NEW YORK STATE OF OPPORTUNITY. Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

September 5, 2019

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Courtney R. Morgan, M.D.
[redacted]

Re: License No. 270876

Dear Dr. Morgan:

Enclosed is a copy of the vacated New York State Board for Professional Medical Conduct (BPMC) Order No. 19-230. This vacatur order went into effect September 5, 2019.

Please direct any questions to: Board for Professional Medical Conduct, Riverview Center, 150 Broadway, Suite 355, Albany, New York, 12204, telephone # 518-402-0846.

Sincerely,

[redacted]

Robert A. Catalano, M.D.
Executive Secretary
Board for Professional Medical Conduct

Enclosure

NEW YORK STATE DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

BPMC No. 19-230

IN THE MATTER
OF
COURTNEY MORGAN, M.D.

VACATUR
ORDER

Upon the proposed Application for a Vacatur Order Pursuant to N.Y. Pub. Health Law § 230(10)(q) of COURTNEY MORGAN, M.D. (Respondent), which is made a part of this Vacatur Order, it is agreed to and

ORDERED, that the attached Application, and its terms, are adopted and it is further

ORDERED, that this Vacatur Order shall be effective upon issuance by the Board, either

- by mailing of a copy of this Vacatur Order, either by first class to Respondent at the address in the attached Application or by certified mail to Respondent's attorney, OR
- upon facsimile transmission to Respondent or Respondent's attorney, whichever is first.

SO ORDERED.

DATE: 9/05/2019

[redacted]

ARTHUR S. HENGERER, M.D.
Chair
State Board for Professional Medical Conduct

NEW YORK STATE DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER

OF

COURTNEY MORGAN, M.D.

APPLICATION FOR VACATUR ORDER

COURTNEY MORGAN, M.D., (Respondent) represents that all of the following statements are true:

That on or about June19, 2013, I was licensed to practice as a physician in the State of New York, and issued License No. 270876 by the New York State Education Department.

My current address is [redacted], and I will advise the Director of the Office of Professional Medical Conduct of any change of address.

I am currently subject to ARB Determination and Order (No.18-200) of the State Board for Professional Medical Conduct (Attachment I) (henceforth "Original Order"), which went into effect on September 17, 2018. Given the existence of new and material evidence not available at the time of the Original Order, specifically the Final Judgment of the District Court, Travis County, Texas (98 Judicial District) dated April 16, 2019 which reversed the Texas Medical Board's Order dated March 3, 2017, which had issued a Revocation (stayed) of Respondent's license to practice medicine in Texas as well as ten years of Probation, along with other terms (Attachment II) which was the basis for the Original Order. Pursuant to N.Y. Pub. Health Law § 230(10)(q), I hereby apply to the State

Board for Professional Medical Conduct for an Order (henceforth "Vacatur Order"), vacating the Original Order,

I understand and agree that the attorney for the Bureau of Professional Medical Conduct, the Director of the Office of Professional Medical Conduct and the Chair of the State Board for Professional Medical Conduct each retain complete discretion either to enter into the proposed agreement and Order, based upon my application, or to decline to do so. I further understand and agree that no prior or separate written or oral communication can limit that discretion.

DATE 9/3/19

[redacted]

COURTNEY MORGAN, M.D.
RESPONDENT

The undersigned agree to Respondent's attached Application for Vacatur Order.

DATE: _____

_____
, ESQ.
Attorney for Respondent

DATE: 9/3/19

[redacted]
ANNA R. LEWIS
Associate Attorney
Bureau of Professional Medical Conduct

DATE: 9/4/19

[redacted]
PAULA M. BREEN
Acting Director
Office of Professional Medical Conduct

ATTACHMENT I

NEW YORK STATE OF OPPORTUNITY. | Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

September 10, 2018

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Courtney Morgan, M.D.
[redacted]

Ian Silverman Esq.
New York State Department of Health
ESP Corning Tower Bldg. Room 2512
Albany, New York 12237

RE: In the Matter of Courtney Morgan, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 18-200) 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,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cmg
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

In the Matter of Courtney Morgan, 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. 18- 200

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): Ian Silverman, Esq.
For the Respondent: *Pro Se*

The Respondent holds a medical license in the state of Texas, in addition to the Respondent's license to practice medicine in New York. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2018), the ARB considers whether to take action against the Respondent's License following a disciplinary action against the Respondent in Texas. After a hearing below, a BPMC Committee determined that the Respondent engaged in conduct in Texas that would constitute professional misconduct in New York. The Committee voted to suspend the Respondent's License for five years, stay the suspension, place the Respondent on probation, prohibit the Respondent from prescribing controlled substances and limit the Respondent to practicing in a licensed institution. The Respondent then requested administrative review and a modification in the Committee's Determination. After reviewing the record from the hearing and the parties' review submissions, the ARB sustains the Committee's Determination that the Respondent committed professional misconduct. On our own motion, we vote 5-0 to overturn the Committee and to revoke the Respondent's License.

