

January 4, 2013

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Jude B. Mulvey, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2512
Albany, New York 12237

Modesto Fontanez, M.D.
1397 2nd Avenue - #184
New York, New York 10021

Modesto Fontanez, M.D.
REDACTED

Modesto Fontanez, M.D.
2805 Veterans Memorial Highway - #8
Ronkonkoma, New York 11779

Gus Michael Farinella, Esq.
147 West 35th Street - Suite 1008
New York, New York 10001

RE: In the Matter of Modesto Fontanez, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 13-04) 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.

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 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
Office of Professional Medical Conduct
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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2007) and §230-c subdivisions 1 through 5, (McKinney Supp. 2007), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays penalties other than suspension or revocation until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

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 Mr. 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,

REDACTED

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah
Enclosure

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

IN THE MATTER
OF
MODESTO FONTANEZ, M.D.
CO-11-03-1162-A

COPY

DETERMINATION
AND
ORDER
BPMC #13-04

A hearing was held on December 6, 2012, at the offices of the New York State Department of Health ("the Petitioner"). A Notice of Referral Proceeding and a Statement of Charges, both dated May 4, 2012, were served upon the Respondent, **Modesto Fontanez, M.D.**

Pursuant to Section 230(10)(e) of the Public Health Law, **Kendrick A. Sears, M.D.**, Chair, **Robert A. Catalano, M.D., M.B.A.**, and **Thomas W. King, Jr. M.P.A., P.E.**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter. **David A. Lenihan, Esq.**, Administrative Law Judge, served as the Administrative Officer. The Petitioner appeared by **James E. Dering, Esq.**, General Counsel, by **Jude B. Mulvey, Esq.**, of Counsel. The Respondent, **Modesto Fontanez, M.D.**, did appear, with counsel, **Gus Michael Farinella** of New York City. Evidence was received and transcripts of these proceedings were made. After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10) (p). The statute provides for an expedited hearing when a licensee is charged solely with a violation of Education Law Section 6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York State or another jurisdiction, or upon a prior administrative adjudication regarding conduct that would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, the Respondent is charged with professional misconduct pursuant to Education Law §6530(9)(b) – by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state.

Respondent is also charged with having violated New York Education Law §6530(9)(d) by having his license to practice medicine revoked and/or having other disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the license revocation and/or other disciplinary action would, if committed in New York state, constitute professional misconduct under the laws of New York state. Copies of the Notice of Referral Proceeding and the Statement of Charges are attached to this Determination and Order as Appendix 1.

WITNESSES

For the Petitioner:	None
For the Respondent:	Modesto Fontanez, M.D.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers below in parentheses refer to exhibits, denoted by the prefix "Ex." These citations refer to evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. All Hearing Committee findings were unanimous.

1. **Modesto Fontanez, M.D.**, the Respondent, did appear at the hearing with counsel and was duly served and notified of the hearing, by substituted service of process on May 26 and 26, 2012. (Petitioner's Exhibit 2.)
2. **Modesto Fontanez, M.D.**, the Respondent, was authorized to practice medicine in New York State on April 2, 1990, by the issuance of license number 181810 by the New York State Education Department. (Petitioner's Ex. 4)
3. On or about January 12, 2011, the State Medical Board of Ohio (hereinafter "Ohio Board"), by Entry of Order, Report and Recommendations of the Hearing Examiner and excerpt draft Minutes of the State Medical Board (hereinafter "Ohio Order"), permanently revoked Respondent's license to practice medicine, based on findings,

among others, that he practiced below minimal standards of care with regard to the neurosurgical treatment of two patients. (Petitioner's Ex.5).

4. The above determination of the Ohio State Board was affirmed on or about August 4, 2011 by the Court of Common Pleas, Franklin County, Ohio, General Division. (Petitioner's Ex. 6).

5. On or about October 7, 2011, the New Jersey State Board of Medical Examiners Suspended the Respondent's license to practice medicine in that State until such time as his license to practice medicine is fully reinstated with no restrictions, conditions or probation. (Petitioner's Ex. 5).

