

NEW YORK
state department of
HEALTH

Nirav R. Shah, M.D., M.P.H.
Commissioner

Sue Kelly
Executive Deputy Commissioner

November 30, 2011

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Pierce J. Ferriter, M.D.
1421 Third Avenue
New York, New York 10028

John Paul Viti, Esq.
NYS Department of Health
90 Church Street – 4th Floor
New York, New York 10007

RE: In the Matter of Pierce Ferriter, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 11-284) 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.

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 Respondent or the Department may seek a review of a committee determination.

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., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

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 SIGNATURE

James 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

Pierce Ferriter, M.D. (Respondent)

Determination and Order No. 11-284

COPY

Michael Golding, M.D. (Chair), Robert Catalano, M.D. and Mr. James Ducey, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to New York Public Health Law (PHL) §230(10)(e)(McKinney Supp. 2011). James F. Horan, Administrative Law Judge, served as the Committee's Administrative Officer. The Department of Health (Petitioner) appeared by John Thomas Viti, Esq. The Respondent appeared pro se. The Committee received and examined documents and heard witnesses testify under oath and subject to cross-examination. A stenographic reporter prepared a transcript of the proceeding. After consideration of the record, the Hearing Committee sustains the charge that the Respondent committed professional misconduct by failing to comply with a New York State law that requires a physician to provide a patient (Patient A) with a copy of the Patient's medical record, upon the Patient's request. The Committee votes to fine the Respondent \$10,000.00, to suspend the Respondent's license to practice medicine in New York State (License) for three months, to stay the suspension in full and to place the Respondent on probation for three years under the terms that appear in Appendix I to this Determination.

Procedural History

Date of Notice of Hearing and Statement of Charges:	August 11, 2011
Date of Service of Notice of Hearing and Statement of Charges:	August 24, 2011
Date of Answer to Charges:	None submitted
Date of Hearing:	October 3, 2011
Location of Hearing:	New York State Department of Health 90 Church St., 4 th Floor New York, NY 10007
Witnesses for the Petitioner:	Jordan Tucker, Esq. Ms. Lisa Saunders
Deliberations Date:	October 3, 2011
Transcript received:	October 25, 2011

At the Pre-Hearing Conference in this matter, the Petitioner made a motion to have the charges deemed admitted based on Respondent's failure to file an answer. The Petitioner's Exhibit Exhibit (Ex.) 1, the Notice of Hearing, states at page 2 that:

Pursuant to the provisions of PHL §230(10)(c), you shall file a written answer to each of the charges and allegations in the Statement of Charges not less than ten days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted.
(Underline in original)

The Administrative Officer advised the Respondent that due to the failure to file an answer to the charges, the charges would be deemed admitted unless the Committee granted an adjournment of the

the first hearing day. The Respondent indicated that he wished to request such an adjournment. Also at the Pre-hearing, the Administrative Officer determined that the Respondent received legally sufficient notice concerning the hearing and that the Board had obtained jurisdiction over the Respondent. The Administrative Officer also received 23 documents into evidence from the Petitioner [Ex. 1-23] and one document from the Respondent, the medical record for Patient A [Ex. A]. A full list of the exhibits in evidence appears as Appendix II to this Determination.

At the outset of the hearing, the Administrative Officer submitted the request for the adjournment to the Committee [T 6*]. The Committee reserved on the request and chose to hear the evidence in the case, before making a determination. In deliberations following the Hearing, the Committee voted 3-0 to deny the adjournment request, because the evidence at hearing demonstrated that the Respondent received sufficient notice concerning the date, time and issues at the Hearing and concerning the need to file an answer. The Committee found that the Notice of Hearing and PHL §230(10)(c) clearly indicate that the failure to file a written answer will result in the charges and allegations being deemed admitted. Due to Respondent's failure to submit a written answer, the factual allegations and charges of misconduct contained in the Statement of Charges (Ex. 1) are deemed admitted by the Respondent, Corsello v. New York State State Department of Health, 300 A.D.2d 849, 752 N.Y.S.2d 156 (3rd Dept. 2002).

