

## 261 CMR: BOARD OF RESPIRATORY CARE

### 261 CMR 4.00: DISCIPLINARY PROCEEDINGS

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#### 4.01: Preface

261 CMR 4.00 governs the disposition of matters relating to the practice of respiratory care by any person holding or having held a license issued by the Board of Respiratory Care under M.G.L. c. 112, §§ 23R through 23BB, and the conduct of adjudicatory hearings by the Board. 261 CMR 4.00 is based on the principle of fundamental fairness to licensees and patients and shall be construed to secure a speedy and just disposition.

#### 4.02: Definitions

Adjudicatory Hearing. A formal administrative hearing conducted pursuant to M.G.L. c. 30A.

Board. The Board of Respiratory Care.

Complaint. A communication filed with the Board which charges a licensee with misconduct.

Informal. Not subject to strict procedural or evidentiary rules.

Licensee. A person holding or having held any type of license or permit issued pursuant to M.G.L. c. 112, §§ 23R through 23BB.

Order to Show Cause. A paper issued by the Board ordering a licensee to appear before the Board for an adjudicatory proceeding and show cause why the licensee should not be disciplined.

Party. A respondent, prosecutor representing the Board, or intervenor in an adjudicatory proceeding pursuant to 801 CMR 1.01(9).

Quorum. A majority of the Board excluding vacancies.

Respondent. The licensee named in an Order to Show Cause.

#### 4.03: General Provisions

(1) Communications. All written correspondence should be addressed to and filed with the Board of Respiratory Care, 239 Causeway Street, 2<sup>nd</sup> Floor, Boston, Massachusetts 02114.

(2) (a) Service. The Board shall provide notice of its actions in accordance with the Standard Adjudicatory Rules, 801 CMR 1.01(4)b and (5)(f), or otherwise with reasonable attempts at in-hand service, unless the Respondent otherwise has actual notice of the Board's action. Where 261 CMR 4.00 provides that the Board must notify parties, service may be made by first class mail. A notice of appearance on behalf of a Respondent shall be deemed an agreement to accept service of any document on behalf of the Respondent, including a Final Decision and Order of the Board. When a Hearing Officer has jurisdiction over an adjudicatory proceeding, proper service by the Respondent includes filing copies of all papers and exhibits with the Board, care of its Counsel, the Hearing Officer assigned to the adjudicatory proceeding, and the Prosecutor assigned to the adjudicatory proceeding. All papers served must be accompanied by a certificate of service.

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- (b) Notice to Board Members. A respondent (or his representative) and other persons shall not engage in *ex parte* communications with individual Board members regarding a disciplinary proceeding. Communications to Board members regarding disciplinary proceedings shall be in writing and directed to Board members as follows: Six copies to the Chair of the Board, one copy to the Board Counsel, and one copy to the Prosecutor assigned to the disciplinary proceeding.
- (3) Date of Receipt. Communications are deemed received on the date of actual receipt by the Board.
- (4) Computation of Time. The Board shall compute time in accordance with 801 CMR 1.01(4)(c).
- (5) Extension of Time. The Board in its discretion may extend any time limit prescribed or allowed by 261 CMR 4.00.
- (6) Identification and Signature; Paper Size. All papers filed with the Board in the course of a disciplinary proceeding must contain the name, address, and telephone number of the party making the filing and must be signed by either the party or an authorized representative. Paper size shall be 8½" by 11".
- (7) Decisions by the Board; Quorum. Unless 261 CMR 4.00 provides otherwise, a majority of members present and voting at a Board meeting shall make all decisions and the Board shall record its decisions in the minutes of its meetings. A quorum is a majority of the Board, excluding vacancies.
- (8) Availability of Board Records to the Public.
- (a) The availability of the Board's records to the public is governed by the provisions of the Public Records Law, M.G.L. c. 66, § 10, and M.G.L. c. 4, § 7, clause 26, as limited by the Board's regulations. A file or some portion of it is not a public record if the Board determines that disclosure may constitute an unwarranted invasion of personal privacy, prejudice the effectiveness of law enforcement efforts (if the records were necessarily compiled out of public view), violate any provision of state or federal law, or if the records are otherwise legally exempt from disclosure.
- (b) Before the Board issues an Order to Show Cause, dismisses a complaint, or takes other final action, the Board's records concerning a disciplinary matter are confidential.
- (c) The Board's records of disciplinary matters, as limited by 261 CMR 4.03(8)(a) and (b), include the following:
1. Closed complaint files, which contain the complaint and other information, are public records. The name of the complainant or patient and relevant medical records shall be disclosed to the respondent, but this information is otherwise confidential. The names of reviewers and the contents of complaint reviews shall be confidential.
  2. Board Prosecutor's files, which contain portions of complaint files (and related confidential files) as well as papers related to adjudicatory proceedings and attorney work product, are not public records and are confidential.
  3. The Board's files, which contain each paper filed with the Board in connection with an adjudicatory proceeding, are public records, unless otherwise impounded or placed under seal by the Hearing Officer or the Board.
- (9) Public Nature of Board Meetings Under These Rules.
- (a) All meetings of the Board are open to the public to the extent required by M.G.L. c. 30A, § 11A.
- (b) As provided by M.G.L. c. 30A, § 11A, a Board meeting held for the purpose of making a decision required in an adjudicatory proceeding is not open to the public. Evidentiary hearings before individual hearing officers are generally open to the public, but the Board may carry out its functions under these rules in closed session if these functions affect an individual licensee or patient, the licensee or patient requests that the Board function in closed session, and the Board or hearing officer determines that functioning in closed session would be consistent with law and in the public interest.