6. The conduct resulting in the Ohio Board's disciplinary action against Respondent would constitute misconduct under the laws of New York State, pursuant to the following section of New York State law:

New York Education Law §6530(3) (Practicing the profession with negligence on more than one occasion);

VOTE OF THE HEARING COMMITTEE

FIRST PECIFICATION

"Respondent violated New York Education Law §6530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding

was based would, if committed in New York state, constitute professional misconduct under the laws of New York state..."

VOTE: Sustained (3-0)

SECOND SPECIFICATION

"Respondent violated New York Education Law §6530(9)(d) by having his license to practice medicine revoked and/or having other disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the license revocation and/or other disciplinary action would, if committed in New York state, constituted professional misconduct under the laws of New York state..."

VOTE: Sustained (3-0)

HEARING COMMITTEE DETERMINATION

The Respondent did appear at the hearing with counsel. The Administrative Officer, after considering the documentary evidence, which included evidence of the attempts at contacting and serving the Respondent by substituted service (Petitioner's Exhibit 2), ruled that the Petitioner had met the requirements of law for due diligence in the service of process, that jurisdiction had been established over the Respondent, and that the

hearing could proceed. The Respondent's attorney indicated on the record that there was no objection to jurisdiction. (T. 5)

The record in this case indicates that Respondent's license to practice Medicine was revoked in Ohio due to the finding that he practiced below minimal standards of care with regard to the neurosurgical treatment of two patients. Based on the Ohio decision, New Jersey suspended the Respondent's license until his license was cleared in Ohio and all restrictions removed. (See Exhibit 5). The panel was unanimous in finding that the Ohio action warranted revocation of the Respondent's New York license as the only appropriate protection for New York patients.

Respondent did appear at the hearing with counsel who contended that the Ohio action was based on events in 2005 and 2006 and that his client has been retired from neurosurgery since 2007. (T. 34) The Administrative Officer reminded the parties that the Ohio matter would not be relitigated in this proceeding and that the proper forum to address an appeal of the Ohio action would be in Ohio. The panel was unanimous in finding that the Ohio action warranted revocation of the Respondent's New York license as the only appropriate protection for New York patients.

The panel based its determination on the documentation in the record. The panel considered the full range of penalties available and was unanimous that revocation would be the proper penalty. The Respondent is advised that if he should prevail in an appeal of the Ohio action, he may then petition the board to have this matter reopened. Accordingly, for the present, as to the penalty to be imposed, the Hearing Committee

determined that the people of New York State would be protected by a revocation of the Respondent's license.

ORDER

IT IS HEREBY ORDERED THAT:

1. The specifications of professional misconduct, as set forth in the Statement of Charges, are **SUSTAINED**
2. The license of the Respondent to practice medicine in New York State is revoked.
3. This Order shall be effective upon service on the Respondent in accordance with the requirements of Public Health Law Section 230(10)(h).

DATED: Syracuse
January 3, 2013

REDACTED

Kendrick A. Sears, M.D., Chair,

**Robert A. Catalano, M.D.,
Thomas W. King, Jr. M.P.A., P.E.**

APPENDIX I

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

IN THE MATTER NOTICE OF
OF REFERRAL
MODESTO FONTANEZ, M.D. PROCEEDING
CO-11-03-1162-A

TO: Modesto Fontanez, M.D.
1397 2nd Avenue #184
New York, NY 10021

Modesto Fontanez, M.D.
REDACTED

Modesto Fontanez, M.D.
2805 Veterans Memorial Highway, #8
Ronkonkoma, NY 11779

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of New York Public Health Law §§230(10)(p) and New York State Administrative Procedures Act §§301-307 and 401. The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 19th day of July, 2012, at 10:30 a.m., at the offices of the New York State Department of Health, Riverview Center, 150 Broadway, Suite 510, Albany, NY 12204-2719.

At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, that is attached. A stenographic record of the proceeding will be made and the witnesses at the proceeding will be sworn and examined.

You may appear in person at the proceeding and may be represented by counsel who shall be an attorney admitted to practice in New York state. You may produce evidence and/or sworn testimony on your behalf. Such evidence and/or sworn testimony shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered that would show that the conviction would not be a crime in New York State. The Committee also may limit the number of witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify.



