

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

COPY

IN THE MATTER
OF
EMMANUELLA CHERISME-THEOPHILE, M.D.

DETERMINATION
AND
ORDER

BPMC-17-125

This case was brought by the New York State Department of Health, Bureau of Professional Medical Conduct ("the Department"). A Notice of Hearing ("NOH") and Statement of Charges ("SOC") both dated February 19, 2016 were served on Emmanuella Cherisme-Theophile, M.D. ("Respondent") and hearings were held, pursuant to N.Y. Public Health Law ("PHL") §230 and New York State Admin. Proc. Act §§301-307 and 401, at the Department's offices at 90 Church Street, New York, New York. A copy of the NOH and SOC is attached to this Determination and Order as Appendix 1. James R. Dickson, M.D., Cassandra Henderson, M.D., and Curtis Hart, M. Div., duly designated members of the State Board for Professional Medical Conduct ("Board"), served as the Hearing Committee ("Hearing Committee" or "Committee") in this matter. Administrative Law Judge ("ALJ") Ann H. Gayle served as the Administrative Officer. The Department appeared by Richard J. Zahnleuter, Esq., General Counsel, by Claudia M. Bloch, Associate Counsel. Respondent appeared by Jennifer A. Kirschenbaum, Esq., and Michael C. Foster, Esq., of Kirschenbaum & Kirschenbaum. Evidence was received, including witnesses who were sworn or affirmed, and a transcript (pages 1-1138) of this proceeding was made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order. All findings, conclusions, determinations, orders, and discussion are unanimous.

PROCEDURAL HISTORY

Date of Service of NOH and SOC: March 2, 2016; acknowledged by Respondent's counsel on May 25, 2016

Answer Filed: May 26, 2016

Pre-Hearing Conference: May 25, 2016

Hearing Dates in 2016: June 7
June 13
August 12
September 16
September 30
October 14

Witnesses for Petitioner: Scott Postell, M.D.
Jun Lin, M.D.
Dean Dobbin, M.D.

Witnesses for Respondent: Respondent
Patient B's daughter
Omoikhef Akhigbe, M.D.
Milton Haynes, M.D.

Deliberations Date: January 9, 2017 (with a brief follow-up on March 29, 2017)

STATEMENT OF THE CASE

The Department charged Respondent with nineteen specifications of professional misconduct under N.Y. Educ. Law §6530 which included:

First Specification, §6530(3): practicing medicine with negligence on more than one occasion;

Second Specification, §6530(5): practicing medicine with incompetence on more than one occasion;

Third Specification, §6530(4): gross negligence; Specifications 4-6, §6530(32): inadequate record keeping;

Specifications 4-6: §6530(32): inadequate record keeping;

Specifications 7-14, §6530(2): practicing medicine fraudulently; and
Specifications 15-19, §6530(14): violating section twenty-eight hundred five-k of the
PHL.

Respondent denied each of the factual allegations, and specifications 1-14, and she asserted eight affirmative defenses, numbered 3-14, which will be addressed *infra*. Respondent also requested the following relief: (a) that the Board acknowledges that Respondent's conduct does not rise to the level of negligence, gross negligence, incompetence, a failure to maintain records, fraudulent practice, or a violation of any statute; or (b) that the Board limits the penalties imposed on Respondent to the extent that the Board allows Respondent to maintain her license to practice medicine.

FINDINGS OF FACT

The following Findings of Fact ("FOF") were made after a review of the entire record in this matter. Citations in brackets represent 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.

1. Respondent was authorized to practice medicine in New York State on or about June 17, 2002, by the issuance of license number 225117, by the New York State Education Department. [Exhibit 1; Exhibit 2]

Patient A

2. Respondent treated Patient A, her obstetrical patient, at Long Island College Hospital (LICH) from at least September 20-21, 2010. [Exhibit 3]

Patient B

3. Respondent treated Patient B at LICH ambulatory surgery center on September 21, 2010, for an elective diagnostic hysteroscopy and D&C for the management of post-menopausal bleeding. [Exhibit 4]

Patient C

4. Respondent treated Patient C at LICH ambulatory surgery center on July 28, 2009, for a diagnostic hysteroscopy and laparoscopy. [Exhibit 5; Exhibit 5A]

Geisinger Medical Center ("GMC")

5. On July 1, 1999, Respondent began residency training at GMC in Danville, Pennsylvania; she was suspended on December 13, 2001 and dismissed on January 15, 2002. [Exhibit 6, p. 1-5]

SUNY Health Sciences Center Brooklyn, Kings County Hospital ("SUNY-HSCB, at KINGS") and SUNY Downstate

6. Respondent began a residency program with SUNY-HSCB, at KINGS on March 4, 2002. In December 2003, Respondent began a period of "Independent Evaluation" at SUNY Downstate. On July 7, 2004, Respondent was notified that the SUNY Downstate Program's decision to suspend, and not graduate, Respondent was sustained. [Exhibit 7-a, p. 18, 19-22; Exhibit 7-a-1, p. 1-2; Exhibit 7-b; Exhibit 7-c]

Nassau University Medical Center ("NUMC")