Committee Determination on the Charges

Pursuant to PHL § 230 *et seq*, the 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). In the Direct Referral Hearing, the Petitioner charged that the Respondent engaged in misconduct as defined in New York Education Law (EL) §§ 6530(9)(b)(McKinney Supp. 2018) because the duly authorized professional disciplinary agency from another state (Texas) found the Respondent guilty 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);
- permitting, aiding or abetting an unlicensed person in performing activities requiring a license, a violation under EL § 6530(11);
- failure to comply, willfully or with gross negligence, with substantial provisions of federal, state or local laws, rules or regulations governing the practice of medicine, a violation under EL § 6530(16);
- performing professional services not duly authorized by the patient or the patient's representative, a violation under EL § 6530(26); and/or
- failing to maintain accurate patient records, a violation under EL § 6530(32).

In the Direct Referral Hearing, the statute limits the Committee to determining the nature and severity of the penalty to impose against the licensee, see In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

The evidence before the Committee demonstrated that the Texas Medical Board (Texas Board) entered a March 3, 2017 Order finding the Respondent guilty of professional misconduct based on prescriptions for controlled substances and other medications without maintaining treatment plans, considering alternative treatments or adequately recording laboratory results, medical histories and the risks associated with taking prescription drugs. The Texas Board also found that the Respondent permitted an unauthorized staff member to use the Respondent's prescription pad and signature stamp to issue prescriptions to patients. The Texas Board stayed the revocation of the Respondent's Texas license, placed the Respondent on probation for ten years with a practice monitor and ordered the Respondent to complete continuing medical education (CME) courses. The Texas Board also placed practice restrictions on the Respondent for five years to prohibit treatment of chronic pain patients and practice outside of a pre-approved group or institutional setting. The Board also required that the Respondent pass a Medical Jurisprudence Examination (Examination) and complete an assessment by the Texas A & M Health Science Center Knowledge, Skills, Training, Assessment and Research Program (KSTAR Assessment).

The Committee found that the Respondent's conduct in Texas, if committed in New York, would constitute practicing with negligence on more than one occasion, permitting, aiding or abetting an unlicensed person to perform activities requiring a license and failing to maintain an accurate medical record. The Committee found further that the Respondent's misconduct placed his patients at risk for harm. The Committee noted the Respondent's failure to comply with the Texas Board's Final Order and to accept responsibility for his medical practices in Texas, but also noted that the Texas Board found the Respondent capable of rehabilitation and devoted to his patients, including those with limited finances. The Committee rejected the Petitioner's request that the Committee revoke the Respondent's License. The Committee suspended the Respondent's License for five years, stayed the suspension and placed the

Respondent on probation for ten years. The probation terms include practicing with a monitor and completing CME courses in medical recordkeeping and prescribing medications. The Committee also limited the Respondent's License permanently to prohibit the Respondent from prescribing Schedule II and III controlled substances and to restrict the Respondent to practice in a facility holding licensure under PHL Article 28.

Review History and Issues

The Committee rendered their Determination on February 16, 2018. This proceeding commenced on March 28, 2018, when the Respondent filed a Notice requesting 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 Petitioner filed the reply brief on May 17, 2018.

The Respondent mailed his Notice of Review more than one month from the date the Committee issued its Determination. Under PHL § 230-c(4)(a) the party requesting review must file the request within fourteen days from receiving the Committee's Determination. The case record showed that the Respondent had requested to receive a copy of the Committee Determination by electronic mail because regular mail was not reliable where he lived. In his March 28, 2018 Notice, the Respondent indicated that he had just received the Committee's Determination on March 10, 2018. By letter to the parties on May 2, 2018, the Committee's Administrative Officer (AO) informed the parties that the AO's Office was unable to locate any information to contradict the statements in the Notice and that the Notice appeared timely. The AO indicated that the Petitioner could raise the timeliness issue in its submissions to the ARB.

The Respondent's brief challenged the attempts by the Petitioner and the rulings by the Committee's Administrative Officer to limit the evidence the Respondent submitted into the

hearing record. The Respondent contended that the New York findings contained errors and inaccuracies concerning the Texas Final Order and that the Texas findings were not sufficient to support findings of misconduct in Texas or New York. The Respondent asked that the ARB reconsider the permanent restrictions on the Respondent's prescribing and practice setting and that the ARB consider mitigating factors in the case.

The Petitioner asked that the ARB reject the Respondent's Review Notice because the Respondent failed to file the Notice within fourteen days of service of the Committee's Determination. The Petitioner argued that there was no error in excluding the Respondent's answer and some of the Respondent's exhibits from the record. At a pre-hearing conference on December 13, 2017, Administrative Law Judge Kimberly O'Brien ruled that the Respondent had failed to file a timely written answer, so the charges were deemed admitted. The Petitioner also argued that the Respondent's answer and the rejected exhibits sought impermissibly to re-litigate the findings by the Texas Board. The Petitioner contended that the Committee's findings were consistent with the findings in the Texas Order, that the findings would constitute misconduct if committed in New York and that that the findings form the basis for disciplinary action by New York. The Petitioner states that the ARB should make no reduction in the penalty the Committee imposed, but should consider revoking the Respondent's License.

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 see no error in the proceedings below. We affirm the Committee's Determination sustaining the charges that the Respondent's misconduct in Texas would constitute misconduct in New York and make the Respondent liable for action against his License. We overturn the Committee's Determination on penalty and we vote to revoke the Respondent's License.

