

**BEFORE THE IOWA BOARD OF MEDICINE**

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<b>IN THE MATTER OF THE</b>	)	<b>FILE NO. 02-03-708</b>
<b>STATEMENT OF CHARGES</b>	)	
<b>AGAINST</b>	)	
	)	
<b>CARMEN A. FOSTER, M.D.,</b>	)	<b>FINAL ORDER</b>
<b>RESPONDENT.</b>	)	

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Date: January 7, 2009.

1. Respondent was issued Iowa medical license no. 34585 on April 26, 2002.
2. Respondent's license is active and will next expire on July 1, 2009.
3. On October 31, 2006, the Board filed formal disciplinary charges alleging that Respondent engaged in a pattern of professional incompetence and/or practice harmful or detrimental to the public.
4. On September 23, 2008, a hearing on the charges was held before a panel of the Board.
5. On December 1, 2008, the panel issued a Proposed Decision of the Panel dismissing the charges against Respondent.
6. On December 4, 2008, a true copy of the Proposed Decision of the Panel was hand delivered to counsel for the State of Iowa, Theresa O'Connell Weeg, Esq., Assistant Attorney General.
7. On December 5, 2008, a true copy of the Proposed Decision of the Panel was delivered to counsel for Respondent via certified mail.

8. Neither party filed an Appeal of the Proposed Decision of the Panel within thirty (30) days of issuance pursuant to 653 IAC 25.24(2)(c).

9. Pursuant to Iowa Code sections 148.6 and 148.7 (2007) the undersigned, acting on the behalf of the Board, is authorized to enter a Final Order herein.

**THEREFORE IT IS HEREBY ORDERED** that the Proposed Decision of the Panel, a copy of which is attached as Exhibit A, is a **FINAL ORDER OF THE BOARD**.

  
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Yasin Lee, M.D., Chairperson  
Iowa Board of Medical Examiners  
400 SW 8<sup>th</sup> Street, Suite C  
Des Moines, IA 50309-4686

January 7, 2009  
Date

Copy to: Theresa O'Connell Weeg, Esq., Assistant Attorney General  
Respondent  
Presiding Administrative Law Judge

BEFORE THE IOWA BOARD OF MEDICINE

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IN THE MATTER OF THE ) DIA NO. 06DPHMB029  
STATEMENT OF CHARGES ) CASE NO.02-03-708  
AGAINST )  
)  
CARMEN A. FOSTER, M.D. ) PROPOSED DECISION  
) OF THE PANEL  
Respondent )

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TO: CARMEN A. FOSTER, M.D.

Date: December 1, 2008.

On October 31, 2006, the Iowa Board of Medicine (Board) filed a Statement of Charges against Carmen A. Foster, M.D. (Respondent) charging her in Count I with the failure to exercise in a substantial respect that degree of care which is ordinarily exercised by the average physician or surgeon in the state of Iowa, and a willful and repeated departure from, or the failure to conform to, the minimal standard of acceptable and prevailing practice of medicine and surgery in the state of Iowa in violation of Iowa Code section 147.55(2), 148.6(2)(g) and (i), 272C.10(2)(2005) and 653 IAC 23.1(2); and Count II with engaging in practice that was harmful or detrimental to the public, in violation of Iowa Code section 147.55(3) and 653 IAC 23.1(3).

An Original Notice and Order for Hearing were issued setting the hearing for December 13, 2006. The Statement of Matters asserted was provided to Respondent, but not distributed as it was confidential. The hearing was continued and the matter was reset for hearing on November 28 & 29, 2007. The matter was continued until further order on November 20, 2007.

On July 5, 2007, the State filed a Motion for Leave to Amend Statement of Charges. The Motion was resisted by Respondent and Denied by Administrative Law Judge Jeffrey D. Farrell on August 30, 2007. The State appealed this decision and the Board affirmed the ALJ's decision on December 17, 2007.

The case was then reset for hearing on March 26, 2008. Respondent requested, and was granted, a continuance of the hearing. The hearing was rescheduled for September 23, 2008.

