



Department of Health

ANDREW M. CUOMO
Governor

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

LISA J. PINO, M.A., J.D.
Executive Deputy Commissioner

December 31, 2020

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Hannah E. C. Moore, Esq.
NYS Department of Health
Corning Tower Room 2512
Empire State Plaza
Albany, New York 12237

Mark T. Beaman, Esq.
Germer Beaman & Brown PLLC
301 Congress Avenue, Suite 1700
Austin, Texas 78701

Rafael Avila, M.D.
1022 East Griffin Parkway, Suite 110
Mission, Texas 78572

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

Dear Parties:

Enclosed please find the Determination and Order (No. 20-329) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the 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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2015) and §230-c subdivisions 1 through 5, (McKinney Supp. 2015), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the Respondent or the Department may seek a review of a committee determination.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Chief Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Riverview Center
150 Broadway – Suite 510
Albany, New York 12204

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board.

Six copies of all papers must also be sent to the attention of Judge Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,

A black rectangular redaction box covering the signature of James F. Horan.

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: nm
Enclosure

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

COPY

-----X
IN THE MATTER
OF
RAFAEL AVILA, M.D.
-----X

DETERMINATION
AND
ORDER

BPMC-20-329

A hearing was held on December 16, 2020, remotely by videoconference. Pursuant to Public Health Law (PHL) § 230(10)(e), **Reid T. Muller, M.D., Chairperson, Susan C. Ferrary, M.D., and Paul J. Lambiase**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter. **Tina M. Champion**, Administrative Law Judge (ALJ), served as the Administrative Officer.

The Department appeared by Hannah E.C. Moore, Assistant Counsel. A Notice of Referral Proceeding and Statement of Charges, dated September 1, 2020 and September 2, 2020, respectively, were duly served upon Rafael Avila, M.D., (Respondent), who appeared at the hearing with his counsel, Mark T. Beaman, Esq.

The Hearing Committee received and examined documents from the Department (Department Exhibits 1-4) and from the Respondent (Respondent Exhibit A). The Respondent testified on his own behalf. A stenographic reporter prepared a transcript of the proceeding.

BACKGROUND

The Department brought this case pursuant to PHL § 230(10)(p), which provides for a hearing when a licensee is charged solely with a violation of Educ. Law § 6530(9). The Respondent is charged with one specification of professional misconduct pursuant to Educ. Law § 6530(9)(d) for “[h]aving his or her license to practice medicine revoked, suspended or having other disciplinary

action taken, or having his or her application for a license refused, revoked or suspended or having voluntarily or otherwise surrendered his or her license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation, suspension or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or the surrender of the license would, if committed in New York state, constitute professional misconduct under the laws of New York state.” Pursuant to PHL § 230(10), the Department has the burden of proving its case by a preponderance of the evidence. Any licensee found guilty of professional misconduct under the procedures prescribed in PHL § 230 “shall be subject to penalties as prescribed in [PHL § 230-a] except that the charges may be dismissed in the interest of justice.”

FINDINGS OF FACT

The following findings and conclusions are the unanimous determinations of the Hearing Committee:

1. On August 1, 1991, Rafael Avila, M.D., the Respondent, was authorized to practice medicine in New York State by issuance of license number 186479. (Dept. Ex. 3.)
2. The Respondent practices medicine in the field of plastic surgery in Mission, Texas. (Testimony [T.] Respondent.)
3. On June 14, 2019, the Texas Medical Board issued a Mediated Agreed Order whereby the Respondent was publicly reprimanded and ordered to have a chaperone present anytime he performs a physical examination of a female patient. The Mediated Agreed Order also required the Respondent to successfully complete the professional boundaries course offered by the University of California San Diego and complete eight hours of continuing medical education in ethics.

4. The Mediated Agreed Order resulted from a Complaint filed by the Texas Medical Board in October 2018 that was based on the complaint of one patient¹ that the Respondent engaged in sexually inappropriate behavior, including unwanted sexual contact, with that patient in 2017. (Dept. Exs. 1, 4; T. Respondent.)

5. The specific findings in the Mediated Agreed Order include a history of the patient's course of medical treatment with the Respondent, details of how the patient left the Respondent's office on her last visit, that the Respondent maintains he had a chaperone in the room with the patient on the day of her last visit but does not recall the chaperone's name, and that at the time of the last office visit the Respondent did not have a chaperone policy in place that required the identity of the chaperone to be noted in the patient's medical record. (Dept. Ex. 4.)

6. The Mediated Agreed Order notes that, among other things, the Respondent had no prior history with the Texas Medical Board, that he denied all the allegations made by the patient, and that the Respondent agreed to entry of the Mediated Agreed Order to avoid further investigation, hearings and the expense and inconvenience of litigation. (Dept. Ex. 4.)