Proceedings: The Respondent challenged rulings by the Committee's Administrative Officer to exclude the answer and certain exhibits the Respondent offered at the hearing before the Committee on December 20, 2017. Under the ARB authority at PHL § 230-c(4)(b), the ARB may remand a case to the Committee for further proceedings. The ARB concludes that no need exists for a remand here.

The PMC hearing procedures at PHL § 230(10)(p) require a respondent must file a timely answer to the statement of charges or the charges are deemed admitted, Corsello v. N.Y.S. Dept. of Health, 300 A.D.2d 849, 752 N.Y.S.2d 156 (3rd Dept. 2002). The Committee's Administrative Officer rejected the Respondent's answer as untimely. Further, the answer and some exhibits the Respondent offered attempted improperly to re-litigate the proceedings from Texas. In a Direct Referral Hearing, 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, (supra).

The Respondent stated that he has challenged the Texas Board Order, but the Respondent gave no indication that a court has ruled on such a challenge. Until a court invalidates the Texas Board Order, that Order binds the Respondent in a proceeding before the Committee or the ARB and the Respondent may not relitigate the Texas Order's findings and conclusions. As the Petitioner's counsel pointed out at the hearing, if the Texas Courts overturn the Texas Board

Order, BPMC will re-open this matter. The Administrative Officer acted appropriately in barring the Respondent from re-litigating. The Administrative Officer did receive into the record character evidence from the Respondent.

Charges: The Respondent argued that the Texas Board findings did not amount to misconduct in New York. The ARB concludes that the record reveals otherwise. The Texas Board made several findings that the Respondent failed to include important information in patient charts such as lab results, patient history and lists of medications the patient was taking [See Hearing Exhibit 7, Finding 24, page 3 of 13]. The failure to maintain accurate medical records constitutes professional misconduct under EL § 6530(32). The Texas Board found further that the Respondent allowed an employee, who was not a licensed health care provider, to have access to the Respondent's prescription pad and his signature [Hearing Exhibit 7, Finding 34, page 4 of 13]. Such conduct amounts to aiding and abetting an unlicensed person to perform activities requiring a license, a violation under EL §6530(11). In its conclusions, the Texas Board found that the Respondent failed to practice medicine in an acceptable professional manner [Hearing Exhibit 7, Conclusion 12, page 5 of 13]. The failure to follow the acceptable standard of care constitutes negligence in medical practice, Lewis v. DeBuono, 257 A.D.2d 787, 684 N.Y.S.2d 649 (3rd Dept. 1999). The Texas Board found further that the Respondent committed one or more violation that involved more than one patient [Exhibit 7, Finding 36, page 4 of 13]. These findings support the charge that the Respondent's conduct in Texas amounted to practicing with negligence on more than one occasion, a violation under EL §6530(3).

The ARB sustains the Committee Determination on the charges and we turn to considering the appropriate penalty in this case.

Penalty: The Respondent asked the ARB to modify the permanent limitations on his License and noted that the Texas Board had imposed no permanent limitations. The Respondent also faulted the Committee for failing to consider mitigating factors, such as the absence of patient harm. The Petitioner's reply requested revocation. The Petitioner also requested revocation before the Committee. In response to the Petitioner's request at the hearing for revocation, the Respondent called the request ridiculous because Texas never took the Respondent's license in that state [Hearing Transcript pages 60-61].

The record demonstrates that the Texas Board did actually revoke the Respondent's Texas license, but stayed the revocation [Hearing Exhibit 7, Order Paragraph 1, page 6 of 13]. In addition to finding mitigating factors such as lack of patient harm and capacity for rehabilitation, the Texas Board cited as aggravating factors that the Respondent committed one or more violations that involved one or more patients and that the Respondent's conduct increased potential harm to the public. In staying the revocation, the Texas Board did not rely totally on the Respondent's capability for rehabilitation, but also placed extensive restrictions on the Respondent's practice and ordered the Examination, the KSTAR Assessment and CME. The Respondent admitted before the Committee that he had not taken the Examination or arranged for the KSTAR Assessment. The Respondent also indicated that he is practicing medicine somewhere other than Texas, so he is not practicing with a monitor in a pre-approved practice setting and he has not surrendered his DEA registration as the Texas Board has ordered [Hearing Transcript pages 34-37].

The Committee's Determination noted the Respondent's failure to comply with the Texas Board's Order and his failure to accept responsibility for his improper medical practices in Texas. The Committee rejected the Petitioner's request for revocation, however, due to the Texas

Board finding on the Respondent's capability for rehabilitation. The Committee still placed permanent restrictions on the Respondent's practice and prescribing, in addition to a stayed suspension and probation. The ARB finds those restrictions insufficient in this case.

The Respondent has proved himself incapable of rehabilitation. The Respondent continues to deny any wrongdoing in Texas. He has expressed no remorse for his misconduct. He has shown no insight into his errors. He has shown no willingness to correct the deficiencies in his practice. The Texas Board found the Respondent's conduct increased potential harm to the public. The Texas Board allowed the Respondent to retain his license in that state only if he abided by restrictions and underwent testing and assessments. The Respondent has walked away from all the sanctions Texas imposed as conditions for the Respondent to continue practicing there. The ARB sees no reason to believe that the Respondent would abide by any restrictions BPMC would place on his License. The ARB concludes that the Respondent continues to pose a risk for harm to the public as long as he retains his License in New York.

