



**Department  
of Health**

**ANDREW M. CUOMO**  
Governor

**HOWARD A. ZUCKER, M.D., J.D.**  
Commissioner

**SALLY DRESLIN, M.S., R.N.**  
Executive Deputy Commissioner

November 4, 2015

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Darryl Foster, R.P.A.



Darryl Foster, R.P.A.  
Angier Medical Center  
84 Medical Road  
Angier, North Carolina 27501

Michael A. Hiser, Esq.  
NYS Department of Health  
ESP-Corning Tower-Room 2512  
Albany, New York 12237

**RE: In the Matter of Darryl Foster, R.P.A.**

Dear Parties:

Enclosed please find the Determination and Order (No.15-259) 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. 2015) and §230-c subdivisions 1 through 5, (McKinney Supp. 2015), "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., 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,

  
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  
DARRYL FOSTER, R.P.A.

DETERMINATION

AND

COPY

ORDER

BPMC #15-259

A hearing was held October 14, 2015, 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 July 28, 2015, were served upon the Respondent, **Darryl Foster, R.P.A.**

Pursuant to Section 230(10)(e) of the Public Health Law, **Diana M. Sixsmith, M.D., M.P.H.**, Chair, **Leland Deane, M.D., M.B.A.**, and **Janet M. Miller, R.N.**, 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 **Richard Zahnleuter, Esq.**, Acting General Counsel, by **Michael A. Hiser, Esq.**, Deputy Counsel. The Respondent, **Darryl Foster, R.P.A.**, did not appear, although duly served. 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)(d) by having his license to practice as a physician's assistant revoked, suspended, or having other disciplinary action taken after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation would, if committed in New York State, constitute professional misconduct under the laws of New York State.

The Respondent is also 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.

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: None

## 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. The Respondent, Darryl Foster, R.P.A., did not appear, although duly served by personal service on August 14, 2015. (Petitioner's Exhibit 2)
2. Respondent was authorized to practice as a physician's assistant in New York State on July 6, 1987, by the issuance of license number 003234 by the New York State Education Department. (Petitioner's Exhibit 3)
3. On or about April 3, 2014, Respondent entered into a Consent Order with the North Carolina Medical Board ("North Carolina Consent Order") whereby it was determined that Respondent's care of two (2) patients constituted a departure from standards of acceptable medical practice. Specifically, it was found that Respondent failed to maintain minimally acceptable standards in the prescription of opioid drugs. (Petitioner's Exhibit 4)

4. The North Carolina Medical Board disciplined Respondent for unprofessional conduct: to wit: failure to perform minimally acceptable physical examinations and failure to provide sufficient patient history, resulting in inadequate support of the diagnoses used to justify the prescribing of opioid drugs. Furthermore, the North Carolina Board found a failure to explore treatment modalities other than the prescribing of opioid drugs. The Board also found a failure to maintain an accurate medical record. (Petitioner's Exhibit 4)
5. The disciplinary action taken against Respondent was a reprimand, which included a prohibition on the prescribing of controlled substances until such time as Respondent has completed sufficient continuing medical education courses as determined by the North Carolina Medical Board. (Petitioner's Exhibit 4)
6. Upon the resumption of prescribing controlled substances, Respondent was required to have a supervising physician co-sign his chart whenever controlled substances are prescribed; among other standard requirements for ensuring compliance with the North Carolina Consent Order. (Petitioner's Exhibit 4)
7. The conduct resulting in the North Carolina disciplinary action against Respondent, would constitute professional misconduct under the laws of New York state, as violations of:
  - a) New York Education law Section 6530(3) - negligence on more than one occasion;  
and/or
  - b) New York Education law Section 6530(5) - incompetence on more than one occasion;  
and/or
  - c) New York Education law Section 6530(32) – failing to maintain a record for each patient that accurately reflects the evaluation and treatment of the patient.

## VOTE OF THE HEARING COMMITTEE

### FIRST SPECIFICATION

"Respondent violated N.Y. Educ. 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 as a physician's assistant revoked, suspended, or having other disciplinary action taken after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation would, if committed in New York State, constitute professional misconduct under the laws New York State..."

VOTE: Sustained (3-0)

## HEARING COMMITTEE DETERMINATION

The Respondent did not appear at the hearing, either in person or by counsel. The Administrative Law Judge, after considering the documentary evidence, which included an Affidavit of Personal Service of the Notice of Hearing and the Statement of Charges (Petitioner's Exhibit 2), ruled that the Petitioner had met the requirements of law for jurisdiction in the service of process, that jurisdiction had been established over the Respondent, and that the hearing could proceed on the merits notwithstanding the Respondent's absence.

On review of the entire matter, it appears that there is no dispute about the fact of the underlying conviction. The Record shows that, by a Consent Order, the Respondent was given a Reprimand in the State of North Carolina for his failure to maintain standards of acceptable medical practice, specifically his failure to maintain minimally acceptable standards in the prescription of opioid drugs in the case of two patients.

The Department's attorney advised the panel that the limitations imposed by the North Carolina Consent Order have now been removed as the Respondent has completed all the directives imposed. That being the case, the panel determined, unanimously, that no additional penalty should be imposed beyond a Censure and Reprimand. The panel based its determination on the documentation in the record, considered the full range of penalties available, and was unanimous that a Censure and Reprimand would be the proper penalty. Accordingly, as to the penalty to be imposed, the Hearing Committee determined that the people of New York State would be protected by a Censure and Reprimand of the Respondent's license to practice as a physician's assistant.




