

Public

DOH STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Richard F. Daines, M.D.
Commissioner

James W. Clyne, Jr.
Executive Deputy Commissioner

December 21, 2009

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Christine Radman, Esq.
NYS Department of Health
90 Church Street - 4th Floor
New York, New York 10007

Maria Elena Fodera, M.D.
New York Surgical Associates, P.C.
2235 Clove Road
Staten Island, New York 10305

Jeffrey R. Ruggiero, Esq.
Jennifer L. Hogan, Esq.
Arnold & Porter, LLP
399 Park Avenue
New York, New York 10022

RE: In the Matter of Maria Elena Fodera, M.D

Dear Parties:

Enclosed please find the Determination and Order (No. 09-81) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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
Hedley Park Place
433 River Street-Fourth Floor
Troy, New York 12180

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,

Redacted Signature

James F. Horan, Acting Director
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Maria Elena Fodera, M.D. (Respondent)

Administrative Review Board (ARB)

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

Determination and Order No. 09-81

COPY

Before ARB Members Pellman, Wagle and Wilson¹
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Christine Radman, Esq.
For the Respondent: Jeffrey Ruggieo, Esq. & Jennifer Hogan, Esq.

After a hearing below, a BPMC Committee dismissed charges that the Respondent committed professional misconduct in performing surgery on one patient and in providing false information on five applications for licensure or professional privileges. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2009), the Petitioner asks the ARB to modify that Determination by overturning the Committee, by reinstating all the charges and by imposing a substantial penalty. After reviewing the hearing record and the parties' review submissions, the ARB votes 3-0 to overturn the Committee and find that the Respondent committed professional misconduct by willfully filing false reports on her applications for professional privileges at two hospitals. The ARB suspends the Respondent's License for two years, stays the suspension in full and places the Respondent on probation for five years, under the terms that appear in the Appendix to this Determination.

¹ ARB Members Richard D. Milone, M.D. and John A. D'Anna, M.D. did not participate in this case. The ARB proceeded to consider the case with a three-member quorum. Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

Committee Determination on the Charges

The Committee conducted a hearing into factual allegations that the Respondent violated New York Education Law (EL) §§ 6530(2), 6530(4), 6530(6), 6530(14), 6530(20-21) & 6530(32) (McKinney 2009) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently.
- practicing medicine with gross negligence.
- practicing medicine with gross incompetence.
- violating the provisions in PHL § 2805-k that require physicians to provide true and accurate information to health care facilities reviewing physicians for professional privileges.
- engaging in conduct in the practice of medicine that evidences moral unfitness.
- willfully making or filing a false report, and.
- failure to maintain accurate records.

Some charges related to the care that the Respondent, a surgeon, provided to a single person (Patient A). The record refers to the Patient by an initial to protect patient privacy. The remaining charges related to answers the Respondent made on applications to St. Vincent's Catholic Medical Center (St. Vincent's), Victory Memorial Hospital (Victory) and the New York State Education Department (SED). The answers at issue concerned the Respondent's practice at Staten Island University Hospital (SIUH) and a hearing concerning the Respondent's privileges at SIUH.

The Committee found that the Respondent performed surgery on Patient A on May 23, 2006. The Committee concluded that the Respondent's operative report for Patient A reflected the procedures that the Respondent performed on Patient A. The Committee dismissed the charges concerning accurate records, fraud, filing a false report and engaging in conduct in the practice of medicine, which evidences moral unfitness. The Committee found further that the Petitioner failed to prove that the Respondent practiced with gross negligence or gross incompetence in performing surgery on Patient A. The Committee noted that the main basis for

the operative charges against the Respondent came from accusations by Jamie Cepeda, Jr., M.D., the second assistant to the Respondent in the surgery on Patient A. The Committee found Dr. Cepeda's testimony unconvincing, expressed skepticism about the level of Dr. Cepeda's medical knowledge and concluded that Dr. Cepeda misinterpreted what he observed during the May 23rd surgery.