Statement of Case

The State Board for Professional Medical Conduct functions pursuant to PHL § 230 *et seq.* as a duly authorized professional disciplinary agency of the State of New York. The Petitioner charged that the Respondent committed professional misconduct under the definition in N.Y. Education Law (EL) § 6530 (16)(McKinney Supp. 2011), by failing to comply with a substantial provision of New York Law (PHL § 18) that requires a physician to provide a patient with a copy of that patient's medical record, upon the patient's request. This Determination and Order attaches a copy of the Notice of Hearing and the Statement of Charges as Appendix III.

Findings of Fact

The Committee makes the following Findings of Fact after a reviewing the entire record in this matter. The brackets following the Findings cite to testimony [T] and/or documentary evidence [Ex.] the Committee found persuasive in arriving at a particular finding. In instances in which other information in the record conflicts with the evidence on which the Committee relied in making the Findings, the Committee considered and rejected that other information. Under PHL § 230(10), the Petitioner bore the burden to prove its case by a preponderance of the evidence. The Committee agrees unanimously on all Findings.

1. The Respondent received his License (# 145930) from the New York State Education Department on May 8, 1981 [Ex. 3].

* T6 indicates Hearing Transcript, page 6.

2. The Respondent practices as an orthopedic surgeon, with an affiliation at Lenox Hill Hospital and an office on Third Avenue in Manhattan [Ex. 19]
3. The Appellant saw Patient A, an 89 year-old-male, on January 14 and March 8, 2010, for pain and swelling in the Patient's right knee, following a fall by the Patient in a Duane Read Pharmacy [Ex. A].
4. Joseph Tucker, Esq. represented the Patient in a legal action against Duane Read [T. 18].
5. Mr. Tucker obtained an authorization from Patient A so that Mr. Tucker could obtain a copy of the Respondent's medical record for Patient A [T. 19; Ex. A]
6. Mr. Tucker provided the Respondent with a request for a copy of the Patient's chart and the authorization on April 13, 2010 [T. 19; Ex. 6].
7. The Respondent advised Mr. Tucker there would be a \$100.00 fee for copying the record [Ex. 7].
8. Mr. Tucker refused to pay the \$100.00 fee and requested to receive a copy of the record at the per-page copying charge permitted under PHL §§ 17 & 18 [Ex. 8].
9. Lisa Saunders of the Office of Professional Medical Conduct (OPMC) contacted the Respondent by letter on February 14, 2011 to advise the Respondent that he could charge for a copy of a medical record at a per page fee of \$.75 only and Ms. Saunders attached to the letter a copy of PHL § 18 [Exs. 9-11].
10. The Respondent's medical record for Patient A contains a copy of the April 14, 2011 letter from Ms. Saunders and a copy of PHL § 18 [Ex. A].
11. Mr. Tucker never received a copy of the Respondent's chart for Patient A [T. 24].

Conclusions

The Hearing Committee makes the unanimous conclusion, pursuant to the Findings we listed above, to sustain the Factual Allegations from the August 11, 2011 Statement of Charges and to sustain the Misconduct Specification that the Respondent committed professional misconduct by failing willfully to comply with a substantial provision of New York Law that governs medical practice. The Respondent failed to provide Patient A's representative with a copy of the Patient's medical record, upon request and at a copying charge not to exceed \$.75 per page. The Respondent's failure amounted to a willful violation under PHL §§ 18(d-e) and to professional misconduct under EL § 6530(16).

Under PHL § 18, a patient receives the opportunity for access to and copies of the patient's medical records. The choice lies with the patient, rather than to the provider, as to whether the Patient will get access to the record, a copy of the record or both. The Committee rejects the Respondent's assertion that he complied with § 18 by merely offering access. The Respondent violated § 18 willfully by attempting to obtain a \$100.00 flat fee for providing a copy of the record and then refusing to provide a copy of the record to Mr. Tucker when Mr. Tucker refused to pay the flat fee. The Respondent conceded in a letter to Ms. Saunders, on February 21, 2011 that the record for Patient A contained 45 pages and that the fee for copying the record under § 18 would amount to \$33.75.