The Petitioner did not request review in this case and did not submit a brief asking for revocation. The Petitioner made the request for revocation in the last line of the reply to the Respondent's brief. The ARB may, however, 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, (supra). The ARB votes 5-0 to revoke the Respondent's License on our own motion.

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 overturns the Committee's Determination on penalty
3. The ARB revokes 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 Courtney Morgan, M.D.

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

Dated: 14 August, 2018

[redacted]

Linda Prescott Wilson

In the Matter of Courtney Morgan, M.D.

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

Dated: August 10, 2018

Peter S. Koenig, Sr.

In the Matter of Courtney Morgan, M.D.

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

Dated: August 7, 2018

[redacted]

Richard D. Milone, M.D.

In the Matter of Courtney Morgan, M.D.

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

Dated: 8/8/, 2018

[redacted]

Steven Grabiec, M.D.

In the Matter of Courtney Morgan, M.D.

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

Dated: 9-10-18, 2018

[redacted]

John A. D'Anna, M.D.

Exhibit 1

ATTACHMENT II

CAUSE NO. D-1-GN-17-002301

COURTNEY R. MORGAN, M.D.	§	IN THE DISTRICT COURT
Plaintiff,	§	
v.	§	TRAVIS COUNTY, TEXAS
TEXAS MEDICAL BOARD	§	
Defendant.	§	98th JUDICIAL DISTRICT

FINAL JUDGMENT

On February 19, 2019, pursuant to Texas Government Code §§2001.171 and 2001.174 (the Administrative Procedure Act), the Court heard the above-styled and number administrative appeal.

Appellant, Dr. Courtney Morgan, appeared through his attorney of record, Tommy E. Swate. Appellee, the Texas Medical Board, appeared through its attorney of record, Ted A. Ross, Assistant Attorney General. Scott Freshour, the Texas Medical Board's former General Counsel, was also in attendance. The parties announced ready. All matters in controversy were submitted to the Court.

The Court, after reviewing the Administrative Record and the briefs of the parties, and hearing the arguments of counsel, finds that the Court has jurisdiction and that the case should be reversed and remanded for further proceedings consistent with the following:

1. Texas Occupational Codes §§ 168.001 and 168.002 are not unconstitutionally vague.
2. Texas Occupational Codes §168.001(1) was misinterpreted and misapplied in the underlying proceeding. In order to determine that a facility qualifies as a "Pain Management Clinic," there must be a finding that that the facility in question issued the majority of their patients prescriptions for substances listed in Tex. Occ. Code § 168.001(1) for at least two months. Here, no evidence appears to have been presented

to warrant such a finding and so the evidence does not support the finding that Dr. Morgan should have registered his offices as Pain Management Clinics.

3. There is some evidence that suggests that the Board's warrantless search of Dr. Morgan's offices may have violated his rights under Article I, Section 9 of the Texas Constitution and the 4th Amendment of the United States Constitution. The ALJ is directed to gather and explore this evidence and determine, in accordance with the guidance given by this Court in its opinion letter, whether the records gained from the Board's warrantless search should be excluded in the case-at-bar.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Appellee's March 28, 2017 Order regarding Appellant Morgan shall be and is hereby REVERSED, and that this case shall be and is hereby REMANDED for further proceedings consistent with the foregoing findings and conclusions.

All relief not granted herein is DENIED.

SIGNED on April 16, 2019.

[redacted]

Maya Guerra Gamble, Judge Presiding

cc:

Hon. James F. Horon, Chief ALJ

Stephen J. Boese, Executive Secretary
Email: medbd@nysed.gov
Fax: 518-486-4846

Mr. Boese, please forward this motion to the following:

Professional Medical Conduct Administrative Review Board Members:
John A. D'Anna
Peter S. Koenig
Steven Grabiec
Linda Prescott Wilson
Richard D. Milone

State Board for Professional Misconduct Hearing Committee/Panel Members:
Dennis P. Zimmerman, M.S., CRC
Trevor A Litchmore, M.D.
Lyon M. Greenberg, M.D.

Mr. Boese, please also send this motion to the following:

[redacted]

Copied on previous Order 18-200:

[redacted]
Mr. Weintraub
Mr. Michael Hiser

New York State Department of Health
Office of Professional Medical Conduct

STATE OF NEW YORK DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT AND
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

In the Matter of Courtney Morgan, M.D. License No. 270876	NOTICE OF REVERSAL OF OUT OF STATE DISCIPLINE MOTION TO VACATE DETERMINATION AND ORDER ORDER NO. 18-200

TO: Professional Medical Conduct Administrative Review Board
Board of Professional Medical Conduct Disciplinary Committee and Panel Members for Respondent's Telephonic Hearing
State of New York Department of Health
Office of Professional Medical Conduct

BACKGROUND

The Texas Medical Board issued a Final Order on March 3, 2017, for stayed revocation pending completion of probation. The appeal process was subsequently initiated in the Travis County District Court of Texas around April 28, 2017, on several grounds, including the Administrative Law Judge (ALJ) and Texas Medical Board staff not following the Texas laws, not complying with their own procedures, the board staff prosecutor removing evidence favorable to my case and lying to the ALJ and the actual board members, and many other corrupt, unethical and unlawful actions.

