



## Department of Health

KATHY HOCHUL  
Governor

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

KRISTIN M. PROUD  
Acting Executive Deputy Commissioner

October 8, 2021

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

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Germer Beaman & Brown PLLC  
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Austin, Texas 78746

Hannah E.C. Moore, Esq.  
Bureau of Professional Medical Conduct  
Room 2512, Corning Tower  
Empire State Plaza  
Albany, New York 12237

**RE: In the Matter of Rafael Avila, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 21-209) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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

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In the Matter of

Rafael Avila, M.D. (Respondent)

Administrative Review Board (ARB)

Determination and Order No. 21- 209

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

Before ARB Members Torrelli, Rabin, Wilson and Milone  
Administrative Law Judge Jean T. Carney drafted the Determination

For the Department of Health (Petitioner): Hannah E.C. Moore, Esq.  
For the Respondent: Mark T. Beaman, Esq.

Following the Respondent's disciplinary action by the Texas Medical Board that resulted in a Mediated Agreed Order, a BPMC Hearing Committee determined that the Respondent's conduct did not constitute professional misconduct as alleged in the Statement of Charges. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c(4)(a), the Respondent asked the ARB to review that Determination. After reviewing the hearing record and the parties' review submissions, the ARB affirms the hearing committee's determination.

**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 alleged that the Respondent committed professional misconduct under New York

Education Law (Educ. Law) § 6530(9)(d) by having disciplinary action taken against his license by a duly authorized professional disciplinary agency of another state where the conduct resulting in the disciplinary action would constitute professional misconduct under Educ. Law § 6530(20), conduct in the practice of medicine that evidences moral unfitness to practice medicine; and/or Educ. Law § 6530(31), willfully harassing, abusing, or intimidating a patient either physically or verbally; if the conduct occurred in New York State. (Hearing Exhibit 1). 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 on June 14, 2019, the Respondent entered into a Mediated Agreed Order with the Texas Medical Board whereby the Respondent was reprimanded. Additionally, the Respondent was required to have a chaperone present while performing a physical examination of female patients, noting the chaperone's presence in the patients' charts and ensuring the chaperone signed the note; successfully complete a boundaries course; and eight hours of continuing medical education in ethics. The Mediated Agreed Order arose from an investigation into a complaint made by a patient alleging the Respondent engaged in sexually inappropriate behavior. (Hearing Exhibit 4).

The patient alleged that during one of three visits to his office in April 2017, there was no chaperone in the room, and the Respondent hugged and kissed her, and touched her buttocks. The patient called the police to the Respondent's office after a follow-up appointment in June 2017, and accused the Respondent of sexual assault, alleging she had recorded the assault. The Respondent was later questioned by the police, but he was not charged with any crime. (Hearing Exhibit 4). No civil lawsuit was filed against the Respondent, and the record does not contain any evidence supporting the patient's allegations.

The Committee determined that the Respondent's conduct as determined by the Texas Medical Board and evidenced in the Mediated Agreed Order did not constitute professional misconduct under Educ. Law §§ 6530(20) or (31).

### **Review History and Issues**

The Hearing Committee rendered their Determination on December 30, 2020. This proceeding commenced on January 11, 2021, 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 and the Respondent's reply brief. The record closed when the ARB received the reply brief on March 4, 2021.

The Petitioner argued that the Committee mistakenly used the Respondent's denial as the basis for not sustaining the charges, and imposed a burden on the petitioner to show guilt of the out of state conduct. The Petitioner urges the ARB to overturn the Committee's determination and revoke the Respondent's license.

The Respondent contends that the Petitioner is attempting to relitigate the disciplinary matter in Texas and points out that the Mediated Agreed Order makes no finding of inappropriate sexual conduct. The Respondent also argued that the Petitioner failed to meet its burden of proving by the preponderance of the evidence that the Respondent committed misconduct as charged.

### **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 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. The Petitioner's argument conflates the conduct that formed the basis of the Texas Medical Board's discipline, and the conduct alleged by the patient. The Mediated Agreed Order found that a patient "...left the office yelling and screaming, and filed a police report against the Respondent alleging inappropriate sexual conduct with her." (Hearing Exhibit 4).

The Mediated Agreed Order also found that the "Respondent maintains there was a chaperone in the room with the patient on the day of her last visit, but he does not recall the name of that chaperone." (Hearing Exhibit 4). Ultimately, the Respondent was disciplined based on his inability to confirm the presence of a chaperone after allegations were made against him, not for the allegations themselves. Notably, the discipline imposed by the Texas Medical Board was rationally related to the misconduct found. This conduct neither evidences moral unfitness to practice medicine, nor willfully harassing, abusing, or intimidating a patient either physically or verbally.

We agree with the Committee that the Respondent's conduct resulting in disciplinary action in Texas does not constitute professional misconduct under Educ. Law §§ 6530(20) or (31).

#### 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 did not commit professional misconduct.

Linda Prescott Wilson

Jill Rabin, M.D.

Richard D. Milone, M.D.

Carmela Torrelli

In the Matter of Rafael Avila, M.D.

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

Dated: 11 September, 2021

  
Linda Prescott Wilson



In the Matter of Rafael Avila, M.D.

Carmela Torrelli, an ARB Member concurs in the Determination and Order in the  
Matter of Dr. Avila.

Dated: Sept 27, 2021

A solid black rectangular box redacting the signature of Carmela Torrelli.

Carmela Torrelli

In the Matter of Rafael Avila, M.D.

Jill M. Rabin, M.D., an ARB Member concurs in the Determination and Order in  
the Matter of Dr. Avila.

Dated: September 15<sup>th</sup>, 2021

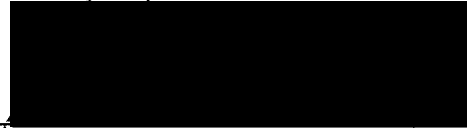


Jill M. Rabin, M.D.

In the Matter of Rafael Avila, M.D.

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

Dated: September 20, 2021



Richard D. Milone, M.D.