



## Department of Health

ANDREW M. CUOMO  
Governor

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

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

November 14, 2018

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Marc S. Nash, Esq.  
Bureau of Professional Medical Conduct  
Corning Tower Building – Room 2512  
Empire State Plaza  
Albany, New York 12237

Arthur Mercado, M.D.



**RE: In the Matter of Arthur Mercado, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 18-255) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine if **said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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

Arthur Mercado, M.D. (Respondent)

Administrative Review Board (ARB)

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

Determination and Order No. 18- 255

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): Marc S. Nash, Esq.  
For the Respondent: No Submission

Following the Respondent's New York State criminal conviction for criminal sale of prescription drugs, a BPMC Committee determined that the Respondent's conduct amounted to professional misconduct. The Committee voted to limit the Respondent to practice in a licensed facility, ban the Respondent from prescribing controlled substances and suspend the Respondent's license to practice medicine in New York State (License) until such time as the Respondent completes a competency evaluation. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2018), the Petitioner requests that the ARB revoke the Respondent's License, or in the alternative, that the ARB modify the terms for the License suspension. After considering the hearing record and the Appellant's review submission, the ARB votes 3-2 to revoke the Respondent's License.

### 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 Petitioner's Statement of Charges [Hearing Exhibit 1] alleged that the Respondent committed professional misconduct under the definition in New York Education Law (EL) §6530(9)(a)(i) (McKinney 2018) by engaging in conduct that resulted in a criminal conviction under New York 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 case began with a April 23, 2018 Order suspending the Respondent from practice summarily following the criminal conviction, pursuant to PHL § 230(12)(b).

The evidence before the Committee demonstrated that the Respondent entered a guilty plea on November 22, 2017 in Oneida County Court to one count of criminal sale of prescription drugs, a Class C Felony under New York Penal Law § 220.65 (McKinney Supp. 2018). The Court sentenced the Respondent to five years on probation and suspended the Respondent's driver's license for six months. The Respondent waived the right to appeal.

The evidence before the Committee also showed that the Respondent signed a Consent Agreement and Order with BPMC effective November 1, 2007 (2007 Order). In that Order, the Respondent admitted to having sexual intercourse with a patient in the Respondent's medical office. The Order suspended the Respondent's License for nine months, placed the Respondent on probation for five years, imposed a fine and required the Respondent to have a chaperone

present when examining or treating female patients. The Committee found the evidence relating to that prior disciplinary matter was unrelated to the current charges.

The Committee determined that the Respondent's 2017 criminal conviction made the Respondent liable for action against his License pursuant to EL § 6530(9)(a)(i). The Committee voted to limit the Respondent's License to prohibit the Respondent from prescribing controlled substances and to limit the Respondent's License to practice under supervision in a facility licensed pursuant to PHL § 2801, such as a hospital or nursing home. The Committee also suspended the Respondent's License wholly under PHL § 230-a (2)(e) until such time as the Respondent: 1) submits to and cooperates in a medical competency evaluation by a physician, physicians or facility proposed by the Respondent, but subject to prior written approval by the Director of the Office of Professional Medical Conduct (OPMC Director) and 2) causes the evaluator to confirm in a written report to the OPMC Director that the Respondent is fit to practice medicine.

#### Review History and Issues

The Committee rendered their Determination on July 18, 2018. This proceeding commenced on August 3, 2018, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record and the Petitioner's brief. The respondent made no submission.

The Petitioner requested that the ARB overturn the Committee and revoke the Respondent's License. The Petitioner notes that the Respondent entered a guilty plea to knowingly and unlawfully selling a prescription for Hydrocodone to one person that was written in the name of another person. At hearing, the Respondent denied any wrongdoing, blamed the

conduct on someone else and criticized his lawyer for forcing the Respondent to agree to the plea bargain. The Petitioner argued that the ARB should consider the 2007 Order, in which the Respondent agreed to accept a disciplinary penalty after admitting to having sexual intercourse with a patient in the Respondent's Office. The Petitioner asked, in the alternative, that if the ARB chooses to sustain the penalty the Committee imposed, that the ARB modify the Determination to reflect the appropriate authority for the suspension the Committee imposed. The Petitioner argued that the Committee cited incorrectly to PHL § 230-a(2)(e) as the authority for suspending the Respondent's License. The Petitioner argued that the authority for such a suspension comes from PHL §230-a(2)(b) and urges the ARB to make that correction to the Committee's Determination.