The hearing was held on September 23, 2008 at 8:30 a.m. in the conference room at the Board office, 400 SW 8th Street, Suite C, Des Moines, Iowa. The hearing was held before the following members of the Board: Carole Frier, D.O.; Janice Galli, D.O.; and Janice Valentine, Public Member. Respondent appeared and was represented by her counsel, David Dutton. Theresa O'Connell Weeg, Assistant Attorney General, represented the state.

The hearing was open to the public, pursuant to Iowa Code section 272C.6(1) and 653 IAC 25.18(12). The hearing was recorded by a certified court reporter. John M. Priester, Administrative Law Judge, assisted the Board in conducting the hearing and was instructed to prepare this decision of the Board, in accordance with their deliberations. A motion was taken in open session.

#### THE RECORD

The record includes the Statement of Charges, the Original Notice, the Order for Hearing, the Orders for Continuance, the testimony of the witnesses, and State's Exhibits 1-10, and 13-60 and Respondent Exhibits A-V.

#### FINDINGS OF FACT

1. Respondent was issued license number 34585 to practice medicine and surgery in the state of Iowa on April 26, 2002, as recorded in the permanent records in the office of the Board. Respondent's license is currently valid. (State Exhibit 1 and Records of the Board)

2. A Statement of Charges was filed against Respondent by the Board on October 31, 2006 charging Respondent with two counts. Count I alleged that Respondent failed to exercise the degree of care which is ordinarily exercised by the average physician or surgeon acting in the state of Iowa and willful or repeated departure from, or failure to conform to the minimal standard of acceptable and prevailing practice of medicine and surgery in the state of Iowa. Count II alleged that Respondent engaged in practice that was harmful or detrimental to the public. (State Exhibit 1)

3. Respondent is employed as a refractive surgeon at TLC Laser Eye Center in Robins, Iowa. Respondent lived out of state. Respondent would routinely, about once a month, fly from Kansas City to Robins, Iowa, to perform laser refractive surgeries on patients. The patients would have been examined by a licensed optometrist prior to Respondent's arrival. The optometrist would have performed all pre-operative tests and procedures required, including slit lamp exams.

When Respondent arrived she would have reviewed each patient's file and she would then repeat the slit lamp examination. Respondent did not document anywhere that she repeated the examinations. (Testimony of Respondent)

4. A complaint was filed against Respondent alleging that Respondent was performing Lasik surgery without providing proper post-operative care to the patients. (State Exhibit 3)

5. The Board conducted an investigation of Respondent and her practice. After the investigation the Board found probable cause to file statement of charges against Respondent. The grounds for the statement of charges were that Respondent was not properly documenting her pre-operative examinations, specifically the slit lamp examination, and that Respondent did not disclose fully to her patients that she lived out of state and that she would not be available for emergency procedures and follow-up care. (State Exhibit 1 and 2)

6. Respondent presented evidence that a properly licensed optometrist performed all required pre-operative examinations and procedures. Respondent would then review each file prior to the surgery. Respondent would then conduct another slit lamp examination on the patient. Respondent testified that she would make notations on the file only if there was a discrepancy with the results of the prior examination. If there were no discrepancies, Respondent would not make any notation that the examination had been performed. (Testimony of Respondent)

7. Respondent and her employer testified as to the procedures utilized by TLC in Robins, Iowa. Each patient was informed that Respondent would be performing the surgery and she was from out of state. This was conveyed orally and the patients were not given written notice of this fact. Patients were given Respondent's business card that listed the TLC phone number, Respondent's cell phone number and a toll-free phone number for TLC nation-wide. A local ophthalmologist, Dr. Lee Birchansky, M.D., had an informal agreement to assist with any of Respondent's patients that needed emergency care. Otherwise Respondent would fly back to provide emergency follow-up care. (Testimony of Respondent and Richard Noyes, O.D.)

#### CONCLUSIONS OF LAW

Iowa Code section 148.6(2)(h)(2005) provides, in relevant part:

2. Pursuant to this section, the board of Medicine may discipline a licensee who is guilty of any of the following acts or offenses:

g. Being guilty of a willful or repeated departure from, or the failure to conform to, the minimal standard of acceptable and prevailing practice of medicine and surgery . . .

i. Willful or repeated violation of lawful rule or regulation adopted by the board or violating a lawful order of the board . . .