Determination As To Penalty

Under PHL § 230-a, this Committee may impose penalties for professional misconduct against the Respondent that include a suspension from practice [§ 230-a(2)] and fine up to \$10,000.00 [§ 230-a(7)]. The Committee may stay such penalty in whole or in part and may also impose probation with or without any other penalty [§ 230-a(9)]. After a full and complete review of all of the evidence and pursuant to our Findings and Conclusions, the Committee votes unanimously to suspend the Respondent's License for three months, to stay the suspension in full, to fine the Respondent \$10,000 and to place the Respondent on probation for three years. This Committee reached this determination after due and careful consideration of the full spectrum of penalties available under PHL §230-a.

The Respondent's record for Patient A contained a copy of PHL § 18 and a copy of the letter from Ms. Saunders notifying the Respondent concerning his obligation under the law. The Respondent ignored that obligation or he deliberately violated that obligation in this case. The Respondent showed no remorse for his conduct and he provided the Committee with no explanation explanation for his violation. The Respondent continued at the hearing in demonstrating a disregard disregard for his clear obligations under the law. The Notice of Hearing informed the Respondent clearly that he needed to file an answer to the charges or the charges would be deemed admitted. The Respondent filed no answer. The Committee concludes that the Respondent will continue to disregard his obligations under the law unless the Committee imposes a sanction that will penalize penalize the Respondent for his misconduct and that will put the Respondent on notice that he can no longer substitute his own rules for his obligations under the law. The Committee concludes

concludes that a fine will penalize the Respondent. We conclude further that a period on probation, probation, with a provision for record review by OPMC, will assure that the Respondent has corrected his practice.

ORDER

Based on the foregoing, the Committee issues the following ORDER:

1. The Committee sustains the First Specification contained in the Statement of Charges (Ex. 1);
2. The Committee suspends the Respondent's License to practice medicine in the State of New York and stays the suspension in full;
3. The Committee places the Respondent on probation for three years under the terms that appear in Appendix I to this Determination;
3. The Committee fines the Respondent \$10,000.00, payable to NYS Department of Health, Bureau of Accounts Management, Corning Tower Room 1717, Empire State Plaza, Albany, Albany, New York 12237 within 90 days of the effective date of this Order;
4. Any civil penalty not paid by the date prescribed herein shall be subject to all provisions of laws relating to debt collection by the State of New York. This includes but is not limited to the imposition of interest, late payment charges and collection fees; and non-renewal of permits or licenses (Tax Law, section 171(27); State Finance Law, section 18; CPLR, section 5001; Executive Law, section 32;

5. This Order shall be effective on personal service on the Respondent or 7 days after the date of mailing of a copy to Respondent by certified mail or as provided by PHL §230(10)(h).

DATED: New York, New York
28 November, 2011

REDACTED SIGNATURE

Michael P. Golding, M.D. (Chair),
Robert Catalano, M.D.,
Mr. James Ducey.

To: Pierce J. Ferriter, M.D.
1421 Third Avenue
New York, NY 10028

John Paul Viti, Esq.
Associate Counsel
NYS Department of Health
Bureau of Professional Medical Conduct
90 Church Street- 4th Fl.
New York, NY 10007