#### 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 ARB may also remand a case to the Committee for further proceedings, pursuant to PHL § 230-c(4)(b).

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 Petitioner's brief. We vote unanimously to sustain the Committee's Determination that the Respondent's criminal conduct constituted professional misconduct and made the Respondent liable for disciplinary action against his License. The Respondent's guilty plea to the criminal charge binds the Respondent in this proceeding, despite the Respondent's attempt during the hearing to repudiate the plea and blame

others for his misconduct. We vote 3-2 to overturn the Committee and revoke the Respondent's License.

The Respondent admitted in Court to using his License to engage in criminal conduct - the criminal sale of prescription drugs. The Committee found that the Respondent failed to accept responsibility for his conviction. The Committee also found the Respondent's hearing testimony self-serving and lacking repentance. The Committee also found the Respondent's misconduct isolated and found the 2007 Order unrelated to this charge. The majority disagrees with the Committee's position on the 2007 Order.

The majority finds that the Respondent used his License to engage in serious criminal misconduct within ten years from the time that the Respondent engaged in serious, prior misconduct by engaging in sexual intercourse with a patient at the Respondent's office. Under the terms of the 2007 Order, the Respondent received a suspension, fine, probation and a condition on his License (the chaperone). That severe penalty following the prior misconduct failed to deter the Respondent from the criminal misconduct at issue in this proceeding. The Respondent's testimony at the hearing in this case showed no remorse and no realization by the Respondent that he must change. The majority finds no possibility here for rehabilitation and we see no reason to give the Respondent a further chance.

The other two ARB members believe that the Committee imposed a severe and appropriate penalty in view of the single criminal charge for which the Respondent entered the guilty plea. These members would modify the Committee's Determination on the suspension as the Petitioner had requested.



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 votes 3-2 to overturn the penalty the Committee imposed and to revoke the Respondent's License.

Peter S. Koenig, Sr.  
Steven Grabiec, M.D.  
Linda Prescott Wilson  
John A. D'Anna, M.D.  
Richard D. Milone, M.D.

In the Matter of Arthur Mercado, M.D.

Linda Prescott Wilson, an ARB Member affirms that she participated in the deliberations in this case and that this decision reflects the Determination of the ARB majority in the Matter of Dr. Mercado.

Dated: 6 November, 2018

A black rectangular redaction box covers the signature of Linda Prescott Wilson. Below the box, there is a faint, illegible handwritten mark.

Linda Prescott Wilson

In the Matter of Arthur Mercado, M.D.

Peter S. Koenig, Sr., an ARB Member affirms that he participated in the deliberations in this case and that this decision reflects the Determination of the ARB majority in the Matter of Dr. Mercado.

Dated: October 29, 2018

A black rectangular box redacting the signature of Peter S. Koenig, Sr.

Peter S. Koenig, Sr.

In the Matter of Arthur Mercado, M.D.

Steven Grabiec, M.D., an ARB Member affirms that he participated in the deliberations in this case and that this decision reflects the Determination of the ARB majority in the Matter of Dr. Mercado.

Dated: 11/5, 2018



Steven Grabiec, M.D.

In the Matter of Arthur Mercado, M.D.

Richard D. Milone, M.D., an ARB Member affirms that he participated in the deliberations in this case and that this decision reflects the Determination of the ARB majority in the Matter of Dr. Mercado.

Dated: October 27, 2018

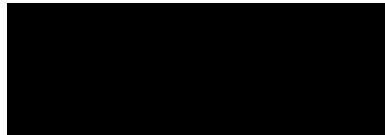


Richard D. Milone, M.D.

In the Matter of Arthur Mercado, M.D.

John A. D'Anna, M.D., an ARB Member affirms that he participated in the deliberations in this case and that this decision reflects the Determination of the ARB majority in the Matter of Dr. Mercado.

Dated: Nov 12, 2018



John A. D'Anna, M.D.