4.04: Disposition of Complaints

- (1) Initiation. Any person, organization, or member of the Board may make a complaint to the Board which charges a licensee with misconduct. A complaint may be filed in any form. The Board, in its discretion, may investigate anonymous complaints.
- (2) Complaint Committee. The Board may establish a Complaint Committee to review complaints charging a licensee with misconduct. If the Complaint Committee or a Board investigator determines that a communication does not relate to any of the matters set forth in M.G.L. c. 112, § 23X and 261 CMR 4.04(5), the Complaint Committee or the investigator may refer the communication to the proper authority or regulatory agency.
- (3) Investigations.
  - (a) Preliminary Investigation. A Board investigator shall conduct such preliminary investigation, which may include a request for an answer from the licensee, as is necessary to allow the Board or the Complaint Committee to determine whether a complaint is frivolous or lacking in either merit or factual basis.
  - (b) Subsequent Inquiry, Investigation. After receipt and review of a complaint, if the Board or the Complaint Committee determines that the complaint is frivolous or lacking in either legal merit or factual basis, it may close the complaint. As to other complaints, the Board or the Complaint Committee shall conduct, or cause to be conducted, any reasonable inquiry or investigation it deems necessary to determine the truth and validity of the allegations set forth in the complaint.
- (4) Conference. To facilitate disposition, the Board or the Complaint Committee may request any person to attend a conference at any time prior to the commencement of an adjudicatory proceeding. The Board or Complaint Committee shall give timely notice of the conference with reference to the complaint or a statement of the nature of the issues to be discussed.
- (5) Grounds for Complaint.
  - (a) Specific Grounds for Complaints Against Licensees. A complaint against a licensee may be based on any of the following: Fraudulent or deceptive procurement, or attempt at fraudulent or deceptive procurement, of a license or Limited Permit or its renewal; commitment of an offense against any provision of the laws of the Commonwealth relating to the practice of respiratory care, or any rule or regulation adopted thereunder; conduct which places into question the licensee's competence to practice respiratory care; practicing respiratory care while the ability to practice is impaired by alcohol, drugs, physical disability or mental instability; knowingly permitting, aiding or abetting an unlicensed person to perform activities requiring a license; conviction of a felony or of a crime involving moral turpitude; continuing to practice while his license or Limited Permit is lapsed, suspended, or revoked; having been disciplined in another jurisdiction in any way by the proper licensing authority, institution, society, credentialing board, agency, or court for reasons substantially the same as those set forth in M.G.L. c. 112, § 23X and 261 CMR 4.04(5); failing to report any disciplinary action within 30 days of the date of that action; cheating on or attempting to compromise the integrity of any licensing examination; having acted in a manner which is professionally unethical according to ethical standards of the profession of respiratory care.
  - (b) Other Grounds for Complaints Against Licensees. Nothing herein shall limit the Board's adoption of policies and grounds for discipline through adjudication as well as through rule-making.
- (6) Order for Answering and Answer. The Board or Complaint Committee may order that the licensee, who is the subject of a complaint, respond to a complaint or order within 21 days. A licensee shall respond to an order or complaint either personally or through his attorney, in compliance with 261 CMR 4.03(6). An answer must address the substantive allegations set forth in the complaint or order.

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(7) Dismissal by Board or Complaint Committee. Upon receipt of a licensee's answer or at any point during the course of investigation or inquiry into a complaint, the Board or Complaint Committee may determine that there is not and will not be sufficient evidence to warrant further proceedings or that the complaint fails to allege misconduct for which a licensee may be sanctioned by the Board. In such event, the Board or Complaint Committee shall close the complaint.