If you intend to present sworn testimony, the number of witnesses and an estimate of the time necessary for their direct examination must be submitted to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 433 River Street, Fifth Floor South, Troy, NY 12180, ATTENTION: HON. JAMES F. HORAN, ACTING DIRECTOR, BUREAU OF ADJUDICATION (Telephone: (518-402-0748), (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, no later than ten (10) days prior to the scheduled date of the Referral Proceeding, as indicated above.

Pursuant to the provisions of New York Public Health Law §230(10)(p), you shall file a written answer to each of the charges and allegations in the Statement of Charges not less than ten (10) days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health, whose name appears below. You may file a written brief and affidavits with the Committee. Six (6) copies of all papers you submit must be filed with the Bureau of Adjudication at the address indicated above, no later than fourteen (14) days prior to the scheduled date of the Referral Proceeding, and a copy of all papers must be served on the same date on the Department of Health attorney, indicated below. Pursuant to §301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide, at no charge, a qualified Interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person. Pursuant to the terms of New York State Administrative Procedure Act §401 and 10 N.Y.C.R.R. §51.8(b), the Petitioner demands, hereby, disclosure of the evidence that Respondent intends to introduce at the hearing, including the names of witnesses, a list of and copies of documentary evidence, and a description of physical and/or other evidence that cannot be photocopied.

YOU ARE ADVISED, HEREBY, THAT THE ATTACHED CHARGES WILL BE MADE PUBLIC FIVE (5) BUSINESS DAYS AFTER THEY ARE SERVED.

Department attorney: Initial here _____

The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to the Bureau of Adjudication, at the address indicated above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five (5) days prior to the scheduled date of the proceeding. Adjournment requests are not routinely granted. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation. Failure to obtain an attorney within a reasonable period of time prior to the proceeding will not be grounds for an adjournment.

The Committee will make a written report of its findings, conclusions as to guilt, and a determination. Such determination may be reviewed by the administrative review board for professional medical conduct.

SINCE THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT SUSPENDS OR REVOKES YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE AND/OR IMPOSES A FINE FOR EACH OFFENSE CHARGED, YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York
May 4, 2012

REDACTED

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct

Inquiries should be addressed to:

Jude B. Mulvey
Associate Counsel
Bureau of Professional Medical Conduct
Corning Tower – Room 2512
Empire State Plaza
Albany, NY 12237
(518) 473-4282

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

IN THE MATTER
OF
MODESTO FONTANEZ, M.D.
CO-11-03-1162A

STATEMENT
OF
CHARGES

MODESTO FONTANEZ, M.D., Respondent, was authorized to practice medicine in New York State on April 2, 1990, by the issuance of license number 181810 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about January 12, 2011, the State Medical Board of Ohio (hereinafter "Ohio Board"), by Entry of Order, Report and Recommendations of the Hearing Examiner and excerpt draft Minutes of the State Medical Board (hereinafter "Ohio Order"), permanently revoked Respondent's license to practice medicine, based on findings, among others, that he practiced below minimal standards of care with regard to the neurosurgical treatment of two patients. The determination of the Ohio Board was affirmed on or about August 4, 2011 by the Court of Common Pleas, Franklin County, Ohio, General Division.

B. The conduct resulting in the Ohio Board's disciplinary action against Respondent would constitute misconduct under the laws of New York State, pursuant to the following sections of New York State law:

1. New York Education Law §6530(3) (Practicing the profession with negligence on more than one occasion);

SPECIFICATIONS OF MISCONDUCT

FIRST SPECIFICATION

Respondent violated New York Education Law §8530(9)(b) by having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that Petitioner charges:

1. The facts in Paragraphs A and/or B.

SECOND SPECIFICATION

Respondent violated New York Education Law §8530(9)(d) by having his license to practice medicine revoked and/or having other disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the license revocation and/or other disciplinary action would, if committed in New York state, constituted professional misconduct under the laws of New York state, in that Petitioner charges:

2. The facts in Paragraphs A and/or B.

DATED:

May 4, 2012
Albany, New York

REDACTED

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct