



Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, M.D., M.P.H.
Commissioner

JOHANNE E. MORNE, M.S.
Acting Executive Deputy Commissioner

December 5, 2023

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Jacques G. Simon, Esq.
200 Garden City Plaza
Suite 301
Garden City, New York 11530

Ahvie Herskowitz, M.D.
[REDACTED]

Paul Tsui, Esq.
NYS Department of Health
Corning Tower Room 2512
Empire State Plaza
Albany, New York 12237

RE: In the Matter of Ahvie Herskowitz, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 23-249) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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,



Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB:nm
Enclosure

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

COPY

In the Matter of

Ahvie Herskowitz, M.D. (Respondent)

Administrative Review Board (ARB)
Determination and Order No. 23- 249

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

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

For the Department of Health (Petitioner):
For the Respondent:

Paul Tsui, Esq.
Jacques G. Simon, Esq.

Following the Respondent's disciplinary action by the Medical Board of California (CA Board), 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' review 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)(b) by having been found guilty of misconduct by

the CA Board, and § 6530(9)(d) by having disciplinary action taken against his license to practice medicine in California (CA license); where the conduct resulting in the disciplinary action would constitute professional misconduct if committed in New York State. 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 by decision dated November 23, 2021, the CA Board determined to revoke the Respondent's CA license, stay the revocation, and impose a period of probation of five years with conditions including successful completion of a Board approved course in medical recordkeeping. The CA Board's determination was based on findings that the Respondent committed multiple acts of negligence in the treatment of two patients by failing to perform thorough assessments and physical examinations; and failure to document thorough physical examinations, and informed consent for treatment.

The Committee determined that the Respondent's conduct constituted professional misconduct under Educ. Law §§ 6530(9)(b) and (d) in that the conduct for which the Respondent was disciplined would violate Educ. Law § 6530(3), practicing the profession with negligence on more than one occasion; Educ. Law § 6530(4), practicing the profession with gross negligence on a particular occasion; and § 6530(32), failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient; if committed in New York State. The Committee imposed a penalty of censure and reprimand on the Respondent's NY license.

Review History and Issues

The Hearing Committee rendered their Determination on June 16, 2023. This proceeding commenced on June 23, 2023, when the ARB received the Petitioner's Notice

requesting a Review. The record for review contained the Committee's Determination, the hearing record, brief and reply brief. The record closed when the ARB received the Respondent's reply brief on August 17, 2023.

The Petitioner contends that the Committee's determination is inconsistent with the findings of fact and insufficient to protect the public. The Petitioner urges that the Respondent's license be subject to a three-year stayed suspension, that he be placed on probation with a practice monitor for three years, and Board approved Continuing Medical Education (CME), with the penalty tolled while the Respondent practices outside of New York state.

The Respondent argues that the Committee's determination was consistent with the facts and the law, and the penalty imposed was appropriate. The Respondent argues that the negligence arose from improper recordkeeping, which he has rectified. Additionally, there is no basis in the record to support a reciprocal penalty to that imposed by the CA Board.

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. We affirm the Committee's determination to impose a censure and reprimand on the Respondent's license. In addition, if the Respondent returns to New York State to practice medicine, he shall be placed on probation for three years, subject to the terms appended hereto.

The Respondent failed to perform a thorough examination of a patient's cervical spine; and failed to perform a thorough examination and assessment of another patient before starting treatment. These findings pertain directly to patient care and were made in addition to the Respondent's failure to maintain accurate records. The Committee found that those acts, if committed in New York, would constitute negligence on more than one occasion, and gross negligence on a particular occasion. The ARB rejects the Petitioner's contention that without a practice monitor, the Respondent will have no

incentive to improve his practice. The record reflects that while California's oversight has been superficial, the Respondent has fully complied, and has changed his documentation practice to be consistent with the course he successfully completed. The ARB agrees with the Petitioner that the Respondent's misconduct raises concerns regarding his patient care. Therefore, we impose a penalty of censure and reprimand, and a term of probation of three years, with the term of probation tolled unless the Respondent returns to New York State to practice.

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)(b) and (d).
2. The ARB imposes a censure and reprimand on the Respondent's license.
3. The ARB imposes three years of probation, to be tolled unless and until the respondent returns to practice medicine in New York, and pursuant to the terms and conditions attached hereto as Appendix I.

Linda Prescott Wilson

Jill Rabin, M.D.

Carmela Torrelli

Richard D. Milone, M.D.

Michael J. Reichgott, M.D., Ph.D.

In the Matter of Ahvie Herskowitz, M.D.

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

Dated: 27 November, 2023

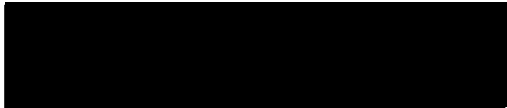


Linda Prescott Wilson

In the Matter of Ahvie Herskowitz, M.D.

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

Dated: NOVEMBER 17th, 2023



Jill M. Rabin, M.D.

In the Matter of Abbie Herskowitz, M.D.

Carmela Terrilli, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Herskowitz.

Dated: Nov 28, 2023

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Carmela Terrilli

In the Matter of Ahvie Herskowitz, M.D.

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

Dated: November 27, 2023

A large black rectangular redaction box covers the signature area of the document.

Richard D. Milone, M.D.

In the Matter of Ahvie Herskowitz, M.D.

Michael J. Reichgott, M.D., Ph.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Herskowitz.

Dated: 11/27/2023, 2023



Michael J. Reichgott, M.D., Ph.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 N.Y. Educ. Law §§ 6530 or 6531 shall constitute a violation of probation and may subject Respondent to any action pursuant to N.Y. Pub. Health Law § 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, NY 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 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. Respondent shall fulfill any remaining probation terms and such additional requirements as the Director may reasonably impose related to the matters set forth in the Determination and Order, or are necessary to protect the public health.
6. OPMC's Director 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 periodic visits or interviews with Respondent and his staff at practice locations or OPMC offices.

7. Respondent shall maintain legible and complete medical records which accurately reflect the evaluation and treatment of patients. The medical records shall contain all information required by State rules and regulations.

8. Respondent shall comply with these probationary terms and shall bear all associated costs. Upon receiving evidence of noncompliance with, or violations of these terms, the Director of OPMC and/or Board may initiate a violation of probation proceeding, and/or any other such proceeding authorized by law, against Respondent.