7. On Respondent's December 6, 2004 application for residency at NUMC ("NUMC application"), in response to question #12, which read, "Were you ever dismissed from employment for reasons other than reduction in staff?" Respondent answered "Yes", and stated, "I did not graduate." Respondent's only further explanation, (in response to question

#20, which read, "Use this space to explain 'yes' answers to questions 7-12..." was "I did not receive a certificate. I have to make up time." [Exhibit 8, p. 2, 4]

8. With regard to Respondent's prior experience (NUMC application question #18), she listed SUNY – Kings County Hospital Center ("SUNY KCHC"), and stated her reason for leaving as, "I did not graduate" when, in fact, she was terminated for cause. Respondent also listed GMC, and stated her reason for leaving as, "Better Opportunities" when, in fact, she was dismissed for cause. [Exhibit 8, p. 3] [See FOF #5 and 6]
9. Respondent entered a residency program at NUMC beginning on January 5, 2005. [Exhibit 8, p. 4]

Lourdes Medical Associates ("LMA")

10. On her September 7, 2006 application to LMA ("LMA Application"), regarding Training Information, Respondent stated her reason for not completing training at GMC as, "family leave of absence" when, in fact, she was dismissed for cause. Respondent further stated her reason for not completing training at SUNY – KCHC as, "contract dispute with new Chairman/Program Director," when, in fact, she was terminated for cause. [Exhibit 10, p. 3-4] [See FOF #5 and 6]
11. In response to the LMA Application question # 3, under Disclosure Information, which read, "Have your clinical privileges or medical staff membership at any hospital or healthcare institution, voluntarily or involuntarily, ever been denied, suspended, revoked, restricted, denied renewal or subject to probationary or to other disciplinary condition...or have proceedings toward any of those ends been instituted or recommended by any hospital or healthcare institution, medical staff or committee or governing board?" Respondent

answered, "No," when, in fact she had been dismissed from GMC and terminated from SUNY – KCHC. [Exhibit 10, p. 6] [See FOF #5 and 6]

12. On August 15, 2006, Respondent entered into an employment contract with LMA in Hadden Heights, New Jersey. Respondent was terminated from her LMA employment contract on November 1, 2006. [Exhibit 10, p. 1, 10-31]

Southern Jersey Family Medical Center, Inc. ("SJFMC")

13. On her December 14, 2006 application for appointment to the medical staff/employment application at SJFMC ("SJFMC Application"), in answer to the "General" question: "Have your privileges at any hospital ever been suspended, diminished, revoked, or not renewed," Respondent answered "Yes," stating only, "I was not given certificate of completion at SUNY/Downstate," when, in fact, she was terminated for cause. [Exhibit 11, p. 5] [See FOF #6]
14. Under "Previous Employment History" on the SJFMC Application, Respondent listed LMA, and stated her reason for leaving as "temporary employment" when, in fact, Respondent's contract was terminated for cause. [Exhibit 11, p. 10] [See FOF #12]
15. Respondent failed to include her employment history with GMC on her SJFMC Application. [Exhibit 11, p. 1-12] [See FOF #5]
16. Respondent was employed by SJFMC; her start date was March 26, 2007. Respondent was suspended from SJFMC on July 25, 2007, and on July 27, 2007, Respondent submitted a letter of resignation, pre-dated to July 24, 2007. [Exhibit 11, p. 14, 24-27]

Long Island College Hospital ("LICH")

17. On her February 20, 2009 application to LICH ("LICH Application"), in response to question #4, "Has your participation in any internship, residency or other training program ever been

suspended, restricted or terminated prior to completion, or have you been denied certification of completion of training in any such program?" Respondent answered, "Yes," stating only, "no certificate of completion at SUNY/Downstate" and she did not make any mention of GMC. [Exhibit 9-c, p. 3-8] [See FOF #5 and 6]

18. In response to question #9 on the LICH Application, "Have your medical/dental staff appointment/employment status or clinical privileges in any hospital or health care facility ever been denied, revoked, suspended, restricted, reduced, limited, placed on probation, not renewed, voluntarily relinquished, discontinued or otherwise changed, including any leaves of absence?" Respondent did not state her termination from LMA and suspension from SJFMC, both of which were for cause. [Exhibit 9-c, p. 3-8] [See FOF #12 and 16]

19. Respondent was employed by LICH as an attending physician in the Department of OB/GYN; her commencement date was March 9, 2009. Respondent was terminated on November 10, 2010, and, thereafter, she entered into a settlement agreement with LICH, effective December 21, 2010, whereby Respondent resigned her medical staff privileges, effective December 31, 2010. [Exhibit 9-a, p. 1-11; Exhibit 9-b, p. 1-6; Exhibit 9-c, p. 1-2]

New York State Medical License Registration Renewal ("NYS license registration renewal")