As a consequence of the Texas Medical Board Final Order, I subjected to several reciprocal actions by medical board agencies of various states, including New York. After a telephonic hearing on December 20, 2017, a *Determination and Order* (BPMC-18-036) was issued on February 12, 2018, by The State Board for Professional Medical Conduct ordering 5 years of probation with certain temporary and permanent restrictions. This order was appealed by me

where another *Determination and Order* was issued (Order No. 18-200) by the Administrative Review Board for Professional Misconduct in August of 2018, revoking my New York State medical license.

NOTICE OF REVERSAL OF TEXAS ORDER BY THE TEXAS DISTRICT COURT

On April 16, 2019, the outcome of the appeal of the Texas Medical Board Final Order (which prompted the initial New York action) was reversed by the *Texas District Court's Final Judgment*[1] issued, along with a decisional letter[2] in this matter, stating:

i. The **Texas law was misinterpreted and misapplied to Dr. Morgan**, where the evidence did not support the finding that he was required to obtain a pain management clinic registration; and

ii. The Final Order regarding Dr. Morgan "**shall be and is hereby REVERSED.**"

MOTION TO VACATE THE DETERMINATION AND ORDER (ORDER NO. 18-200) AND CORRECT PUBLIC RECORDS

Reciprocal action taken by the New York Department of Health is legally inconsistent with the nullified Texas Final Order. Accordingly, I am requesting that the New York Department of Health reverse and remove from its public record the related *Determination and Orders* issued by the Committees for professional misconduct and administrative review, the Statement of Charges, the Texas Final Order, and any other public accounts related to the proceedings, action or discipline taken by the New York Department of Health, as a result of the Texas Final Order which has since been reversed, and likewise modify its report to the National Practitioner Data Bank.

Respectfully submitted by:
/s/Courtney Morgan
Courtney Morgan, M.D.
[redacted]
[redacted] Fax: 844-840-8030
[redacted]

[1] Exhibit 1 – Travis County District Court's Final Judgment.
[2] Exhibit 2 – Travis County District Court Judge's Opinion.

MY MAILING ADDRESS HAS BEEN PROVIDED MULTIPLE TIMES ORALLY AND THEN IN WRITING TO ONE OF THE PROSECUTORS VIA EMAIL, THEN AS A NOTICE THAT WAS FILED WITH THE COURT AND SENT TO THE ALJ, YET LETTERS HAVE STILL BEEN REPEATEDLY SENT TO THE WRONG ADDRESS.

PLEASE SEND ANY AND ALL CORRESPONDENCE TO THE ABOVE ADDRESS (WHICH HAS BEEN PROVIDED IN THE PAST) SO THAT THE CORRESPONDENCE CAN BE RECEIVED TIMELY.

Exhibit 2

MAYA GUERRA GAMBLE
Judge
(512) 854-9384

SAM DENTON
Staff Attorney
(512) 854-9307

ARIEL SAUCEDA
Court Operations Officer
(512) 854-9384

459TH DISTRICT COURT
HEMAN MARION SWEATT
TRAVIS COUNTY COURTHOUSE
P. O. BOX 1748
AUSTIN, TEXAS 78767

ALICIA DUBOIS
Official Court Reporter
(512) 854- 9301

ELIZABETH MEDINA
Court Clerk
(512) 854-5854

April 16, 2019

Tommy E. Swate
Swate Attorney at Law
403 Wild Plum
Houston, TX 77013
Via Email: swatemd@aol.com
Counsel for Courtney R. Morgan, M.D.

Ted A. Ross
Assistant Attorney General
Administrative Law Division
Office of the Attorney General of Texas
PO Box 1548, Capitol Station
Austin, TX 78711-2548
Via Email: ted.ross@oag.texas.gov
Counsel for Texas Medical Board

Re: Cause No. D-1-GN-17-002301; *Courtney R. Morgan, M.D. v. Texas Medical Board*

Dear Mr. Swate and Mr. Ross:

This Court heard your administrative appeal on February 19, 2019. Mr. Swate was present on behalf of appellant, Dr. Morgan. Mr. Ross represented appellee, the Texas Medical Board (TMB). Scott Freshour, the TMB's former General Counsel, was also in attendance. After considering the pleadings, evidence, and arguments of counsel, I reverse and remand with the following guidance.

I. Issues Presented by Dr. Morgan.

1. Are the Texas Occupational Code §§ 168.001 and 168.002, concerning regulation of pain management clinics, unconstitutionally vague on its face in violation of

the fifth and fourteenth amendments of the United States Constitution and the Texas Constitution, Article I, Section 19?

2. Did the Administrative Law Judge incorrectly interpret the Texas Occupational Code §§ 168.001 and 168.002, which define a pain management clinic and list exemptions, by applying an interpretation that is contrary to cannons of construction and legislative intent?

3. Can the TMB's staff use evidence from the "Fruit of the Poisonous Tree" in an administrative hearing?

II. Standard of Review.

Where, as here, a law authorizes review in a contested case but does not define the scope of judicial review, a "court may not substitute its judgment for the judgment of the state agency on the weight of the evidence but: (1) may affirm the agency decision in whole or in part; and (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are [in relevant part]: (A) in violation of a constitutional or statutory provision...(D) affected by other error of law."[1]

III. Texas Occupational Code §§ 168.001 and 168.002.

Texas Occupational Code § 168.001 and § 168.002 are not unconstitutionally vague. However, the ALJ misinterpreted and misapplied §168.001(1) in the underlying proceeding.

