

March 22, 2012

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Edward Festus, R.P.A.
Clinica Central De Diagnostico &
Treatment Center
82-09 Roosevelt Avenue
Jackson Heights, New York 11372

Joseph T. Pareres, Esq.
Siverson, Pareres & Lombardi, LLP
192 Lexington Avenue, 17th Floor
New York, New York 10016

Anna Lewis, Esq.
NYS Department of Health
90 Church Street – 4th Floor
New York, New York 10007

RE: In the Matter of Edward Festus, R.P.A.

Dear Parties:

Enclosed please find the Determination and Order (No. 11-282) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Edward Festus, R.P.A. (Respondent)

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

Administrative Review Board (ARB)

Determination and Order No. 11-282

COPY

Before ARB Members D'Anna, Koenig, Wagle, Wilson and Milone
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Anna Lewis, Esq.
For the Respondent: Joseph T. Pareras, Esq.

After a hearing below, a BPMC Committee determined that that the Respondent committed professional misconduct as a physician assistant, by practicing the profession fraudulently and practicing beyond the scope permitted by law. The Committee voted to revoke the Respondent's license to practice as a physician assistant in the State of New York (License). In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2012), the Respondent asks the ARB to nullify or modify the Committee's Determination. After reviewing the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination in full.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(2) & 6530(24)(McKinney Supp. 2012) by committing professional misconduct under the following specifications:

- practicing the profession fraudulently, and,

- practicing or offering to practice beyond the scope permitted by law or performing without supervision services which require supervision.

The charges related to the Respondent's employment at Clinica Central De Diagnostico and Treatment Center (Center) in Jackson Heights and the Respondent's use of prescription pads.

The Respondent's answer admitted to working at the Center, but denied the other charges.

Following the hearing on these charges, the Committee rendered the Determination now on review.

The Respondent held a license as a physician in the Dominican Republic, but failed the United States Medical Licensing Exam and has never held licensure as a physician in the United States. The Respondent has practiced as a registered physician assistant in New York State since 1993. The Committee found that the Respondent worked at the Center from October 2006 to April 2008. While working at the Center, the Respondent used designation the M.D., R.P.A. on checks, business cards and advertisements. The Respondent wrote payroll checks for Center staff using the title M.D.,R.P.A. or M.D. and signed a lease for the Center as "Edward Festus, M.D." The Committee found that the Respondent held himself as a duly licensed physician to the staff and patients at the Center, who referred to the Respondent as Dr. Festus. The Committee found further that the Respondent ordered Official New York State Prescription pads in 2007 that stated "Marina Manrique, M.D." on the pads. The Committee found that Dr. Manrique worked as a physician at the Center, but that Dr. Manrique did not supervise the Respondent and that Dr. Manrique had left the Center by the time the Respondent ordered the pads. The Respondent submitted an order for Official New York State Prescription pads in 2008 that listed Luisa Perez, M.D. as the Respondent's supervising physician. The Committee found that Dr. Perez never

worked at the Center, never supervised the Respondent and never authorized the Respondent to identify Dr. Perez as the Respondent's supervising physician.

The Committee noted that the controlling law and regulations at EL § 6542 and Title 10 NYCRR § 94.2 require that a licensed physician supervise continuously a physician assistant and limit the physician assistant's practice to only what the supervisor assigns and what falls within the supervisor's scope of practice. The Committee sustained the charges that the Respondent misrepresented his status knowingly and intentionally and the Committee sustained the specifications that charged practicing fraudulently and practicing beyond the scope that the law permits. In arriving at their findings and conclusions, the Committee relied on testimony by Dr. Marinque, Dr. Perez and Nurse Hilda Hernandez, who worked at the Center. Both Dr. Marinque and Ms. Hernandez testified that the Respondent stated that he was a physician. Dr. Perez testified that she never agreed to serve as the Respondent's supervisor. The Committee rejected contrary testimony by the Respondent as self-serving and unsubstantiated by the record.

The Committee concluded that the Respondent engaged in repeated willful attempts to mislead the public and to thwart the mandated professional practice requirements for physician assistants in New York State. The Committee voted to revoke the Respondent's License.

Review History and Issues

The Committee rendered their Determination on November 22, 2011. This proceeding commenced on December 7, 2011, 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 reply brief on January 13, 2012.

The Respondent argued that the ARB made erroneous conclusions on the evidence, relied upon unsubstantiated and uncorroborated hearsay and abused its discretion in both sustaining the charges and in revoking the Respondent's License. The Respondent asked that the ARB overturn the Committee Determination in full, or that the AARB at least reduce the sanction against the Respondent.

The Petitioner replied that the evidence supported the Committee's Determination to revoke the Respondent's License.

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 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. The ARB votes unanimously to sustain the Committee's Determination on the charges and to sustain the Committee's Determination to revoke the Respondent's License.