20. On her July 30, 2007 NYS license registration renewal form for the 09/01/2007 through 08/31/2009 registration period, in response to the question numbered 2.e., "Since your last registration application, has any hospital or licensed facility restricted or terminated your professional training, employment, or privileges, or have you voluntarily or involuntarily resigned or withdrawn from such association to avoid the imposition of such action due to professional misconduct, unprofessional conduct, incompetency or negligence?" Respondent answered "No," and she failed to disclose that (1) her employment was terminated, for cause,

from LMA on November 1, 2006, and (2) she was suspended, for cause, pending investigation, from SJFMC on July 25, 2007, or that she resigned from LMA on July 27, 2007, to avoid the imposition of action due to professional misconduct, unprofessional conduct, incompetency and/or negligence. [Exhibit 2, p. 7-8] [See FOF #12 and 16]

21. On her August 4, 2011 NYS license registration renewal form for the 09/01/2011 through 08/31/2013 registration period, in response to the "Moral Character" question, "Since your last registration application, has any hospital or licensed facility restricted or terminated your professional training, employment or privileges, or have you voluntarily or involuntarily resigned or withdrawn from such association to avoid the imposition of such action due to professional misconduct, unprofessional conduct, incompetency or negligence?" Respondent answered "No" and she failed to disclose that her employment/privileges were terminated for cause from LICH on November 10, 2010 or that she thereafter, entered into a settlement agreement with LICH, effective December 21, 2010, whereby Respondent resigned her medical staff privileges, effective December 31, 2010. [Exhibit 2, p. 5] [See FOF #19]

FACTUAL ALLEGATIONS NOT SUSTAINED

The Department charged Respondent with misconduct based on four factual allegations for Patient A, two for Patient B, and three for Patient C. None of the factual allegations for the three patients were sustained.

Patient A

The Department charged Respondent with failing to be present and ready to perform Patient A's ordered C-section in a timely manner (A.1), and failing to delay the elective procedure on Patient B, so as to timely begin the ordered emergent C-Section on Patient A

and/or failing to arrange for another physician to perform Patient A's C-Section (A.2). In relying heavily on Dr. Haynes' testimony, the Committee found that not being present at the moment a patient is ready for surgery is something that happens in surgery; a mechanism was in place for another physician to cover in such circumstances and that other physician, Dr. Postel, did indeed cover; the timing of the administration of the spinal anesthetic to Patient A in relation to when the surgery could begin was not dangerous; and Patient B's surgery should not have been delayed due to her diabetes and other medical conditions. As such, the Committee did not sustain factual allegations A.1 and A.2.

The Department further charged Respondent with failing to advise any hospital staff, physician or nurses, of her whereabouts after ordering the emergent C-Section (A.3). The Committee noted that Respondent was juggling the two patients' surgeries, and the Committee accepted the testimony of both Respondent and Dr. Akhigbe that Respondent informed Dr. Akhigbe that she was leaving the area to tend to Patient B. As such, the Committee did not sustain factual allegation A.3.

The Department further charged Respondent with failing to maintain a record which accurately reflects the care and treatment of Patient A (A.4). The Committee found that Respondent's note for Patient A reflected what was done for Patient A, and further found that not only did Respondent's note for Patient A not need to reflect that she went downstairs to perform surgery on another patient but that it would have been inappropriate to include such information in Patient A's chart. As such, the Committee did not sustain factual allegation A.3.

Patient B

The Department charged Respondent with willingly, and with intent to deceive, creating a false operative report (B.1), and with knowingly and willfully creating a hospital medical

record for Patient B which did not accurately reflect the care and treatment rendered to Patient B (B.2). Both the testimony before the Committee and the Committee's scrutiny of the notes revealed that the differences in the two notes did not change their meaning. The second note (Respondent's dictated note) both superseded the brief operative note and reflected what occurred. The Committee, in finding nothing deceitful or dishonest in that dictated note, concluded that it was not created with intent to deceive. The Committee further found that Respondent was sloppy, inattentive, and rushed when she signed off on the Resident's note without correcting it, but this, too, did not demonstrate an intent to deceive. As such, the Committee did not sustain factual allegations B.1 and B.2.

Patient C

The Department charged Respondent with failing to perform the appropriate surgical technique for placement of the umbilical trocar (C.1). The Committee, in accepting Dr. Haynes' testimony that there is no appreciative difference in morbidity and mortality between the open and closed methodology, found that what Respondent did was appropriate. As such, the Committee did not sustain factual allegation C.1.

The Department further charged Respondent with failing to maintain a record that accurately reflected the care and treatment of the patient (C.2), and with knowingly and willfully creating a hospital medical record for Patient C which did not accurately reflect the care and treatment rendered to Patient C (C.3). The Committee found that because a surgeon might not see or know of a perforation at the time of surgery, Respondent's record for Patient C was accurate. Also, because Respondent recorded exactly what happened at the surgery in Patient C's record, the subsequent treating physicians knew what happened and knew exactly what to do for

record for Patient B which did not accurately reflect the care and treatment rendered to Patient B

(B.2). Both the testimony before the Committee and the Committee's scrutiny of the notes revealed that the differences in the two notes did not change their meaning. The second note (Respondent's dictated note) both superseded the brief operative note and reflected what occurred. The Committee, in finding nothing deceitful or dishonest in that dictated note, concluded that it was not created with intent to deceive. The Committee further found that Respondent was sloppy, inattentive, and rushed when she signed off on the Resident's note without correcting it, but this, too, did not demonstrate an intent to deceive. As such, the Committee did not sustain factual allegations B.1 and B.2.