The Committee also dismissed the charges concerning the applications to St. Vincent's, Victory and SED. The hearing record demonstrated that the Respondent held surgical privileges at SIUH. The Executive Committee of the SIUH Medical and Dental Staff proposed denying the Respondent reappointment in July 2002. The Respondent requested a hearing to challenge the denial. SIUH took no subsequent action on the recommendation and the Respondent continued to admit patients and perform surgery at SIUH. In applications to St. Vincent's in 2003 and to SED in 2004, the Respondent denied any termination or non-renewal of her hospital privileges ever occurred. The Committee found no misconduct in the Respondent's answers on those two applications, because the SIUH Executive Committee made only a non-renewal recommendation and the Respondent continued to admit patients and perform surgery at SIUH. In February 2004, SIUH suspended the Respondent summarily for violating her clinical privileges and the Respondent requested a hearing on that suspension. During that proceeding, the Respondent's counsel and SIUH agreed that the suspension would be held in abeyance during a hearing and any appeals process and that the Respondent would refrain from exercising her hospital privileges. In April 2006, the SIUH Board of Trustees upheld a 28-day suspension for the Respondent and that ruling ended the hearing and appeal process at SIUH. The Respondent filed three further applications at issue in this case between February 2004 and August 2006. In the Respondent's application for reappointment to the surgical staff at St. Vincent's in May 2005, the Respondent answered no to a question whether there had been a suspension of any of the Respondent's clinical privileges or medical staff appointments at any hospital or whether such an action was pending [Hearing Committee Finding of Fact (FF) 24]. In the Respondent's 2006 SED registration application, the Respondent answered no to a question whether any facility had restricted the Respondent's employment or privileges. In the Respondent's March 2006

application for appointment at Victory, the Respondent answered no to a question as to whether her privileges had been or were in the process of being suspended and the Respondent omitted any documentation of her affiliation with SIUH [FF 27]. The Committee found no fraud, false reporting, moral unfitness or PHL § 2805-k violations in the answers on those three applications. The Committee found no knowing or intentional failure to disclose, because there was no final determination on the suspension by SIUH Board of Trustees at the time of the three applications. The Committee found no misconduct for failing to mention SIUH on the 2005 Victory Application, because the Respondent believed that the Victory Application was requesting information about current privileges only and the Respondent was not practicing at SIUH at the time.

Review History and Issues

The Committee rendered their Determination on April 29, 2009. This proceeding commenced on May 7, 2009, 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, the Respondent's brief and the Respondent's reply to the Petitioner's brief. The record closed when the ARB received the reply brief on June 18, 2009.

The Petitioner asks that the ARB overturn the Committee's Determination and sustain all charges. The Petitioner argues that the Committee found that the Respondent made incorrect answers on the applications at issue, but that the Committee erred by accepting the Petitioner's explanations for the incorrect answers and dismissing the fraud, false reporting and 2805-k charges. The Petitioner argues further that the Committee failed to reconcile properly the conflicting evidence concerning the surgery on Patient A. The Petitioner asks that the ARB credit information from the record that the Committee rejected and that the ARB sustain the

charges relating to Patient A. The Petitioner requests further that the ARB impose a substantial penalty.

The Respondent argued that the evidence that the Committee found credible provided ample support for all the findings by the Committee. The Respondent challenged the contention by the Petitioner that the Committee failed to consider conflicting evidence and noted that the Committee discussed conflicting evidence specifically in the Committee's Determination at pages 6-7. The Respondent argued further that the Petitioner failed to produce a single witness to show that the Respondent possessed the intent to deceive with regard to her answers on the SED, St. Vincent's and Victory Applications. The Respondent also argued that the Petitioner's brief misstated the law governing review authority by the ARB.

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 Spatalis 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 substitute our judgment and 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 to dismiss all charges concerning Patient A and to dismiss charges that the Respondent's answers on the applications at issue amounted to fraud in the practice of medicine. The ARB overturns the Committee and holds that the Respondent willfully filed false reports by failing to inform St. Vincent's Hospital and Victory Hospital concerning an ongoing proceeding or pending action to suspend the Respondent's privileges at SIUH.