7. The Mediated Agreed Order contained no finding or admission of sexually inappropriate behavior. (Dept. Ex. 4.)

8. The Respondent's office practice at the time of the alleged inappropriate behavior was to have a chaperone present during examinations requiring a female patient to disrobe. The Respondent now has a policy in place where he has the chaperone and the patient sign a notation for the medical record stating that a chaperone was present. (T. Respondent.)

¹ The Statement of Charges states that the alleged inappropriate behavior involved "patients." However, the Complaint and Mediated Agreed Order makes clear that the alleged inappropriate behavior involved one patient. (Dept. Exs. 1, 4.)

VOTE OF THE HEARING COMMITTEE

The Hearing Committee, by a vote of 3-0, does not sustain the charge that the Respondent committed professional misconduct as defined in Educ. Law § 6530(9)(d).

HEARING COMMITTEE DETERMINATIONS

The Department charged the Respondent with one specification of professional misconduct pursuant to Educ. Law § 6530(9)(d) for having disciplinary action taken after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting disciplinary action would, if committed in New York, constitute professional misconduct under the laws of New York State. There is no dispute that the Texas Medical Board took disciplinary action against the Respondent by way of the 2019 Mediated Agreed Order. There is also no dispute that the complaint of the patient in this matter involved allegations of conduct that would, if committed in New York, constitute professional misconduct under Educ. Law § 6530(20) (conduct in the practices of medicine which evidences moral unfitness) and § 6530(31) (willfully harassing, abusing, or intimidating a patient). However, the Respondent argues that there has been no finding or admission of conduct that constitutes moral unfitness or willful harassing, abusing or intimidating a patient.

The Hearing Committee has thoroughly reviewed and considered the evidence, testimony and arguments of the parties, including the specific findings in the Mediated Agreed Order. The Hearing Committee found particularly compelling that the Respondent has no prior history with the Texas Medical Board and that the Mediated Agreed Order contains no finding or admission of sexually inappropriate behavior. The Hearing Committee concludes that the conduct of the Respondent as determined by the Texas Medical Board and evidenced in the Mediated Agreed Order does not constitute professional conduct under Educ. Law §§ 6530(20) or (31). (see Findings of Fact ¶¶5-7, above; Dept. Ex. 4.)


ORDER


Now, after reviewing the evidence from the hearing, it is hereby ordered that:


1. The specification of professional misconduct as set forth in the Statement of Charges is not sustained;
2. This Order shall be effective upon service on the Respondent in accordance with the requirements of PHL § 230(10)(h).


Dated: Albany, New York

12/30/2020


Reid T. Muller, M.D., Chairperson
Susan C. Ferrary, M.D.
Paul J. Lambiase

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APPENDIX I

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

IN THE MATTER
OF
RAFAEL AVILA, M.D.

STATEMENT
OF
CHARGES

Rafael Avila, M.D., the Respondent, was authorized to practice medicine in New York State on or about August 1, 1991, by the issuance of license number 186479 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. On or about June 14, 2019, the Texas Medical Board issued a Mediated Agreed Order (hereafter "Texas Board Order") whereby the Respondent was publicly reprimanded and ordered to have a female chaperone present anytime he performs a physical examination of a female patient. Further, Respondent must successfully complete the professional boundaries course offered by the University of California San Diego, and he must complete eight hours continuing medical education in the topic of ethics. The Texas Board Order was based on allegations that the Respondent engaged in sexually inappropriate behavior with patients that included unwanted sexual contact.
- B. Respondent's conduct as described above upon which the disciplinary action in Texas was based would, if committed in New York State, constitute professional misconduct under the laws of the State of New York as follows:
1. New York Education Law § 6530 (20) (Conduct in the practice of medicine which evidences moral unfitness to practice medicine).
 2. New York Education Law § 6530 (31) (Willfully harassing; abusing, or intimidating a patient either physically or verbally).

SPECIFICATION OF CHARGES**FIRST SPECIFICATION****HAVING HAD DISCIPLINARY ACTION TAKEN**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(9)(d) by having his or her license to practice medicine revoked, suspended or having other disciplinary action taken, or having his or her application for a license refused, revoked or suspended or having voluntarily or otherwise surrendered his or her license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation, suspension or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or the surrender of the license would, if committed in New York state, constitute professional misconduct under the laws of New York state (namely N.Y. Educ. Law §§ 6530 (20) and (31)) as alleged in the facts of the following:

1. The facts in Paragraphs A and B.

DATE: September 2 , 2020
Albany, New York



Timothy J. Mahar
Deputy Counsel
Bureau of Professional Medical Conduct