Patient C

The Department charged Respondent with failing to perform the appropriate surgical technique for placement of the umbilical trocar (C.1). The Committee, in accepting Dr. Haynes' testimony that there is no appreciative difference in morbidity and mortality between the open and closed methodology, found that what Respondent did was appropriate. As such, the Committee did not sustain factual allegation C.1.

The Department further charged Respondent with failing to maintain a record that accurately reflected the care and treatment of the patient (C.2), and with knowingly and willfully creating a hospital medical record for Patient C which did not accurately reflect the care and treatment rendered to Patient C (C.3). The Committee found that because a surgeon might not see or know of a perforation at the time of surgery, Respondent's record for Patient C was accurate. Also, because Respondent recorded exactly what happened at the surgery in Patient C's record, the subsequent treating physicians knew what happened and knew exactly what to do for

Patient C when she subsequently returned to the hospital with complications. As such, the Committee did not sustain factual allegations C.2 and C.3.

Based on the foregoing, all Factual Allegations pertaining to Patients A, B, and C are dismissed.

CONCLUSIONS OF LAW

Respondent is charged with nineteen Specification of Charges of professional misconduct under Educ. Law §6530. Having dismissed all charges pertaining to Patients A, B, and C, the Committee concludes that all Specification of Charges related to Patients A, B, and C are not sustained.

The Specification of Charges related to the three patients not sustained are:

First Specification: practicing medicine with negligence on more than one occasion §6530(3);

Second Specification: practicing medicine with incompetence on more than one occasion §6530(5);

Third Specification: gross negligence §6530(4);

Fourth, Fifth, and Sixth Specifications: inadequate record keeping §6530(32); and

Seventh and Eighth Specifications: practicing medicine fraudulently §6530(2) with regard to Patients B and C, respectively.

The Committee further concludes, as will be explained *infra*, that the following Specification of Charges are also not sustained:

Fifteenth, Sixteenth, Eighteenth and Nineteenth Specifications: violating section twenty-eight hundred five-k of the PHL §6530(14) with regard to LMA, SJFMC, and the 2007-2009 and 2011-2013 NYS license registration renewal forms, respectively.

The following Specification of Charges are sustained:

Ninth through Fourteenth Specifications: practicing medicine fraudulently §6530(2); and

Seventeenth Specification: violating section twenty-eight hundred five-k of the PHL §6530(14).

Fraudulent Practice

The ninth through fourteenth specifications charged Respondent with committing professional misconduct as defined in N.Y. Educ. Law § 6530(2) by practicing the profession of medicine fraudulently with respect to answers she gave, and information she failed to disclose, on various employment and residency program applications and on her 2007-2009 and 2011-2013 NYS license registration renewal forms.

The intentional misrepresentation or concealment of a known fact, made in some connection with the practice of medicine, constitutes the fraudulent practice of medicine. Matter of Choudhry v. Sobol, 170 A.D.2d 893, 894, 566 N.Y.S.2d 723, 725 (3d Dept. 1991), citing Matter of Brestin v. Commissioner of Education, 116 A.D.2d 357, 359, 501 N.Y.S.2d 923, 925 (3d Dept. 1986). In order to sustain a charge that a licensee was engaged in the fraudulent practice of medicine, the hearing committee must find that (1) a false representation was made by the licensee, whether by words, conduct or concealment of that which should have been 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 (3d Dept. 1966), aff'd 19 N.Y.2d 679, 278 N.Y.S.2d 870 (1967). The licensee's knowledge and intent may properly be inferred from facts found by the hearing committee, but the committee must specifically state the inferences it is drawing regarding knowledge and intent. Choudhry, at 894, citing Brestin. See also, Adler v. Bureau of Professional Medical

The Committee found that in the answers Respondent gave, and information she failed to disclose, on various employment and residency program applications and on her 2007-2009 and 2011-2013 NYS license registration renewal forms, (1) false representations were made, (2) Respondent knew the representations were false, and (3) she intended to mislead through the false representations. These findings are based on the following:

On January 15, 2002, Respondent was dismissed for cause from her residency training at GMC. On or about July 7, 2004, Respondent was terminated for cause from SUNY Downstate's residency program. Despite being dismissed for cause from GMC and terminated for cause from SUNY Downstate in 2002 and 2004, respectively, Respondent falsely reported these actions on subsequent applications, as follows:

- On her December 6, 2004 NUMC application, Respondent described her dismissals as "I did not graduate," "I did not receive a certificate. I have to make up time," and "Better Opportunities."
- On her September 7, 2006 LMA Application, Respondent described her dismissals as "family leave of absence" and "contract dispute with new Chairman/Program Director," and she also answered "No" to the question, "Have your clinical privileges or medical staff membership at any hospital or healthcare institution, voluntarily or involuntarily, ever been denied, suspended, revoked, restricted, denied renewal or subject to probationary or to other disciplinary condition...or have proceedings toward any of those ends been instituted or recommended by any hospital or healthcare institution, medical staff or committee or governing board?"
- On her December 14, 2006 SJFMC Application, Respondent described her SUNY Downstate dismissal as "I was not given certificate of completion at SUNY/Downstate" and she did not even mention her affiliation with, and dismissal for cause from, GMC on this application.
- On her February 20, 2009 LICH Application, Respondent, in responding "Yes" to the question, "Has your participation in any internship, residency or other training program ever been suspended, restricted or terminated prior to completion, or have you been denied certification of completion of training in any such program?" stated only, "no certificate of completion at SUNY/Downstate" and she did not make any mention of GMC.