The primary concern in construing a statute is the express statutory language, which is construed according to its "plain and common meaning unless a contrary intention is apparent from the context or unless such a construction leads to absurd results."[2] The statute is read as a whole and interpreted to give effect to every part.[3]

Here, the Texas Occupational Code defines "Pain management clinic" as a "publicly or privately owned facility for which a majority of patients are issued on a *monthly* basis a prescription for opioids, benzodiazepines, barbiturates, or carisoprodol, but not including suboxone."[4]

Merriam-Webster's dictionary defined "monthly," in relevant part, as "occurring or appearing every month." It is clear from the "plain and common meaning" of the statute that the threshold requirement to require a facility to register as a pain management clinic should be more than one month. At a bare minimum, the TMB should present evidence that the facility in

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[1] Tex. Gov't Code § 2001.174.
[2] *Hegar v. Autohaus LP*, 514 S.W.3d 897, 902 (Tex. App.—Austin 2017, pet. filed)(*quoting Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010)).
[3] *Id.*
[4] Tex. Occ. Code § 168.001(1)(emphasis added).

question issued the majority of their patients prescriptions for the substances listed in Tex. Occ. Code § 168.001(1) for at least two months.

Since the TMB did not present evidence that the facility in question issued the majority of their patients prescriptions for the substances listed in Tex. Occ. Code § 168.001(1) for at least two months, the evidence is not sufficient to support the ALJ's finding that Dr. Morgan's clinics qualified as pain management clinics and that he should have registered them as such.

IV. Excluded Evidence.

On Appeal, Dr. Morgan urges that evidence obtained in violation of the Texas and United States Constitutions must be excluded from administrative hearings. This Court remands this case to the Texas State Office of Administrative Hearings (SOAH) with instructions to hear evidence regarding the warrantless searches and determine, according to this Court's guidance, if the TMB's evidence, which was gained during those searches, should be excluded.

1. Relevant Facts and Procedural History.

On July 18, 2013, agents of the TMB, the Texas Department of Public Safety (DPS), and other law enforcement agencies executed administrative subpoenas on Dr. Morgan's two medical clinics, which were located in Victoria, Texas. Records gathered during the search were used to bring criminal charges against Dr. Morgan in state court in Victoria County.[5] On October 13, 2015, the state court, which was the 24th Judicial District Court (State Trial Court), granted a motion to suppress and entered findings of fact and conclusions of law regarding the motion. While Dr. Morgan's case was at SOAH, Dr. Morgan urged the Administrative Law Judge (ALJ), on multiple occasions, to take judicial notice of the State Trial Court's findings. The ALJ declined to do so, stating that: (1) the evidence was not relevant as "the standards in an administrative proceeding and criminal proceeding are different;" and (2) the district court considered a criminal action against Respondent to which the TMB was not a party.[6]

2. Summary of Relevant Findings of Fact and Conclusions of Law from the State Trial Court.

The State Trial Court's findings of fact and conclusions of law offer this Court a well thought out and invaluable look at the evidence developed by that court while gathering testimony from members of the TMB and DPS. It provides enough data to sound alarms and warrant further fact-finding for the case-at-bar.[7] Of particular note, the State Trial Court:

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[5] *See State of Texas v. Courtney Ricardo Morgan*, (Cause No. 14-28128-A).

[6] See 16.02.23 Order No. 8 – Denying Respondent's Motion for Judicial Notice. *See also* 16.07.06 Order No. 11 – Ruling on Objections (refusing judicial notice of "any orders of the 24th Judicial District Court, as rulings by that court are irrelevant to the pending administrative dispute.").

[7] It is worth noting that the United States District Court for the Southern District of Texas, Victoria Division, adopted the State Trial Court's findings of fact and conclusions of law for purposes of deciding on a motion to dismiss in a civil suit brought by Dr. Morgan against Mr. Freshour. *See Morgan v. Freshour*, No. 6:17-CV-0004, 2018 U.S. Dist. LEXIS 67315 (S.D. Tex. 2018).

• Stated that that there was ample evidence to suggest that the police either knew about or requested the search, finding "that there were several contacts between the TMB and DPS with regard to using the information secured as a result of the subpoena(s) to charge the defendant with a crime. The fact that a regulatory agency and law enforcement agencies are contacting each other and sharing information to conduct and coordinate a warrantless 'administrative search' is a cause of concern for this Court."[8]

• Found the testimony of the TMB investigator, Mary Chapman, to be "evasive when repeatedly pressed about whether the TMB coordinated with law enforcement to 'search' [Dr. Morgan's] business. Ms. Chapman's testimony was less than credible during the suppression hearing."[9]

• Found that there was an unusual show of force by law enforcement to serve the subpoena and that Dr. Morgan did not consent to the search of his business.[10]

• Noted that Dr. Morgan was "immediately served with notice of the actions of the TMB to ensure that there was no judicial oversight of the search by the TMB and law enforcement."[11]

• Found that there were "no facts presented that would lead to a reasonable conclusion that any evidence would have been destroyed or altered had law enforcement secured a search warrant for the business..."[12]