The Petitioner requested that the ARB overturn the Committee by exercising our "supervisory role". The ARB notes at the outset that we possess no supervisory role over a Committee. Under PHL §§ 230(10)(g), 230(10)(i) & 230-c(4)(b), the Committee makes findings of fact and conclusions and the ARB reviews the findings and conclusions to determine whether the findings and conclusions are consistent with the Committee's Determination on the charges and the penalty. The findings by the Committee concerning the surgery for Patient A [FF 4-16] are consistent with the Committee's Determination to dismiss the charges concerning Patient A. Nothing in FF 4-16 provided the basis to determine the Respondent practiced fraudulently or with gross negligence or incompetence, that the Respondent failed to maintain accurate records, that the Respondent willfully filed a false report or that the Respondent engaged in conduct that evidenced moral unfitness. The Committee made specific findings that the Respondent's conduct constituted no deviation from minimally accepted care standards [FF 9-10] and that the Respondent's operative report for Patient A reflected accurately the procedures the Respondent performed during surgery. The Petitioner asked that the ARB reject the Committee's credibility determination on the grounds that the Committee failed to provide reasons why the Committee credited the testimony by one witness over another. The ARB finds no validity in that argument. The Committee's Determination at pages 6-7 and 10-12 gave extensive reasons why the Committee credited or rejected certain evidence. The ARB defers to the Committee in their judgment on credibility.

Some of the charges concerning answers on applications involved the Respondent's 2003 application to renew privileges at St. Vincent's and the Respondent 2004 biennial SED registration application. Those applications followed the 2002 recommendation against the Respondent's reappointment at SJUH. The Committee found that the Respondent appealed the

recommendation immediately, that no hearing on the appeal ever took place, that SIUH took no action on the recommendation and that the Respondent continued to admit patients at SIUH [FF 17-18]. The Committee dismissed charges that the Respondent engaged in misconduct by denying termination by SIUH on the 2003 St Vincent's application and the 2004 SED application and in denying there was any pending action against the Respondent on the 2003 St. Vincent's application. The ARB affirms the Committee's Determination to dismiss those charges because there was never a final action or a proceeding.

The remaining charges involved the Respondent's applications for SED registration in January 2006, for reappointment at St. Vincent's in May 2005 and for appointment on the Victory medical staff in March 2006. Those applications followed a decision by SIUH to suspend the Respondent's privileges in February 2004. The Respondent challenged that summary suspension and requested the hearing and appellate process that lasted until a final decision affirming the suspension in April 2006. Prior to the hearing's commencement, the Respondent's attorney and SIUH agreed that the suspension would remain in abeyance and the Respondent would refrain from admitting patients. The Committee found that the Respondent understood that she had no obligation to report the suspension until the hearing proceeding and any appellate proceeding concluded. The SED, St. Vincent's and Victory applications all asked whether the medical staff appointments or privileges had been suspended and on each application, the Respondent answered "no". The Committee found no misconduct by the Respondent, because there was no final decision on the suspension and there was no suspension in place at the time the Respondent made the answer on the three applications. The Respondent also omitted any mention about SIUH on the Victory application. The Committee found no violation under PHL § 2805-k, because the Committee accepted the Respondent's explanation

that she believed the Victory question referred to current privileges only and the Respondent was not admitting patients at Victory currently. In making their Determinations on these charges, the Committee found the Respondent credible in her explanations. The ARB again defers to the Committee in their Determination on credibility and we affirm the Committee's Determination to dismiss the charges concerning the failure to reveal the SIUH suspension and the failure to list SIUH.

The Victory and St. Vincent's applications asked another question in addition to whether the Respondent's privileges were actually suspended at a facility. These applications also asked whether there were any proceedings pending to suspend privileges or medical staff appointments. The SED application contained no question about pending proceedings. The Respondent answered no on both the Victory and St. Vincent applications to the question whether there were proceedings pending to suspend the Respondent's privileges and the Petitioner alleged that those answers constituted professional misconduct [Statement of Charges, Factual Allegations C.2.a & D.1.b]. The Committee sustained Factual Allegations C.2.a & D.1.b [Committee Determination page 12] and the Committee found that the Respondent denied on the Victory and St. Vincent's application that there were any pending proceedings to suspend the Respondent's privileges or medical staff appointments [FF 24-25, 27]. The Committee's findings also demonstrated that the Respondent knew there was an ongoing proceeding, because she requested a hearing and because there were ongoing discussions concerning the status of the Respondent's suspension during the proceedings and review [FF 21-23, 25].

The ARB finds that the Respondent willfully filed false reports by denying on the Victory and the May 2005 St. Vincent's applications that there was an ongoing action or process to suspend the Respondent privileges or medical staff appointment at SIUH. To prove willfully

filing a false report requires a finding that a licensee made or filed a false statement willfully, which amounts to a knowing or deliberate act or an act that is voluntary as opposed to accidental.