On November 1, 2006, Respondent was terminated for cause from her LMA employment contract. On July 25, 2007, Respondent was suspended for cause from SJFMC; after her July 25, 2007 suspension for cause, Respondent, on July 27, 2007, submitted a letter of resignation; she pre-dated the resignation letter to July 24, 2007. Despite being terminated for cause from LMA and suspended for cause from SJFMC in 2006 and 2007, respectively, Respondent falsely reported these actions on subsequent applications, as follows:

- On her December 14, 2006 SJFMC Application, Respondent described her LMA dismissal as "temporary employment."
- On her July 30, 2007 NYS license registration renewal form for the 2007 through 2009 registration period, in response to the question, "Since your last registration application, has any hospital or licensed facility restricted or terminated your professional training, employment, or privileges, or have you voluntarily or involuntarily resigned or withdrawn from such association to avoid the imposition of such action due to professional misconduct, unprofessional conduct, incompetency or negligence?" Respondent answered "No," and she failed to disclose that (1) her employment was terminated, for cause, from LMA in 2006, and (2) she was suspended, for cause, pending investigation, from SJFMC on July 25, 2007, or that she resigned from LMA on July 27, 2007, to avoid the imposition of action due to professional misconduct, unprofessional conduct, incompetency and/or negligence.
- On her February 20, 2009 LICH Application, Respondent did not state her termination from LMA and her suspension from SJFMC when asked, "Have your medical/dental staff appointment/employment status or clinical privileges in any hospital or health care facility ever been denied, revoked, suspended, restricted, reduced, limited, placed on probation, not renewed, voluntarily relinquished, discontinued or otherwise changed, including any leaves of absence?"

Respondent was next terminated from LICH on November 10, 2010 and, thereafter, she entered into a settlement agreement with LICH, effective December 21, 2010, whereby she resigned her medical staff privileges, effective December 31, 2010. Despite being terminated for cause from LICH in 2010, Respondent falsely reported this action as follows:

- On her August 4, 2011 NYS license registration renewal form for the 2011 through 2013 registration period, Respondent answered "No" to the question, "Since your last registration application, has any hospital or licensed facility restricted or terminated your professional training, employment or privileges, or have you voluntarily or involuntarily resigned or withdrawn from such association to avoid the imposition of such action due to professional misconduct, unprofessional conduct, incompetency or negligence?" and

she failed to disclose that her employment privileges were terminated for cause from LICH on November 10, 2010 or that she thereafter, entered into a settlement agreement with LICH, whereby she resigned her medical staff privileges, effective December 31, 2010.

The Committee inferred Respondent's *intent to mislead* as follows: she was avoiding the predictable repercussions of answering truthfully. Had she answered truthfully, those repercussions could have included a determination to not hire her, accept her in that institution's residency program, or renew her NYS medical license registration. Respondent intended to mislead the NYS Education Department, NUMC, LMA, SJFMC, and LICH into believing that (1) she was never dismissed, terminated, or suspended for cause from any institution, and (2) each ending was voluntary or mutual, not for cause, or not her fault. The Committee inferred Respondent's *knowledge that the representation was false* from the certified documents from each institution which showed that Respondent was dismissed, terminated, or suspended, and in some instances, Respondent's challenge or response to those determinations revealed that she had to know she was being let go if she responded. Finally, the fact that she sometimes omitted her affiliation and employment with those institutions or described those endings differently on subsequent applications convinced the Committee that she knew she was terminated, dismissed, or suspended for cause and wanted to hide it. Not truthfully describing or disclosing those endings demonstrated both her *knowledge that the representation was false* and her *intent to mislead*.

The Committee believes Respondent knew the purpose of each of the questions and anticipated the consequences of answering truthfully, so she gave half-truths or bland or "fluff" answers hoping the institutions would "steamroll" over her answers and hire her, which they did. Each time an institution let her go, she failed to honestly report it on her subsequent applications. The Committee did not accept Respondent's attempts to convince them that when things went

lie. The Committee found that if it happened once or maybe even twice, they might have accepted that she wasn't lying on the applications but it happened again and again and again with each job and on each application. Based on the foregoing, the Committee found that Respondent knew that the representations were false and intended to mislead through the false representations on the numerous applications and forms.

The ninth through fourteenth specifications are therefore sustained.

Violating PHL §2805-k

The fifteenth through nineteenth specifications charged Respondent with committing professional misconduct as defined in N.Y. Educ. Law §6530(14) by violating section twenty-eight hundred five-k of the PHL with respect to answers she gave and information she failed to disclose on various employment and residency program applications and on two NYS Registration Renewal forms. PHL §2805-k reads in pertinent part,

2805-k. Investigations prior to granting or renewing privileges.