• Noted that "the actions of the TMB and law enforcement bordered on intimidation. It was not necessary for the service of subpoenas to display actions of intimidation such as the following: 1) having several law enforcement agencies present during the search, 2) seizing of phones, 3) prohibiting filming or photographing during the service of subpoenas, and 4) prohibiting employees from talking to other employees."[13]

• Found that "considering the totality of the circumstances surrounding the case at bar...[Dr. Morgan] did not intelligently and voluntarily consent to the search of his business."[14]

• Found that "the TMB acted with bad faith in partnering up with law enforcement to conduct the search of the defendant's business."[15]

• Found that "the TMB's interest in serving the subpoenas upon [Dr. Morgan] was not a legitimate pursuit of its administrative authority but an exercise to circumvent both the Texas and US Constitutions' requirement for a warrant."[16]

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[8] 16.02.10 R – Motion for Judicial Notice, Exhibit A, page 4-5.
[9] *Id.* at 5.
[10] *Id.*
[11] *Id.* at 6.
[12] *Id.*
[13] *Id.* at 7.
[14] *Id.*
[15] *Id.* at 8.

3. Guidance on Determining Whether Evidence from Warrantless Searches Should Be Excluded.

In determining whether the evidence from the warrantless searches should be excluded from the case-at-bar, the controlling case is *Vara v. Sharp*, 880 S.W.2d 844 (Tex. App.—Austin 1994, no writ). In that case, in determining whether to apply the exclusionary rule to a civil proceeding, the Third Court of Appeals of Texas looked to determine whether "the benefit of achieving additional deterrence by applying the exclusionary rule in the instant case outweighs the societal costs imposed by the exclusion of critical evidence."[17] To do so, the Court weighed six factors. Those six factors as applied to the current case are examined below. It is also worth pointing out that, after the Third Court of Appeals weighed its six factors in *Vara*, it noted that Article I, Section 9 of the Texas Constitution would also have been applicable to exclude the relevant evidence in that case.

In the case-at-bar, when gathering and reviewing evidence regarding the TMB's warrantless searches, the ALJ should look to the *Vara* court's guidance provided regarding both the Texas Constitution and the six factors enumerated.

Article I, Section 9 of the Texas Constitution. Specifically, the Third Court of Appeals stated that Article I, Section 9 of the Texas Constitution "guarantees the sanctity of the individual's home and person against unreasonable intrusion," and expands privacy rights of Texas citizens.[18] This supports a broader application of the exclusionary rule than that required by the United States Constitution and means that deterrence is not the primary concern for determining when to apply the exclusionary rule in Texas.[19] "This right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means."[20] The Third Court of Appeals concluded that, even if the Fourth Amendment did not "mandate application of the exclusionary rule" in *Vara*, such application was required by the Texas Constitution.[21] Here, it seems likely that the TMB could easily have achieved their objective through "less intrusive, more reasonable means," as there exists an entire well-developed administrative process for the TMB to execute administrative subpoenas.

The Six Factors from *Vara v. Sharp*. The *Vara* factors are listed below as is this Court's guidance for the ALJ on remand.

(1) Nature of the Search. The absence of a warrant or the valid execution of a subpoena weighs in favor of applying the exclusionary rule.[22] Here, there was no valid warrant. Worse, the State Trial Court found "that there were several contacts between the TMB and DPS

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[16] *Id.*
[17] *Vara* at 850.
[18] *Id.* at 853.
[19] *Id.*
[20] *Id.* (*quoting Tex. State Emps. Union v. Tex. Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1987).
[21] *Vara* at 853.
[22] *See Vara* at 850.

with regard to using the information secured as a result of the subpoena(s) to charge the defendant with a crime."[23]

With respect to valid execution of the subpoena, "[a]bsent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker."[24] Here, Dr. Morgan states he did not give consent and the State Trial Court found that Dr. Morgan "did not intelligently and voluntarily consent to the search of his business."[25] Neither was Dr. Morgan given the opportunity to obtain precompliance review before a neutral decisionmaker. According to the State Trial Court, while there were no "facts presented that would lead to a reasonable conclusion that any evidence would have been destroyed or altered had law enforcement secured a search warrant for the business of the defendant," the Court believed that Dr. Morgan "was immediately served with notice of the actions of the TMB to ensure that there was no judicial oversight of the search by the TMB and law enforcement."[26]

Appellee's brief points to Tex. Occ. Code §§ 153.007 and 22 Tex. Admin. Code, Chapters 179 and 187.8 as authority for service of administrative subpoenas. However, none of these authorities appear to permit TMB investigators to take records immediately or by force. Here, it is not just questionable whether the search of Dr. Morgan's clinic was necessary but whether it was even conducted pursuant to valid authority.

This factor weighs in favor of excluding evidence taken during the warrantless search of Dr. Morgan's office.

(2) Nature of the Proceeding. The proceeding in the underlying case is an administrative hearing where Dr. Morgan was charged with violations of the Texas Medical Practice Act (MPA) and Texas Medical Rules. As noted in *Vara*, "It is generally unlikely that application of the exclusionary rule to bar the evidence in a secondary civil proceeding will deter future Fourth Amendment violations."[27]

However, this Court's concern is that the TMB may have partnered up with law enforcement to circumvent both the Texas and US Constitutions' requirement for a warrant. More troubling is the notion that the TMB's bad behavior may not be limited to this case but instead may be part of a pattern. Certainly, there are a number of cases that involve the TMB engaging in the same behavior. In fact, in Appellant's Reply Brief, Dr. Morgan notes that there are at least five cases that have been filed against the TMB and its agents for similar warrantless searches.[28] Additionally, during oral argument in front of this Court, the TMB admitted that they still execute similar subpoenas in coordination with law enforcement.

