



Department of Health

KATHY HOCHUL
Governor

MARY T. BASSETT, M.D., M.P.H.
Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

July 18, 2022

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David Lifschutz, M.D.
[REDACTED]

Nathan Dembin, Esq.
148 Cannon Circle
Woodstock, New York 12498

Ian H. Silverman, Esq.
Bureau of Professional Medical Conduct
New York State Department of Health
Corning Tower Building, Room 2512
Empire State Plaza
Albany, New York 12237

RE: In the Matter of David Lifschutz, MD

Dear Parties:

Enclosed please find the Determination and Order (No. 22-165) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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,

A large black rectangular redaction box covering the signature of the sender.

Séan D. O'Brien
Acting Chief Administrative Law Judge
Bureau of Adjudication

SDO:nm
Enclosure

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

COPY

In the Matter of

David Lifschutz, M.D. (Respondent)

Administrative Review Board (ARB)

Determination and Order No. 22-165

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): Ian Silverman, Esq.
For the Respondent: Nathan Dembin, Esq.

Following the Respondent's conviction of a crime under New York State law, a BPMC Hearing Committee determined that the Respondent's conduct constituted professional misconduct. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c(4)(a), the Petitioner asked the ARB to review that Determination. After reviewing the hearing record and the parties' submissions, the ARB affirms the hearing committee's determination and modifies the penalty imposed.

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)(a)(i) by being convicted of a crime under New

York State 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 on March 2, 2020, the Respondent plead guilty to one count of criminal diversion of prescription medication, in violation of New York Penal Law § 178.10. The Respondent was sentenced to conditional discharge for one year.

The Committee determined that the Respondent's guilty plea constituted professional misconduct under Educ. Law § 6530(9)(a)(i), being convicted of committing an act constituting a crime under New York State law. The Committee imposed a penalty of two years of probation; during which time the Respondent is barred from prescribing controlled substances, and shall only practice medicine in New York under the supervision of a practice monitor board certified in pain management.

Review History and Issues

The Hearing Committee rendered their Determination on January 11, 2022. This proceeding commenced on January 28, 2022, when the ARB received the Respondent's Notice requesting a 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 ARB received the Petitioner's reply brief on March 28, 2022.

The Respondent argues that the Committee's determination is excessive and arbitrary, and that the penalty is not related to the charge. The Respondent asserted that he had voluntarily ceased prescribing controlled substances, and therefore that restriction was not warranted. The Respondent also asserted that the criminal

conviction was unlawful, and should be annulled by the ARB. The Respondent urged the ARB dismiss the charge in the interest of justice.

The Petitioner contends that the evidence supports the Committee's determination, and the penalty is appropriate. However, the Petitioner also argues that the ARB should modify the penalty imposed by the Committee: suspending the Respondent's license to practice medicine for three years, with three years on probation, a permanent limitation on the Respondent's license prohibiting him from prescribing controlled substances, and requiring the Respondent to pay a \$10,000 fine. The Petitioner argued that because the Respondent failed to take responsibility for his conduct that resulted in his criminal conviction, this stronger penalty is warranted.

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 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 affirm the Committee's determination that the Respondent's conduct constitutes professional misconduct. The ARB adopts the Committee's determination as to penalty, but increases the period of probation to three years, and imposes a stayed suspension on the Respondent's license while he is on probation.

Initially, we note that this is an administrative matter, and the ARB has no authority to amend, annul, or in any way disturb the Respondent's conviction of the crime of criminal diversion of prescription medication. The record supports a finding of professional misconduct, and we reject the Respondent's argument for dismissing the charge in the interest of justice. The ARB agrees with the Petitioner that a stronger penalty will more adequately ensure that the Respondent adheres to all applicable laws and best practices going forward. Consequently, we find that imposing a term of probation for three years under the supervision of a practice monitor board certified in pain management will adequately protect the public. In addition, the ARB wholly

suspends the Respondent's license, such suspension to be stayed and to run concurrently with the term of probation.

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's conduct constituted professional misconduct pursuant to § 6530(9)(a)(i).
2. The ARB imposes three years of probation pursuant to the terms and conditions attached hereto as Appendix I.
3. The ARB imposes a whole suspension on the Respondent's license for three years, such suspension to be stayed and run concurrently with the period of probation.