1. Prior to granting or renewing professional privileges or association of any physician ... or hiring a physician, ... **a hospital or facility approved pursuant to this article** (emphasis added) shall request from the physician ... and the physician ... shall be required to provide the following information:

(a) The name of any hospital or facility with or at which the physician ... had or has any association, employment, privileges or practice;

(b) Where such association, employment, privilege or practice was discontinued, the reasons for its discontinuation ...

LMA and SJFMC are both located in New Jersey, and for this reason, neither is a hospital or facility approved pursuant to Article 28 of the PHL of the State of New York. The Education Department of the State of New York is not a hospital or facility, and it is not approved pursuant

to Article 28 of the PHL of the State of New York. Therefore, pursuant to the very definition of PHL §2805-k, Specifications 15, 16, 18 and 19 (regarding LMA, SJFMC, and the NYS Education Department, respectively) cannot be sustained.

LICH is a hospital approved pursuant to Article 28 of the PHL of the State of New York. Respondent did not provide truthful or complete information about GMC, SUNY Downstate, LMA, and SJFMC on the LICH Application. Therefore, Specification 17 (regarding LICH) is sustained.

Accordingly, the fifteenth, sixteenth, eighteenth, and nineteenth specifications are not sustained, and the seventeenth specification is sustained.

AFFIRMATIVE DEFENSES

Respondent asserted the following affirmative defenses, which are copied exactly (including numbering) from Respondent's Answer:

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

3. To the extent that any of the medical records kept by Respondent were inaccurate, such inaccuracies were not willful or knowing.

Since the Committee dismissed all charges regarding patients, this affirmative defense is moot.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

4. To the extent that any information presented by Respondent on job applications and/or medical license registration renewals was inaccurate, such inaccuracies were not willful or knowing.

Respondent did not convince the Committee of this. The Committee has found that Respondent's answers and omissions were willful and knowing, as described *supra*.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

5. To the extent that any of the medical records kept by Respondent were inaccurate, such inaccuracies did not impact the care and treatment of any individual.

Since the Committee dismissed all charges regarding patients, this affirmative defense is moot.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

6. To the extent that any information presented by Respondent on job applications and/or medical license registration renewals was inaccurate, such inaccuracies did not impact the care and treatment of any individual.

Respondent has demonstrated this.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

7. The information provided by Respondent's employers upon her departure conflicted with that contained within resignation letters, resulting in Respondent's good-faith belief that she was not terminated.

Respondent did not convince the Committee of this. The Committee has found that Respondent knew she was fired, as described *supra*.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

8. The passage of 5-11 years between this matter and each of its underlying events has greatly impacted Respondent's ability to locate documents and witnesses to mount a vigorous defense.

The Committee dismissed this affirmative defense in that despite the passage of years, Respondent was able to mount a vigorous defense.

9. To the extent that any medical record contained two separate accounts of the same event, Respondent had no knowledge that a resident in training was submitting a report without her review and approval.

Since the Committee dismissed all charges regarding patients, this affirmative defense is moot.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

10. Prior to and after the events underlying this matter, Respondent has used her medical license for the benefit of her local community and abroad.

11. Through her practice and outreach in the lower-income areas of New Jersey and Pennsylvania, Respondent has aimed to increase general health awareness and decrease health disparities.

12. For the last ten years, Respondent has traveled to Haiti several times each year on medical missions to assist in the nation's growth. Specifically, she has utilized her medical expertise for the care and treatment of Haitians in a country with ones [sic] of the highest HIV rates, as well as maternal, neonatal, and pediatric mortalities.

13. Respondent is currently engaging in philanthropic efforts to build a hospital in L'Artibonite, Haiti.

14. Respondent's medical license has allowed her to give back to others. Without her license, she will no longer be able to make these valuable contributions to society.

The Committee finds that Respondent has proven the assertions in this (eighth) affirmative defense.

WITNESS CREDIBILITY AND WEIGHT

The Department presented three witnesses: Scott Postell, M.D., Jun Lin, M.D., and Dean Dobbin, M.D. Respondent testified in her own behalf and presented three witnesses: Patient B's daughter, Omoikhef Akhigbe, M.D., and Milton Haynes, M.D.

Both Dr. Dobbin and Dr. Haynes had the requisite experience and credentials to render expert opinions. However, the Committee found that Dr. Dobbin failed to give an adequate analysis of the patient cases. Consequently, the Committee gave less weight to his testimony and opinions. In contrast, Dr. Haynes appeared to have vast knowledge, and he answered questions in an extremely responsive and articulate manner which led the Committee to afford his testimony a great deal of weight.

The Committee found that Dr. Akhigbe gave a thoughtful and honest interpretation of the facts surrounding the care provided to Patients A and B as well as the workings of LICH at that time.

Patient B's daughter, in describing the lengths to which Respondent went to explain and share with her, at each stage of her mother's care, what Respondent was doing and what her mother was going through, gave the Committee good insight into Respondent's bedside manner and the warm and caring physician she is.