The Board can also suspend or revoke a professional's license if it determines by a preponderance of the evidence that the licensee exhibits professional incompetence. Iowa Code § 272C.10(2). The Board shall likewise suspend or revoke if a licensee engages in practice that is harmful or detrimental to the public. Iowa Code § 147.55(2) and (3).

Before the Board addresses the Statement of Charges, it must rule on an issue that arose during the hearing as a result of discovery in this case. At the outset of the hearing Respondent moved to have her Request for Admissions Directed to the Iowa Board of Medicine deemed admitted because they were not responded to in a timely fashion.

Respondent filed her Request for Admissions on March 26, 2007. The State responded to the Request for Admissions on August 9, 2007. The Iowa Rules of Civil Procedure require that Request for Admissions be answered within 30 days or they are deemed to be admitted. Iowa R.Civ.Pro. 1.510. Since the State failed to respond within the required time frame Respondent moved that the Request for Admissions be admitted.

The State resisted the Motion. The State, at hearing and in post-hearing briefs, pointed out that discovery deadlines in this case were not adhered to by either party. Respondent was late in responding to requests for discovery, the Request for Admissions were answered a full year before the hearing, and Respondent made no effort to resolve the discovery dispute prior to making the issue known at hearing.

After reviewing the briefs supplied post-hearing, the Board finds that the Request for Admissions shall be deemed admitted. The State did not respond within the required 30 days. The Iowa Court of Appeals has held that there is no right to file late responses to request for admissions, and a court is under no obligation to allow for the late filing of responses. Double D Land and Cattle Co., Inc. v. Brown, 541 N.W.2d 547 (Iowa App. 1995). The late filing was not a few days late, it was almost 100 days late. While both parties were not abiding by the Rules of Civil Procedure, a mutual agreement was not made to waive, or extend, the time to file the admissions. Late is late, and the Request for Admissions shall be deemed admitted.

Request for Admission number 8 states, "Does the Iowa Board of Medicine admit that Dr. Foster personally performed the preoperative examination of all her Lasik patients including retinoscopy, subjective refraction, and slit lamp examination?" Due to the late filing of the response to the Request for Admission this is deemed admitted.

Even if the Board did not deem the Request for Admission admitted, it does not find that the State has established, by a preponderance of the evidence that Respondent failed to perform the required slit lamp examinations. The evidence showed that the slit lamp examinations were performed by a licensed optometrist prior to the surgery.

The Board finds Respondent's testimony credible when she stated that she duplicates the slit lamp examinations before each surgery. While not required, Respondent's duplication of this examination is found to be appropriate. However, Respondent should document any examination that she performs. The Board concluded that Respondent's failure to document the duplicate slit lamp exams does not rise to the level of failure to conform to minimal standards because the examinations were performed and documented by an Iowa-licensed ophthalmologist. Count I is therefore DISMISSED.

The second allegation was that Respondent engaged in a practice that was harmful or detrimental to the public by not disclosing to her patients that she lived out of state and flew to Robins to perform the surgeries. The preponderance of the evidence failed to establish that Respondent failed to inform her patients that she lived out of state.

A better practice would be to have the patients sign an informed consent documenting that they understand that Respondent lives out of state. However, the Board finds that Respondent, and TLC Laser Eye Center of Robins, does inform patients that Respondent lives out of state. Based upon the evidence introduced in the hearing the Board finds that Count II shall be DISMISSED.

ORDER

IT IS THEREFORE ORDERED, that both Counts in the Statement of Charges are hereby DISMISSED.

Dated this 1<sup>st</sup> day of December, 2008.



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Carol Frier, D.O.

cc: Theresa O'Connell Weeg, AAG  
David Dutton, Attorney

Judicial review of the board's action may be sought in accordance with the terms of the Iowa administrative procedure Act, from and after the date of this order.