The Respondent was aware that as a physician assistant, he was unlicensed to practice medicine and unauthorized to practice as a physician assistant without a physician as a practice supervisor. The testimony by the Respondent's witnesses, Attorney Thomas Hoering and Ramon Tallaj, M.D. established that the Respondent abided by those restrictions when he worked previously at St. Vincent's Midtown Hospital /Academy Clinic. The testimony from Dr.

Manrique and Ms. Hernandez established that the Respondent misrepresented himself as a physician while at Centro. The testimony by Dr. Manrique and Dr. Perez established that the Respondent practiced without supervision. The testimony by the Respondent's witness, Ms. Monroy, indicated that staff and patients at the Center referred to the Respondent as Dr. Festus.

The testimony by the Respondent contradicted the testimony by Dr. Manrique, Dr. Perez and Nurse Hernandez and created a clear question of fact. The Committee, as finder of fact, determined that the Respondent lacked credibility as a witness. The ARB defers to the Committee as finder of fact in making the determination on credibility, but we also agree that the Respondent testified in a self-serving manner, without substantiation. The Respondent's testimony made clear that he knew what he was doing and that he intended to mislead.

The Respondent argued that the Committee erred by finding all witnesses credible other than the Respondent. The ARB finds no error by the Committee. There was no conflict in the testimony by the Respondent's witnesses Hoering and Tallaj with the Petitioner's witnesses Manrique, Perez and Hernandez, because Mr. Hoering and Dr. Tallaj testified concerning the Respondent's activities outside the Center. The testimony by Mr. Hoerig and Dr. Tallaj showed that the Respondent knew the rules for practice by a physician assistant and the testimony by Dr. Perez, Dr. Manrique and Ms. Hernandez demonstrated that the Respondent violated those rules. That evidence provided the grounds for the Committee to infer that the Respondent made knowing and intentional misrepresentations. The Committee found that the Respondent's witness, Ms. Monroy, credible in her factual testimony, but found that she failed to demonstrate that she knew the distinction between a physician and a physician assistant.

In order to sustain a charge that a licensee practiced medicine fraudulently, a hearing committee must find that (1) a licensee made a false representation, whether by words, conduct

or by concealing that which the licensee should have disclosed, (2) the licensee knew the representation was false, and (3) the licensee intended to mislead through the false representation, Sherman v. Board of Regents, 24 A.D.2d 315, 266 N.Y.S.2d 39 (Third Dept. 1966), aff'd, 19 N.Y.2d 679, 278 N.Y.S.2d 870 (1967). A committee may infer the licensee's knowledge and intent properly from facts that such committee finds, but the committee must state specifically the inferences it draws regarding knowledge and intent, Choudhry v. Sobol, 170 A.D.2d 893, 566 N.Y.S.2d 723 (Third Dept. 1991). A committee may reject a licensee's explanation and draw the inference that the licensee intended or was aware of the misrepresentation, with other evidence as the basis, Matter of Brestin v. Comm. of Educ., 116 A.D.2d 357, 501 N.Y.S.2d 923 (Third Dept. 1986).

The ARB concludes that the credible evidence established that the Respondent made knowing misrepresentations about his status and that he practiced beyond the scope of his License. The ARB affirms the Committee's Determination that the Respondent's conduct violated EL §§ 6530(2) and 6530(24). The ARB agrees with the Committee that the Respondent's misconduct was repeated, that the Respondent misled the public and that the Respondent thwarted the practice requirements for his profession. The ARB affirms the Committee's Determination that the Respondent's fraudulent conduct demonstrated his unfitness to practice as a physician assistant. We affirm the Determination to revoke the Respondent's License.

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 committed professional misconduct.
2. The ARB affirms the Committee's Determination to revoke the Respondent's License.

Peter S. Koenig, Sr.
Datta G. Wagle, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

In the Matter of Edward Festus R.P.A.

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

Dated: 16 March, 2012

REDACTED SIGNATURE

Linda Prescott Wilson

In the Matter of Edward Festus, R.P.A.

Peter S. Koenig, Sr., an ARB Member concurs in the Determination and Order in the
Matter of Mr. Festus.

Dated: ___ March 17, 2012

REDACTED SIGNATURE

Peter S. Koenig, Sr.

In the Matter of Edward Festus, R.P.A.

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

Matter of Mr. Festus.

Dated: 19th March 2012

REDACTED SIGNATURE

Datta G. Wagle, M.D.

In the Matter of Edward Festus, R.P.A.

Richard D. Milone, an ARB Member concurs in the Determination and Order in the

Matter of Mr. Festus.

Dated: March 20, 2012

REDACTED SIGNATURE

Richard D. Milone, M.D.

In the Matter of Edward Festus, R.P.A.

John A. D'Anna, M.D., an ARB Member concurs in the Determination and Order in the
Matter of Mr. Festus.

Dated: MAR 21, 2012

REDACTED SIGNATURE

John A. D'Anna, M.D.