The Committee did not give much weight to the testimony of Dr. Lin and Dr. Postell. It seemed to the Committee that they just went along with the hospital's view of what occurred with Patient A, and it also seemed like they might have had a grudge against Respondent. Their testimony did, however, reinforce for the Committee how Respondent seems to not get along with colleagues and those in authority, and how this could impact patient care, and why she needs to address this shortcoming of hers in therapy (to be discussed *infra*).

The Committee found that Respondent was not a good witness in her own defense. She testified in a defensive and at times condescending manner. She was not forthcoming, and she skirted the questions, just as she did in her applications. Respondent's presentation to the Committee reflected her apparent attitude toward authority figures as reflected in the exhibits. While Respondent's testimony did not raise suspicion that she was clinically inadequate, her testimony did raise concerns about her interpersonal skills, insight, and willingness to change.

DETERMINATION AS TO PENALTY

Respondent's attorney argued that judgment should be granted in favor of Respondent and she should be allowed to continue the practice of medicine in New York State without any restrictions. The Department argued that revocation is the only appropriate available sanction sufficient to address Respondent's acts of professional misconduct, to deter future misconduct, and to appropriately protect the public, and that each sustained specification, standing alone, warrants the sanction of revocation.

The totality of the evidence highlighted Respondent's strong bedside manner and commitment to her patients, particularly the underserved, and nothing to indicate that she is medically or surgically inadequate. In contrast, she repeatedly misrepresented and falsified information on applications and license registration renewal forms. The Committee concludes that despite not sustaining the majority of the allegations and specifications, the fraudulent violations that were sustained warrant revocation. However, the Committee, most cognizant of its duty to protect the public, believes revoking Respondent's license at this time, without giving her the opportunity to address her shortcomings, would be a disservice to her and the patient population she serves, and not a protection of the public. The Committee knows that a bad doctor

is worse than no doctor in a particular area or for a particular patient population, but the Committee has not found Respondent to be a bad doctor. Respondent has good bedside manner, she really cares about her patients, and her patients need and like her. Her two practice venues, Haiti and Reading, Pennsylvania, are underserved and require skilled physicians. Respondent is a skilled physician who meets the standard of care, but she has serious interpersonal difficulty with her colleagues and superiors, and she failed to be truthful to medical institutions and her licensing agency.

The Committee, having considered the full range of penalties available pursuant to PHL §230-a, determined the appropriate penalty for Respondent's wrongdoing to be (1) a two-year stayed suspension, (2) probation for two years, and (3) a requirement to take a course in Medical Ethics that addresses fraud and has a focus on professional honesty and conduct with regard to cooperation and synergy with peers and persons of authority. Within 90 days of the effective date of this Order, Respondent must identify such course to the Director of OPMC for approval, and she must take and successfully complete it the first time it is offered following OPMC's Director's approval.

Probation shall include a requirement that Respondent be treated by a psychiatrist or clinical psychologist (including, if the psychiatrist/psychologist so determines, group therapy, which could assist Respondent in being more reflective and learning how her words and actions impact others). Because probation is tolled when Respondent is not engaged in active medical practice in New York State ("NYS") for a period of thirty consecutive days or more, and Respondent is currently neither residing nor practicing medicine in NYS, the Committee understands that the terms of probation, including the requirement that she be treated by a psychiatrist or psychologist, cannot be enforced unless and until Respondent returns to active

medical practice in NYS. Although the Board cannot order Respondent to seek treatment with a psychiatrist or psychologist when she is practicing medicine away from NYS, this Committee urges Respondent, for her own sake and the sake of her patients, to undergo such treatment where she resides and practices medicine. Receiving such treatment away from, and before she returns to the active practice of medicine in, NYS does not satisfy any of the requirements in the probation terms of this Order for Respondent to be treated by a psychiatrist or clinical psychologist. As set forth in the probation terms, probation resumes upon Respondent's return to active practice in NYS, and "Respondent shall fulfill any unfulfilled probation terms and such additional requirements as the Director may impose as reasonably relate to the matters set forth in the Determination and Order or as are necessary to protect the public health."

Respondent shall bear the cost of all orders and probation terms pursuant to this Order. Any violation by Respondent of any of the requirements of this Order will activate the suspension; any violation of probation will warrant additional charges against Respondent.

Respondent must understand and appreciate that this Board is giving her a "pass." Revocation is warranted here based on Respondent's fraudulent actions but the public needs her and she should have a chance to reflect on, address, and improve her behavior. However, any repetition or failure will trigger the suspension, and any further Board action related to this Order or any new allegations should take the findings and concerns about Respondent in this Order into consideration.