Appendix I

Terms of Probation

1. Respondent shall conduct himself in all ways in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct and obligations imposed by law and by his profession.
2. Respondent shall submit written notification to the New York State Department of Health addressed to the Director, Office of Professional Medical Conduct (OPMC), Hedley Park Place, 433 River Street Suite 303, Troy, New York 12180-2299; said notice is to include a full description of any employment and practice, professional and residential addresses and telephone numbers within or without New York State, and any and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty days of each action.
3. Respondent shall fully cooperate with and respond in a timely manner to requests from OPMC to provide written periodic verification of Respondent's compliance with the terms of this Order. Respondent shall personally meet with a person designated by the Director of OPMC as requested by the Director.
4. The period of probation shall be tolled during periods in which Respondent is not engaged in the active practice of medicine in New York State. Respondent shall notify the Director of OPMC, in writing, if 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. 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 Respondent's return to practice in New York State.
5. Respondent's professional performance may be reviewed by the Director of OPMC. 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 Respondent and his/her staff at practice locations or OPMC offices.
6. 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 regarding controlled substances.
7. Respondent shall comply with all terms, conditions, restrictions, limitations and penalties to which he is subject pursuant to the Order and shall assume and bear all costs related to compliance. Upon receipt of evidence of noncompliance with, or any violation of these terms, the Director of OPMC and/or the Board may initiate a violation of probation

proceeding and/or any such other proceeding against Respondent as may be authorized pursuant to the law.

Appendix II

List of Exhibits

- Ex. A Respondent's Medical Record Patient A
- Ex. 1 Notice of Hearing,
- Ex. 2 Affidavit of Service,
- Ex. 3 Licensing Documents,
- Ex. 4 Statement of Charges 8/11/11,
- Ex. 5 Return Receipt,
- Ex. 6 Letter from Gordon Tucker, Esq.,
- Ex. 7 Letter from Respondent to Tucker 6/14/10,
- Ex. 8 Tucker Reply to Respondent,
- Ex. 9 Saunders Letter to Respondent 2/14/11 (Regular Mail),
- Ex. 10 Same Letter (Return Receipt),
- Ex. 11 Returned Envelope,
- Ex. 12 Respondent Letter to Saunders 2/21/11,
- Ex. 13 Saunders Letter to Respondent 3/8/11 (Regular Mail),
- Ex. 14 Same Letter (Return Receipt),
- Ex. 15 Returned Envelope,
- Ex. 16 Saunders to Respondent 3/14/11 (Regular Mail),
- Ex. 17 Same Letter (Return Receipt),
- Ex. 18 Returned Envelope,
- Ex. 19 Report of Respondent's Interview 4/5/11,
- Ex. 20 Cover Letter to Respondent with Interview,
- Ex. 21 U.S. Postal Service Tracking Information,
- Ex. 22 Letter Tucker to Respondent 4/28/11,
- Ex. 23 Letter from Respondent to Saunders 5/1/11.

Appendix III

Statement of Charges (attached)

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

IN THE MATTER
OF
PIERCE FERRITER, M.D.

STATEMENT
OF
CHARGES

PIERCE FERRITER, M.D., the Respondent, was authorized to practice medicine in New York State on or about May 8, 1981, by the issuance of license number 145930 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. During the period on and after approximately April 13, 2010, Respondent failed to provide a copy of patient information regarding Patient A as required by N.Y. Pub. Health Law § 18, following a written request made by Individual A, the attorney for Patient A.
[Individual A, and Patient A are identified in the attached "Appendix."]

SPECIFICATION OF CHARGES

FIRST SPECIFICATION

**WILLFUL FAILURE TO COMPLY WITH SUBSTANTIAL PROVISIONS OF
FEDERAL, STATE OR LOCAL LAWS, RULES, OR REGULATIONS
GOVERNING THE PRACTICE OF MEDICINE**

Respondent is charged with committing professional misconduct as defined

in N.Y. Educ. Law § 6530(16) by a willful or grossly negligent failure to comply with substantial provisions of federal, state, or local laws, rules, or regulations governing the practice of medicine, to wit: §18 of the N.Y. Pub. Health Law as alleged in the facts of:

1. Paragraph A.

DATE: August 11, 2011
New York, New York

REDACTED SIGNATURE

ROY NEMERSON
Deputy Counsel
Bureau of Professional Medical Conduct