**BEFORE THE IOWA BOARD OF MEDICINE**

---

<b>IN THE MATTER OF THE</b>	)	<b>FILE NO. 02-03-708</b>
<b>STATEMENT OF CHARGES</b>	)	<b>DIA NO. 06DPHMB029</b>
<b>AGAINST:</b>	)	
	)	
<b>CARMEN A. FOSTER, M.D.,</b>	)	<b>ORDER ON THE STATE'S</b>
	)	<b>APPEAL OF DENIAL OF STATE'S</b>
<b>RESPONDENT.</b>	)	<b>MOTION FOR LEAVE TO AMEND</b>

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Date: December 17, 2007.

**STATEMENT OF THE CASE AND DISCUSSION**

On July 5, 2007, the State of Iowa filed a motion for leave to amend notice hearing and statement of charges. The State sought to amend the statement of charges to add a section asserting factual allegations relating to the charges. The factual allegations were previously provided to respondent, but withheld from the public after a district court ruled in a different case that the factual allegations in a statement of charges were confidential. The State's motion is responsive to the Iowa Court of Appeals decision in *Reveiz v. Iowa Board of Medical Examiners*, 735 N.W.2d 203 (Iowa App. 2007), which reversed the district court decision in the Reveiz case.

The Board referred the motion and Respondent's resistance to the Department of Inspections and Appeals to assign the case to an administrative law judge. On August 30, 2007, Administrative Law Judge Jeffrey Farrell issued an order denying the motion. The State appealed the ALJ's order to the Board.

On November 8, 2007, the Board heard argument on the appeal. Attorney David Dutton represented Respondent Carmen A. Foster, M.D.. Assistant Attorney General Theresa Weeg represented the State. The Board included the following members: Yasyn Lee, M.D., Dana Shaffer, D.O., Siroos Shirazi, M.D., Rod Zeitler, M.D., Colleen Kennedy, M.D., and Sally Schroeder, public member. ALJ Farrell assisted the Board during deliberations and drafting of this order.

After considering the arguments of the parties, the Board decided to affirm the ALJ's order. There is no due process ground to amend the statement of charges because the statement of factual assertions was provided to Respondent at the time the charges were filed. The statement of factual assertions is an existing document, so the Board can consider releasing that document under *Reveiz* and other applicable law in the event a public records request is

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made.

**ORDER**

The ALJ's order denying the State's motion for leave to amend is affirmed.

Dated this 17<sup>th</sup> day of December, 2007.

A handwritten signature in black ink, appearing to read "Yasyn Lee", written over a horizontal line.

Yasyn Lee, M.D., Chair

cc: Theresa O'Connell Weeg  
David Dutton

**BEFORE THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF IOWA**

---

<b>IN THE MATTER OF THE</b>	)	<b>FILE NO. 02-03-708</b>
<b>STATEMENT OF CHARGES</b>	)	
<b>AGAINST</b>	)	
	)	
<b>CARMEN A. FOSTER, M.D.,</b>	)	<b>STATEMENT OF CHARGES</b>
<b>RESPONDENT.</b>	)	

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**COMES NOW** the Iowa Board of Medical Examiners October 31, 2006, and files this Statement of Charges pursuant to Iowa Code Section 17A.12(2). Respondent was issued Iowa medical license no. 34585 on April 26, 2002. Respondent's license is active and will next expire on July 1, 2007.

**A. TIME, PLACE AND NATURE OF HEARING**

1. Hearing. A disciplinary contested case hearing shall be held on December 13, 2006, before the Iowa Board of Medical Examiners. The hearing shall begin at 8:30 a.m. and shall be located in the conference room at the Iowa Board of Medical Examiners office at 400 SW 8<sup>th</sup> Street, Suite C, Des Moines, Iowa.

2. Answer. Within twenty (20) days of the date you are served this Statement of Charges you are required by 653 Iowa Administrative Code 24.2(5)(d) to file an Answer. In that Answer, you should also state whether you will require a continuance of the date and time of the hearing.

3. Presiding Officer. The Board shall serve as presiding officer, but the Board may request an Administrative Law Judge make initial rulings on prehearing matters, and be present to assist and advise the board at hearing.