ORDER

IT IS HEREBY ORDERED THAT:

1. The following charges of misconduct under Educ. Law §6530 are sustained:

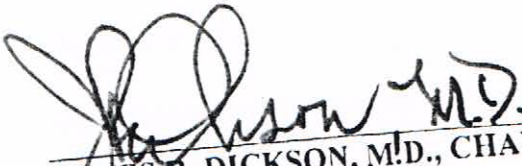
Educ. Law §6530(2) – practicing fraudulently (Specifications 9-14)
Educ. Law §6530(14) – violating PHL §2805-k (Specification 17)

2. The following charges of misconduct under Educ. Law §6530 are not sustained:

- Educ. Law §6530(2) – practicing fraudulently (Specifications 7 and 8)
- Educ. Law §6530(3) – practicing with negligence on more than one occasion
- Educ. Law §6530(4) – practicing with gross negligence
- Educ. Law §6530(5) – practicing with incompetence on more than one occasion
- Educ. Law §6530(14) – violating PHL §2805-k (Specifications 15, 16, 18 and 19)
- Educ. Law §6530(32) – failure to maintain an accurate record

3. Pursuant to PHL §230-a(2)(a) Respondent's license to practice medicine shall be suspended, wholly, for a period of two (2) years, but the suspension shall be stayed. Any violation of the Order activates the suspension.
4. Pursuant to PHL §230-a(8) Respondent shall be required to pursue a course of education or training in Medical Ethics that addresses fraud and has a focus on professional honesty and conduct with regard to cooperation and synergy with peers and persons of authority. Respondent must identify such CME or equivalent course and submit it to OPMC's Director for approval within 90 days of the effective date of this Order. Such course shall be taken and successfully completed the first time it is offered following OPMC's Director's approval.
5. Pursuant to PHL §230-a(9) Respondent shall be placed on Probation for a period of two (2) years. Terms of Probation are attached to this Determination and Order as Appendix 2. Probation will include a requirement for Respondent to be treated by a psychiatrist or clinical psychologist with reports to the Director of OPMC. Any violation of probation may trigger additional charges against Respondent, including, but not limited to, a violation of probation proceeding.
6. This order shall be effective upon service on the Respondent by personal service or by certified mail as required under PHL §230(10)(h)

DATED: New York, New York
~~March~~, 2017
APRIL 6, 2017



JAMES R. DICKSON, M.D., CHAIR
CASSANDRA HENDERSON, M.D.
CURTIS HART, M. DIV.

TERMS OF PROBATION

1. Respondent's conduct shall conform to moral and professional standards of conduct and to governing law. Any act of professional misconduct by Respondent as defined by New York Education Law §§6530 or 6531 shall constitute a violation of probation and may subject Respondent to an action pursuant to New York Public Health Law §230 (10) or (19), or both.
2. Respondent shall remain in continuous compliance with all requirements of New York Education Law §6502, including but not limited to the requirements that a licensee shall register and continue to be registered with the New York State Education Department (except during periods of actual suspension) and that a licensee shall pay all registration fees. Respondent shall not exercise the option provided in New York Education Law §6502(4) to avoid registration and payment of fees.
3. Respondent shall provide to the Director of the Office of Professional Medical Conduct (OPMC), Riverview Center, 150 Broadway, Suite 355, Albany, New York, 12204, (OPMC's address) at least every six months and as otherwise requested, or within thirty days of any change in the information, the following information in writing:
 - a. a full description of the Respondent's employment and practice;
 - b. all professional and residential addresses and telephone numbers within and outside New York State;
 - c. any and all information concerning investigations, arrests, charges, convictions or disciplinary actions by any local, state, or federal agency; and
 - d. any and all information concerning investigations, terminations, or disciplinary matters by any institution or facility.
4. Respondent shall provide to the Director of OPMC, at OPMC's address, copies of all applications relating to the practice of medicine, including but not limited to, privileges, insurance, and licensure, in any jurisdiction, concurrent with their submission.
5. Respondent shall cooperate fully with, and will respond within two weeks to, OPMC requests to provide written periodic verification of Respondent's compliance with these terms of probation. Upon the Director of OPMC's request, Respondent shall meet personally with a person designated by the Director.

6. The probation period shall toll when Respondent is not engaged in active medical practice in New York State for a period of thirty consecutive days or more. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in, or intends to leave, active medical practice in New York State for a consecutive thirty-day period. Respondent shall then notify the Director again at least fourteen days before returning to active practice. Upon Respondent's return to active practice in New York State, the probation period shall resume, and Respondent shall fulfill any unfulfilled probation terms and such additional requirements as the Director may impose as reasonably relate to the matters set forth in the Determination and Order or as are necessary to protect the public health.
7. The Director of OPMC, or his/her designee, may review Respondent's professional performance. This review may include but shall not be limited to:
- a. A review of office records, patient records, hospital charts, and/or electronic records;
 - b. Interviews with or periodic visits with Respondent and/or staff at practice locations or at OPMC offices.
8. Respondent shall maintain complete and legible medical records that accurately reflect the evaluation and treatment of patients, and contain all information required by State rules and regulations concerning controlled substances.
9. Respondent shall be treated by a clinical psychologist or psychiatrist, proposed by Respondent within 60 days of the effective date of the initiation of the period of probation, and subject to written approval of the Director of OPMC. Respondent shall cause the clinical psychologist/psychiatrist to report quarterly, in writing, to the Director of OPMC.
10. Respondent shall comply with these Terms of Probation, and shall bear all associated compliance costs. Upon receiving evidence of noncompliance with or a violation of these terms, the Director of OPMC and/or the Board for Professional Medical Conduct may

initiate a violation of probation proceeding, and/or any other proceeding authorized by law, against the Respondent.

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