ORDER

IT IS HEREBY ORDERED THAT:

1. The specifications of professional misconduct, as set forth in the Statement of Charges, are SUSTAINED.
2. The Respondent is Censured and Reprimanded for his actions in the State of North Carolina.
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: New York, New York

October 31, 2015



Diana M. Sixsmith, M.D., M.P.H., Chair,  
Leland Deane, M.D., M.B.A.  
Janet M. Miller, R.N.

Darryl Foster, R.P.A. - Direct Referral

7

To:

Darryl Foster, R.P.A.  
Respondent



Darryl Foster, R.P.A.  
Respondent  
Angier Medical Center  
84 Medical Road  
Angier, NC 27501

Michael A. Hiser, Esq.  
Attorney for Petitioner  
Deputy Counsel  
NYS Department of Health  
Bureau of Professional Medical Conduct  
Corning Tower, Room 2512  
Empire State Plaza  
Albany, New York 12237

## APPENDIX 1

IN THE MATTER  
OF  
DARRYL FOSTER, R.P.A.

NOTICE OF  
REFERRAL  
PROCEEDING

TO: Darryl Foster, R.P.A.

Darryl Foster, R.P.A.  
Angier Medical Center  
84 Medical Road  
Angier, NC 27501

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law §230(10)(p) and N.Y. State Admin. Proc. 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 October 14, 2015, at 10:30 a.m., at the offices of the New York State Department of Health, Riverview Center, 150 Broadway, Suite 510, Menands (Albany), NY 12204-2719.<sup>1</sup>

At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, which 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 or sworn testimony on your behalf. Such evidence 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 which would show that the conviction would not be a crime in New York State. The

<sup>1</sup> For GPS purposes, enter "Menands", not "Albany".



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, Riverview Center, 150 Broadway - Suite 510, Albany, NY 12204-2719, ATTENTION: HON. JAMES HORAN, 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 twenty days prior to the scheduled date of the Referral Proceeding, as indicated above.

Pursuant to the provisions of N.Y. Pub. 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 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 copies of all papers you submit must be filed with the Bureau of Adjudication at the address indicated above, no later than fourteen 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 N.Y. State Admin. Proc. Act §401 and 10 N.Y.C.R.R. §51.8(b), the Petitioner hereby demands disclosure of the evidence that the 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 or other evidence which cannot be photocopied.

YOU ARE HEREBY ADVISED THAT THE ATTACHED CHARGES WILL BE MADE PUBLIC FIVE 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 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 AS A PHYSICIAN ASSISTANT 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  
July 28, 2015

  
MICHAEL A. HISER  
Deputy Counsel  
Bureau of Professional Medical Conduct

Inquiries should be addressed to:

Michael Hiser  
Deputy Counsel  
Bureau of Professional Medical Conduct  
Corning Tower – Room 2512  
Empire State Plaza  
Albany, NY 12237  
(518) 473-4262

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

IN THE MATTER  
  
OF  
  
DARRYL FOSTER, R.P.A.

STATEMENT  
OF  
CHARGES

DARRYL FOSTER, R.P.A., the Respondent, was authorized to practice as a physician's assistant in New York State on or about July 6, 1987, by the issuance of license number 003234 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about April 3, 2014, Respondent entered into a Consent Order with the North Carolina Medical Board ("North Carolina Consent Order") whereby it was determined that Respondent's care of two (2) patients constituted a departure from standards of acceptable medical practice, specifically Respondent's failure to maintain minimal acceptable standards in the prescription of opioid drugs. The North Carolina Medical Board disciplined Respondent for unprofessional conduct: failure to perform minimally acceptable physical examinations and failure to provide sufficient patient history, resulting in inadequate support of the diagnoses used to justify the prescribing of opioid drugs; failure to explore treatment modalities other than the prescribing of opioid drugs; and failure to maintain an accurate medical record. The disciplinary action taken against Respondent was a reprimand, which included prohibiting of the prescribing of controlled substances until such time as Respondent has completed sufficient continuing medical education courses as determined by the North Carolina Medical Board; upon the resumption of prescribing controlled substances, Respondent



is required to have a supervising physician co-sign his chart whenever controlled substances are prescribed; among other standard requirements for ensuring compliance with the North Carolina Consent Order.

B. The conduct resulting in the North Carolina disciplinary action against Respondent, would constitute professional misconduct under the laws of New York state, as violations of:

1. New York Education law Section 6530(3)[negligence on more than one occasion]; and/or
2. New York Education law Section 6530(5)[incompetence on more than one occasion]; and/or
3. New York Education law Section 6530(32)[failing to maintain a record for each patient that accurately reflects the evaluation and treatment of the patient].

#### **SPECIFICATION OF CHARGES**

##### **FIRST SPECIFICATION**

##### **HAVING BEEN FOUND GUILTY OF PROFESSIONAL MISCONDUCT**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. 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 (namely N.Y. Educ. Law §§ 6530(3), (5), and/or (32) as alleged in the facts of the following:

1. The facts in Paragraphs A and B and B.1, and/or A and B and B.2, and or A and B and B.3.


**SECOND SPECIFICATION**

**HAVING HAD DISCIPLINARY ACTION TAKEN**

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law § 6530(9)(d) by having his or her license to practice as a physician's assistant revoked, suspended or having other disciplinary action taken, or having his or her application for a license refused, revoked or suspended or having voluntarily or otherwise surrendered his or her license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation, suspension or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or the surrender of the license would, if committed in New York state, constitute professional misconduct under the laws of New York state (namely N.Y. Educ. Law § 6530(3), (5), and/or (32) ) as alleged in the facts of the following:

2. The facts in Paragraphs A and B and B.1, and/or A and B and B.2, and/or A and B and B.3.

DATE: July 28, 2015  
ALBANY, New York

  
MICHAEL A. HISER  
Deputy Counsel  
Bureau of Professional Medical Conduct