Linda Prescott Wilson

Jill Rabin, M.D.

Richard D. Milone, M.D.

Carmela Torrelli

In the Matter of David Lifschutz, M.D.

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

Dated: 13 July, 2022




Linda Prescott Wilson

In the Matter of David Lifschutz, M.D.

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

Dated: July 8th, 2022



Jill M. Rabin, M.D.

In the Matter of David Lifschutz, M.D.

Carmela Tornelli, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Lifschutz.

Dated: July 13, 2022


Carmela Tornelli

In the Matter of David Lifschutz, M.D.

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

Dated: July 9, 2022



Richard D. Milone, M.D.

APPENDIX I

Terms of Probation

1. Respondent's conduct shall conform to moral and professional standards of conduct and governing law. Any act of professional misconduct by Respondent as defined by Educ. Law § 6530 or § 6531 shall constitute a violation of probation and may subject Respondent to an action pursuant to PHL § 230(19).
2. Respondent shall maintain active registration of his license with the New York State Education Department Division of Professional Licensing Services, and shall pay all registration fees.
3. Respondent shall provide the Director, Office of Professional Medical Conduct (OPMC), Riverview Center, 150 Broadway, Suite 355, Albany, New York 12204 with the following information, in writing, and ensure that this information is kept current: a full description of his employment and practice; all professional and residential addresses and telephone numbers within and outside New York State; and all investigations, arrests, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility. Respondent shall notify OPMC, in writing, within 30 days of any additions to or changes in the required information.
4. Respondent shall cooperate fully with and respond in a timely manner to OPMC requests to provide written periodic verification of his compliance with these terms. Upon the Director of OPMC's request, Respondent shall meet in person with the Director's designee.
5. The probation period shall toll when Respondent is not engaged in active medical practice in New York State for a period of 30 consecutive days or more. Respondent shall notify the Director of OPMC, in writing, if he is not currently engaged in, or intends to leave, active medical practice in New York State for a consecutive 30-day period. Respondent shall then notify the Director again at least 14 days before returning to active practice. Upon Respondent's return to active practice in New York State, the probation period shall resume and Respondent shall fulfill any unfulfilled probation terms and such additional requirements as the Director may impose as reasonably relate to the matters set forth in the Determination and Order or as are necessary to protect the public health.
6. The Director of OPMC may review Respondent's professional performance. This review may include but shall not be limited to: a review of office records, patient records, hospital charts, and/or electronic records; and interviews with or periodic visits with Respondent and staff at practice locations or OPMC offices.

7. The Respondent shall practice medicine in New York State only when monitored by a licensed physician, board certified in pain management (practice monitor), who is proposed by Respondent and subject to the written approval of the Director of the OPMC.
 - a. The Respondent shall make available to the monitor any and all records or access to the practice requested by the monitor, including on-site observation. The practice monitor shall visit the Respondent's medical practice at each and every location, on a random, unannounced basis at least monthly and shall examine a selection (no fewer than 20) of records maintained by the Respondent, including patient records, prescribing information and office records. The review will determine whether the Respondent's medical practice is conducted in accordance with generally accepted standards of professional medical care. Any perceived deviation of accepted standards of medical care or refusal to cooperate with the monitor shall be reported within 24 hours to the OPMC.
 - b. Respondent shall cause the practice monitor to report quarterly, in writing, to the Director of the OPMC.
 - c. Respondent shall be solely responsible for all expenses associated with monitoring, including fees, if any, to the monitoring physician.
 - d. Respondent shall maintain medical malpractice insurance coverage with limits no less than \$2 million per occurrence and \$6 million per policy year, in accordance with § 230(18)(b) of the Public Health Law. Proof of coverage shall be submitted to the Director of OPMC prior to Respondent commencing practice within the State of New York.
8. Respondent is prohibited from prescribing controlled substances during the probation term.
9. The terms set forth in the paragraphs above are the minimum probation terms to be imposed on the Respondent, and other terms may be added by the Director of the OPMC. All compliance costs, including expenses and fees associated with the practice monitor, shall be the Respondent's responsibility.
10. Respondent shall comply with these probationary terms and shall bear all associated compliance costs. Upon receiving evidence of noncompliance with, or a violation of,

these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding, and/or any other such proceeding authorized by law, against Respondent, and may lift the stay on the suspension of the Respondent's license.