Matter of Brestin v. Comm. of Educ., 116 A.D.2d 357, 501 N.Y.S.2d 923 (3rd Dept. 1986);

People v. Coe, 131 Misc. 2d 807, 501 N.Y.S.2d 997, affd. 126 A.D.2d 436, 510 N.Y.S.2d 470,

affd. 71 N.Y.2d 852. The ARB overturns the Committee's Determination to dismiss the false

reporting charges relating to these applications, because the Determination is inconsistent with

the Committee's Determination to sustain Factual Allegations C.2.a & D.1.b and with the

Committee's FF 21-25, 27. The ARB affirms the remaining portions of the Committee's

Determination.

As a sanction for the Respondent's willful false reports, the ARB votes 3-0 to suspend the Respondent's License for two years, to stay the suspension in full and to place the Respondent on probation for five years under the terms that appear as the Appendix to this Determination.

ORDER

NOW, with this Determination as our basis, the ARB renders the following ORDER:

1. The ARB overturns the Committee and holds that the Committee's findings demonstrate that the Respondent committed professional misconduct by willfully filing a false report on two occasions.
2. The ARB votes 3-0 to suspend the Respondent's License for two years, to stay the suspension in full and to place the Respondent on probation for five years under the terms that appear in the Appendix to this Determination.

Thea Graves Pellman
Datta G. Wagle, M.D.
Linda Prescott Wilson

In the Matter of Maria Elena Fodera, M.D.

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

Dated: 17 Dec 2009

Redacted Signature

Linda Prescott Wilson

In the Matter of Maria Elena Fodera, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Fodera.

Dated: Dec 17, 2009

Redacted Signature

Thea Graves Pellman

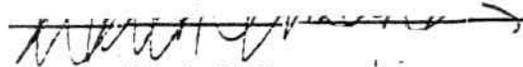
In the Matter of Maria Elena Fodera, M.D.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Fodera.

Dated: 12/17, 2009

Redacted Signature

A handwritten signature in black ink, appearing to read "Datta G. Wagle", written over a horizontal line.

Datta G. Wagle, M.D.

Appendix

Terms of Probation

1. The Respondent shall conduct herself in all ways in a manner befitting her professional status, and shall conform fully to the moral and professional standards of conduct imposed by law and by her profession.

2. The Respondent shall comply with all federal, state and local laws, rules and regulations governing the practice of medicine in New York State.

3. The Respondent shall submit written notification to the Board, addressed to the Director, Office of Professional Medical Conduct ("OPMC"), 433 River Street, Suite 305, Troy, New York 12180-2299 regarding any change in employment, practice, address, (residence or professional) telephone numbers, and facility affiliations within or without New York State, within 30 days of such change.

4. The Respondent shall submit written notification to OPMC of any and all investigations, charges, convictions or disciplinary actions taken by any local, state or federal agency, institution or facility, within 30 days of each charge or action.

5. The period of probation shall be tolled during periods in which the Respondent is not engaged in the active practice of medicine in New York State. The Respondent shall notify the Director of OPMC in writing, if the Respondent is not currently engaged in or intends to leave the active practice of medicine in New York State for a period of thirty (30) consecutive days or more. The Respondent shall then notify the Director again prior to any change in that status. The period of probation shall resume and any terms of probation which were not fulfilled shall be fulfilled upon the Respondent's return to practice in New York State.

6. The Respondent shall maintain legible and complete hospital and office medical records, which accurately reflect evaluation and treatment of patients. All hospital and office medical records shall contain a comprehensive history, physical examination findings, chief complaint, present illness, diagnosis and treatment. In cases of prescribing, dispensing, or administering of controlled substances, the medical record shall contain all information required by state rules and regulations regarding controlled substances.

7. The Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of the Respondent's compliance with the terms of this Order. The Respondent shall meet with a person designated by the Director of OPMC as requested by the Director.

8. The Director of OPMC may review the Respondent's professional performance. This review may include, but shall not be limited to, a review of office records, patient records and/or hospital charts, interviews with or periodic visits with the Respondent, her staff at locations or OPMC offices.

9. The Respondent shall comply with all terms, conditions, restrictions, and penalties to which he is subject pursuant to the Order of the Board. A violation of any of these terms of probation shall be considered professional misconduct. On receipt of evidence of non-compliance or any other violation of the terms of probation, a violation of probation proceeding and or such other proceedings as may be warranted, may be initiated against the Respondent pursuant to New York Public Health Law §230(19) or any other applicable laws.