(8) Board Action Required. If a licensee fails to answer within the 21 day period or if the Complaint Committee determines that there is reason to believe that the acts alleged occurred and constitute a violation for which a licensee may be sanctioned by the Board, the Complaint Committee may recommend that the Board issue an Order to Show Cause.

(9) Disposition by the Board. The Board shall review each recommendation which the Complaint Committee forwards to it and shall require an adjudicatory hearing if it determines that there is reason to believe that the acts alleged occurred and constitute a violation of any provision of 261 CMR 4.04(5) or M.G.L. c. 112, § 23X. The Board may take such informal action as it deems a complaint warrants. If the Board requires an adjudicatory hearing, it may appoint a Hearing Officer to preside in the adjudicatory proceeding.

### 4.05: Adjudicatory Hearing

After the Board issues an Order to Show Cause, the Board shall conduct all hearings in accordance with the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.00.

### 4.06: Final Decision and Order and Miscellaneous Provisions

(1) In General. Every Final Decision and Order of the Board requires the concurrence of a majority of the Board. If the Hearing Officer is a member of the Board, the Hearing Officer's vote counts only in the event the Board is not otherwise able to reach a final decision.

(2) Sanctions. In disposition of disciplinary charges brought by the Board, the Board may revoke, suspend, cancel the license or Limited Permit, or place on probation, reprimand, censure, require the performance of public service in a manner and at a time and place to be determined by the Board, require a course of education or training or otherwise discipline or limit the practice of a licensee.

(3) Reinstatement. A person previously licensed by the Board may apply for reinstatement as ordered by the Board. An application for reinstatement addressed to the Board, must be made in the form the Board prescribes, must be filed in original with six copies, and will be granted only if the Board determines that doing so would advance the public interest. Applicants for reinstatement are required to explain in detail to the Board why favorable action on the reinstatement request is warranted and provide a detailed summary of how the applicant spent time during the non-licensed period including professional activities, personal psychotherapy or other remediative activities, and academic or other continuing education activities. An applicant for reinstatement must also provide to the Board notarized statements from at least three persons (one of whom must be a respiratory therapist) who have read the Board's Final Decision and Order regarding the applicant and attest to the character of the applicant, including any history of substance abuse, and the applicant's work and professional history since the license revocation. An applicant for reinstatement may also be required to appear before the Board and achieve a passing score on the current licensure examination. If the Board denies a petition for reinstatement, the applicant shall not re-petition the Board for reinstatement until at least one year after the date of denial, unless the Board orders otherwise.

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(4) Resignation.

(a) A licensee who is named in a complaint or who is the subject to an investigation by the Board or who is the respondent in a disciplinary action may submit his resignation to the Board in writing stating that: he desires to resign; his resignation is tendered voluntarily; he realizes that resignation is a final act which deprives a person of all privileges of registration and is not subject to reconsideration or judicial review; and that he is not currently licensed to practice in any other state or jurisdiction, will make no attempt to gain licensure elsewhere, or will resign any other licenses contemporaneously with his resignation in the Commonwealth.

(b) If a complaint, investigation, or Order to Show Cause arises solely out of a disciplinary action in another jurisdiction, within the meaning of 261 CMR 4.04(5)(a)11., the licensee may submit a resignation pursuant to 261 CMR 4.06(4)(a), but need not make any representation regarding licensure status in other jurisdictions, is permitted to gain licensure elsewhere, and need not resign any other licenses contemporaneously with the resignation.

(5) Unauthorized Respiratory Care Practice. The Board may refer to the appropriate District Attorney or other appropriate law enforcement agency any incidents of unauthorized respiratory care practice which comes to its attention.

(6) Imposition of Restrictions. Consistent with 261 CMR 4.00 and M.G.L. c. 30A or otherwise by agreement with the licensee, the Board may impose restrictions to prohibit a licensee from performing certain respiratory care procedures, or from performing certain respiratory care procedures except under certain conditions, if the Board determines that:

(a) the licensee has engaged in a pattern or practice which calls into question his competence to perform such procedures; or

(b) the restrictions are otherwise warranted by the public health, safety and welfare.

(7) Ethical Standards and Professional Conduct. The Board adopts as its official guide the American Association for Respiratory Care Code of Ethics as amended from time to time.

### 4.07: Suspension Prior to Hearing

If, based upon affidavits or other documentary evidence, the Board determines that a licensee is an immediate or serious threat to the public health, safety, or welfare, the Board may suspend or refuse to renew a license pending a final hearing on the merits of the allegations regarding the licensee. A hearing limited to the determination of the necessity of the summary action shall be afforded the licensee within seven days of the Board's action.

## REGULATORY AUTHORITY

243 CMR 4.00: M.G.L. chs. 13 and 11B; c. 112, §§ 23R through 23BB.