



**Department  
of Health**

**ANDREW M. CUOMO**  
Governor

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

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

May 3, 2017

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

David Quist, Esq.  
NYS Department of Health  
ESP-Coming Tower-Room 2438  
Albany, NY 12237

Marvin S. Robbins, Esq.  
666 Old Country Road  
Garden City, NY 11530

Bret Ostrager, D.O.

██████████  
Otisville FCI  
Two Mile Drive  
Otisville, NY 10963

**RE: In the Matter of Bret Ostrager, D.O.**

Dear Parties:

Enclosed please find the Determination and Order (No. 17-130) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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: mw  
Enclosure

COPY

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

In the Matter of

Bret Ostrager, D.O, (Respondent)

Administrative Review Board (ARB)

A proceeding to review a Determination by a Committee  
(Committee) from the Board for Professional Medical Conduct  
(BPMC)

Determination and Order No. 17-130

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): David Quist, Esq.  
For the Respondent: Marvin S. Robbins, Esq.

After a hearing, a BPMC Committee found that the conduct, which resulted in the Respondent's convictions and imprisonment for crimes under Federal Law, constituted professional misconduct. The Committee voted to suspend the Respondent's license to practice medicine in New York State, to order an evaluation and any necessary education and to place the Respondent on probation. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2017), the Petitioner asks the ARB to overrule the Committee and to revoke the Respondent's License. After considering the hearing record and the parties' review submissions, the ARB finds no reason to overrule the Committee and we find that the Petitioner failed to serve the Respondent in the proper manner with the Notice to commence this Review.

Committee Determination on the Charges

Pursuant to PHL § 230 *et seq*, 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). The Direct Referral Hearing began with a September 2, 2016 Order by the Executive Deputy Commissioner of Health of the State of New York suspending the Respondent's License summarily following the Respondent's conviction for a felony, pursuant to § PHL 230(12)(b). The Petitioner's Statement of Charges [Hearing Exhibit 1] alleged that the Respondent committed professional misconduct under the definition in N. Y. Education Law (EL) §6530(9)(a)(ii) (McKinney 2016) by engaging in conduct that resulted in a conviction under Federal Law. In the Direct Referral Hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996). Following the Direct Referral Hearing, the Committee rendered the Determination now on review.

The evidence before the Committee demonstrated that the Respondent entered a guilty plea in the United States District Court for the District of New Jersey on three felony counts: conspiracy to violate the Federal Anti-Kickback Statute and Travel Act, a violation under Title 18 U.S.C. § 371; illegal remuneration, a violation under 18 U.S.C. § 2; and use of the mail and facilities in interstate commerce travel to promote, carry on and facilitate bribery, a violation under 18 U.S.C. §§ 2 and 1952(a)(1) and (3). The Court's sentence included 37 months' imprisonment, one year on supervised release and a \$30,000.00 fine. The Respondent also consented to a criminal forfeiture judgment amounting to \$101,270.00.

The Committee determined that the Respondent's criminal conduct made the Respondent liable for action against his License pursuant to EL § 6530(9)(a)(ii). The Respondent admitted during testimony by telephone from prison that the Respondent received bribes by generating business for a clinical blood laboratory referring blood specimens of his patients to that laboratory from approximately February 2011 through April 2013. The Committee rejected the

Petitioner's request for revocation as a sanction and determined that the Respondent should be able to return to practice following a suspension and program of continuing education. The Committee voted to suspend the Respondent's License during his incarceration and further until the Respondent has demonstrated to the Office of Professional Medical Conduct (OPMC) that his medical knowledge and skills are current. The Respondent must complete a physician reentry evaluation upon release from incarceration. The Respondent must obtain approval from the OPMC Director for the site to obtain the assessment and the Respondent must then complete any continuing medical education (CME) that the OPMC Director requires. The Respondent will bear all costs for the evaluation and any mandated CME. The Respondent will then practice on probation for two years under the terms the Committee specified in Attachment A to the Committee's Determination.

In reaching the determination, the Committee's Determination considered that there was no evidence of patient harm nor unnecessary medical expenditure. The Committee also considered the Respondent's efforts to improve his medical knowledge while incarcerated and the Respondent's capacity to provide valuable medical care to an underserved community.

#### Review History and Issues

The Committee rendered their Determination on December 13, 2016. This proceeding commenced on December 23, 2016, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief, the Petitioner's reply brief, the Respondent's brief and the Respondent's reply

brief. The record closed when the ARB received the Respondent's reply brief on January 27, 2017.