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[23] 16.02.10 R – Motion for Judicial Notice, Exhibit A, page 4-5.
[24] *Zadeh v. Robinson*, 902 F.3d 483 (5th Cir. 2018)(*quoting Cotropia v. Chapman*, 721 F. App'x 354 (5th Cir. 2018)(*quoting City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015)).
[25] 16.02.10 R – Motion for Judicial Notice, Exhibit A, page 7.
[26] 16.02.10 R – Motion for Judicial Notice, Exhibit A, page 6.
[27] *Vara* at 851 (quoting *Wolf v. Commissioner*, 13 F.3d 189, 194 (6th Cir. 1993).
[28] See "Reply Brief of Appellant Courtney Morgan, M.D.," p. 34, fn 67.

As things stand, if the TMB's future coordinations with law enforcement result in exclusion of the evidence at the criminal trial, as it did in the case-at-bar, then the TMB may still use the evidence gathered to bring suit at SOAH. However, if the TMB is denied from using that evidence at SOAH then this Court believes that the exclusionary rule would have a tremendous and profound deterrent effect on the TMB and that the TMB would be far more likely to refrain from violating the Fourth Amendment in the future.

This factor weighs in favor of excluding evidence taken during the warrantless search of Dr. Morgan's office.

(3) Whether the Proposed Use of Unconstitutionally Seized Material is Intersovereign or Intrasovereign. The *Vara* court stated that "[i]ntrasovereign cases are those where the officer that conducted the unconstitutional search is an agent of the same sovereign that seeks to use the evidence in a civil proceeding. Intersovereign cases are those where the evidence is seized by one sovereign's agents, and used in another sovereign's proceedings."[29] The Court explained that the exclusionary rule is generally applied when there are intrasovereign violations.[30]

Here, the proposed use of unconstitutionally seized material was intrasovereign. The TMB, a Texas governmental entity, coordinated with Texas law enforcement agencies in order to seize the evidence taken from Dr. Morgan's offices.

This factor weighs in favor of excluding evidence taken during the warrantless search of Dr. Morgan's office.

(4) Whether the Search and the Secondary Proceeding Were Initiated by the Same Agency. In *Vara*, the Court notes that, where the search and the secondary administrative proceeding were not initiated by the same agency, this factor weighs against application of the exclusionary rule.[31] However, here the search of Dr. Morgan's office and the secondary administrative proceedings were both initiated by and under the authority of the TMB. Additionally, a TMB agent was part of the search.

This factor weighs in favor of excluding evidence taken during the warrantless search of Dr. Morgan's office.

(5) Whether There is an Explicit and Demonstrable Understanding Between the Two Governmental Agencies. When determining whether there is an explicit and demonstrable understanding between the two governmental agencies, one may look to the existence of a statutory regime.[32] Under the Texas Occupational Code, the TMB is required to report investigative information to the appropriate law enforcement agency and must cooperate with and assist law enforcement agencies who are conducting a criminal investigation of a doctor by

[29] *Vara* at 849.
[30] *Id.*
[31] *Id.* at 852.
[32] *Id.*

providing relevant information.[33] It seems likely that, pursuant to statute, the TMB has closely coordinated with a number of enforcement agencies throughout the state. Additionally, the State Trial Court noted that there was ample evidence to suggest that the police either knew about or requested the search, finding "that there were several contacts between the TMB and DPS with regard to using the information secured as a result of the subpoena(s) to charge the defendant with a crime."[34] In other words, the State Trial Court found that the TMB and law enforcement agencies were contacting each other and sharing information to conduct and coordinate a warrantless "administrative search."

This factor weighs in favor of excluding evidence taken during the warrantless search of Dr. Morgan's office.

(6) Whether the Secondary Proceeding Fell Within the "Zone of Primary Interest" of the Officers that Conducted the Search. "Where the relationship between the objectives of the law enforcement agency to which the officer belongs and the secondary proceedings is close, an inference may be drawn that the officers had the use of the evidence in the subsequent proceedings in mind when they made the seizure."[35] Here, the law enforcement agencies involved had as much of an interest in curbing the distribution of controlled substances as the TMB had in regulating its licensees who illegally distribute such substances. The secondary proceeding fell within the zone of primary interest of the officers that helped to conduct the search.

This factor weighs in favor of excluding evidence taken during the warrantless search of Dr. Morgan's office.

V. Conclusion.

SOAH's Proposal for Decision and the TMB's Final Order are reversed and remanded to SOAH for further proceedings, which will follow the guidance contained in this letter and this Court's order.

Sincerely,

[redacted]

Maya Guerra Gamble
Presiding Judge
459th District Court

cc: Ms. Velva L. Price, Travis County District Clerk

[33] Tex. Occ. Code § 164.007 (g) and (h).
[34] 16.02.10 R – Motion for Judicial Notice, Exhibit A, page 4-5.
[35] *Vara* at 852 (*citing Wolf*, 13 F.3d at 195).