago via email at SZubiago@nixonpeabody.com.

A handwritten signature in blue ink, reading "Stephen Morris", is written over a horizontal line.