The Petitioner's brief requests that the ARB overrule the Committee and revoke the Respondent's License. The Petitioner argues that the Respondent used his License for unjust enrichment and betrayed the honesty and integrity expected of the medical profession. The Petitioner notes that the Respondent's criminal conduct occurred over a fourteen-month period, so that the Respondent's conduct was no one time short-lived error. The Petitioner requests, if the ARB finds revocation inappropriate, that the ARB impose a more severe sanction than the Committee imposed, such as the sanction that the ARB imposed in *Matter of Garry Leeds* (BPMC 16-131). In that case the ARB upheld an actual suspension that began after a Respondent's release from incarceration for a crime that involved Dr. Leeds's practice of medicine.

The Respondent's brief argues that the Petitioner failed to serve the Notice of Review on the Respondent or the Respondent's counsel, but rather the Petitioner served the Notice on the ARB only, which constituted an *ex parte* communication. The Respondent's brief notes that PHIL § 230-c(4) mandates that the party seeking Review must serve the Notice on the ARB and the adverse party by certified mail within fourteen days. The Respondent's counsel asserted that the Respondent became aware of the Petitioner's Review Notice only when the Administrative Officer for the ARB sent a January 4, 2017 letter to the parties advising the parties as to the dates for filing review briefs. The Respondent's brief indicated that the Respondent did not receive the Administrative Officer's letter until January 9, 2017, more than fourteen days from the date of the Committee's Determination. The Respondent argues that the ARB must dismiss the Review Notice for that reason.

The Petitioner's reply brief conceded that the Petitioner mailed the Review Notice to the Respondent's Counsel by regular mail, rather than by certified mail. The Petitioner argued that the ARB may overlook the failure to use certified mail because the Respondent received actual notice about the Review through the Administrative Officer's letter setting the date for filing briefs. To support that argument, the Petitioner cited to Matter of Gilbert Ross v. New York State Department of Health, 226 A.D.2d 863, 640 N.Y.S.2d 359 (3<sup>rd</sup> Dept. 1996). In Ross, the New York Supreme Court Appellate Division for the Third Judicial Department upheld an ARB Determination in a case in which the Petitioner had mailed a Review Notice by regular mail rather than certified, but the Respondent acknowledged receiving the Notice. The Court found that the Respondent's acknowledgment showed actual notice.

#### ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL §230-a permits. The ARB may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3<sup>rd</sup> Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3<sup>rd</sup> Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health. 222 A.D.2d 750, 634 N.Y.S.2d 856 (3<sup>rd</sup> Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even

without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3<sup>rd</sup> Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

#### Determination

The ARB has considered the record and the parties' briefs. We disagree with the Petitioner's contention that the ARB Determination in *Matter of Garry Leeds* (supra) supports the Petitioner's request for an increase in the penalty the Committee imposed in this case. We note primarily, however, that we agree with the Respondent that the Petitioner failed to properly serve the Review Notice on the Respondent.

The Petitioner has failed to offer proof that the Respondent or the Respondent's counsel ever actually received the Review Notice and the Respondent's counsel has denied that either the



counsel or the Respondent received the Notice. In the case Petitioner's reply brief cited, Matter of Ross, the circumstances differed because the licensee admitted to actually receiving the Notice. We hold the Department to a higher standard in complying with the PHL provisions that apply to the hearing and the Administrative Review process and we find that the Petitioner failed to follow the requirements on service under PHL § 230-c(4) in this case.

**ORDER**

NOW, with this Determination as our basis, the ARB renders the following ORDER:

The ARB affirms the Committee's Determination.

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 Bret Ostrager, D.O.

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

Dated: 4/24, 2017



Steven Grabiec, M.D.

In the Matter of Bret Ostrager, D.O.

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

Dated: April 22, 2017



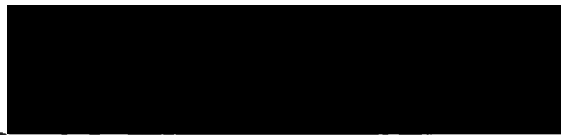
Peter S. Koenig, Sr.

In the Matter of Bret Ostrager, D.O.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Ostrager.

Dated 23 April, 2017



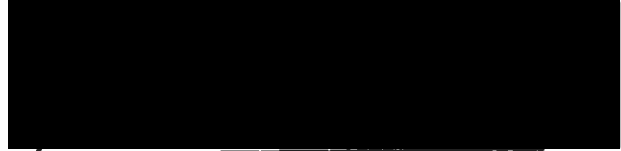
Linda Prescott Wilson

In the Matter of Bret Ostrager, D.O.

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

the Matter of Dr. Ostrager.

Dated: April 20, 2017

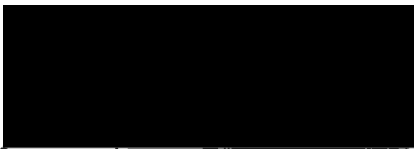


Richard D. Milone, M.D.

In the Matter of Bret Ostrager, D.O.

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

Dated: APR 21, 2017



John A. D'Anna, M.D.