4. Hearing Procedures. The procedural rules governing the conduct of the hearing are found at 653 Iowa Administrative Code Chapter 25. At hearing, you will be allowed the opportunity to respond to the charges against you, to produce evidence on your behalf, cross-examine witnesses, and examine any documents introduced at hearing. You may appear personally or be represented by counsel at your own expense. If you need to request an alternative time or date for hearing, you must review the requirements in 653 Iowa Administrative Code 25.16. The hearing may be open to the public or closed to the public at the discretion of the Respondent.

5. Prosecution. The office of the Attorney General is responsible for representing the public interest (the State) in this proceeding. Pleadings shall be filed with the Board and copies should be provided to counsel for the State at the following address: Theresa O'Connell Weeg, Assistant Attorney General, Iowa Attorney General's Office, 2<sup>nd</sup> Floor, Hoover State Office Building, Des Moines, Iowa 50319.

6. Communications. You may not contact board members by phone, letter, facsimile, e-mail, or in person about this Notice of Hearing. Board members may only receive information about the case when all parties have notice and an opportunity to participate, such as at the hearing or in pleadings you file with the Board office and serve upon all parties in the case. You should direct any questions to Kent M. Nebel, J.D., the Board's Legal Director at 515-281-7088 or to Assistant Attorney General Theresa O'Connell Weeg at 515-281-6858.

## **B. LEGAL AUTHORITY AND JURISDICTION**

7. Jurisdiction. The Board has jurisdiction in this matter pursuant to Iowa Code Chapters 17A, 147, 148, and 272C (2005).

8. Legal Authority: If any of the allegations against you are founded, the Board has authority to take disciplinary action against you under Iowa Code Chapters 17A, 147, 148, and 272C (2005) and 653 Iowa Administrative Code Chapter 25.

9. Default. If you fail to appear at the hearing, the Board may enter a default decision or proceed with the hearing and render a decision in your absence, in accordance with Iowa Code Section 17A.12(3) and 653 Iowa Administrative Code 25.20.

## **C. SECTIONS OF STATUTES AND RULES INVOLVED**

### **COUNT I**

10. Respondent is charged pursuant to Iowa Code section 147.55(2), 148.6(2)(g) and (i), and 272C.10(2) (2005), and 653 IAC sections 23.1(2) by demonstrating one or more of the following in the practice of ophthalmology:

- A. A failure by a physician or surgeon to exercise in a substantial respect that degree of care which is ordinarily exercised by the average physician or surgeon in the state of Iowa acting in the same or similar circumstances; and
- B. A willful or repeated departure from, or the failure to conform to, the minimal standard of acceptable and prevailing practice of medicine and surgery in the state of Iowa.

## COUNT II

11. Respondent is charged under Iowa Code section 147.55(3) (2003) and 653 Iowa Administrative Code section 23.1(3) with engaging in practice harmful or detrimental to the public.

### D. STATEMENT OF MATTERS ASSERTED

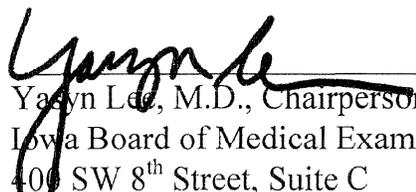
12. A short and plain Statement of the Matters Asserted was reviewed and approved by the Board at the time this Statement of Charges was filed. A Statement of the Matters Asserted shall be furnished to Respondent as an attachment to this Statement of Charges. However, the Statement of the Matters Asserted is not a public record.

### E. SETTLEMENT

13. Settlement. This matter may be resolved by settlement agreement. The procedural rules governing the Board's settlement process are found at 653 Iowa Administrative Code 25. If you are interested in pursuing settlement of this matter, please contact Kent M. Nebel, J.D., Legal Director at 515-281-7088.

### F. PROBABLE CAUSE FINDING

14. On this 31<sup>st</sup> day of October 2006, the Iowa Board of Medical Examiners found probable cause to file this Statement of Charges.

  
Yagyn Lee, M.D., Chairperson  
Iowa Board of Medical Examiners  
400 SW 8<sup>th</sup> Street, Suite C  
Des Moines, Iowa 50309-4686