

COMMONWEALTH OF MASSACHUSETTS
BOARD OF REGISTRATION IN MEDICINE

MIDDLESEX, ss

Adjudicatory Case No. 2022-033
(RM-22-0421)

In the Matter of)
)
)
Mary Kelly Sutton, M.D.)
_____)

FINAL DECISION AND ORDER

Procedural History

On September 8, 2022, the Board of Registration in Medicine (Board) issued a Statement of Allegations (SOA) charging the Respondent with having been disciplined in another jurisdiction for reasons substantially the same as those set forth in G.L.c.112, sec. 5 or 243 CMR 1.03(5), specifically for engaging in conduct which places into question her competence to practice medicine, including but not limited to gross misconduct in the practice of medicine, or practicing medicine fraudulently, or beyond its authorized scope, or with gross incompetence or with gross negligence on a particular occasion of negligence on repeated occasions in violation of 243 CMR 1.03(5)(a)(3). The SOA also alleged that the Respondent lacked good moral character and engaged in conduct that undermines the public confidence in the integrity of the medical profession. Levy v. Board of Registration in Medicine, 378 Mass. 519 (1979); Raymond v. Board of Registration in Medicine, 387 Mass. 708 (1982). The SOA charged that the Respondent's medical license had been revoked by the Medical Board of California (California Board) after it found that the Respondent had violated numerous provisions of that state's medical practice action including those governing grossly negligent conduct, repeatedly negligent conduct and incompetent conduct, when she provided vaccine exemptions for eight juvenile patients. The SOA was also referred to the Division of Administrative Law Appeals on September 8, 2022.

The Respondent filed her Answer on October 20, 2022, attaching several documents concerning her discipline by the California Board. In her Answer, the Respondent argued that the Board should not discipline her as there were several issues with the proceeding before the California Board and the discipline by the California Board was being appealed to the California Sacramento County Superior Court.

Following the pre-hearing conference held on November 15, 2022, the Respondent filed several letters with the Division of Administrative Law Appeals (DALA) seeking relief or orders

from DALA. The Administrative Magistrate, John G. Wheatley, found that these requests for relief generally fell into five categories: Motion to Stay Proceedings & Request for Reasons for Denying Stay; Motion to Dismiss; Motion to Strike; Motion to Postpone Dispositive Motions and to Compel Production of Documents and Request for Legal Authority for Purported RSVP Requirement. On December 2, 2022, the Magistrate denied these motions. As for the Motion to Stay Proceedings, the Magistrate stated that the Board had indicated that it would include legal authority in its Motion for Summary Decision in support of its argument that a pending appeals of a license revocation by another state's medical board does not prevent the Massachusetts Board from taking reciprocal disciplinary action against a physician's Massachusetts medical license. The Magistrate emphasized that this denial was without prejudice to the Respondent's raising the same argument in any opposition to the Motion for Summary Decision. The Magistrate rejected the Motion to Dismiss for lack of subject matter jurisdiction as he found that "[t]he prosecution of disciplinary actions against physicians licensed in Massachusetts rests squarely within the Board's jurisdictions." He further stated that the Board need not have jurisdiction over the writing of childhood vaccine medical exemptions under California law in order to take disciplinary action here nor does it need to relitigate the factual basis for the California Board's disciplinary decision. Haran v. Board of Registration in Medicine, 398 Mass. 571, 575 (1986). Likewise, the Magistrate denied the Motion to Strike on the basis of "wrong facts" and "being highly prejudicial" as not being a valid basis for a motion to strike pursuant to 801 CMR 1.01(7)(c). The Magistrate rejected the Motions to Continue and to Compel, without prejudice, for lack of detail and inadequate justification. Finally, the Magistrate denied the Request for Legal Authority for Purported RSVP Requirement on the basis that he did not understand what the Respondent was seeking.

On November 30, 2022, Complaint Counsel filed a Motion for Summary Decision,¹ On December 13, 2022, the Respondent filed ten "urgent" motions, including three Motions to Dismiss, two Motions addressing discovery matters, a Motion to Stay, a Motion to Strike allegations in the SOA, as well as a Motion to Quash Board's Motion for Summary Decision.² The latter motion was based on alleged violations of Superior Court Rule 9A(b)(5). On December 16, 2022, Complaint Counsel filed an Objection to Respondent's Urgent Motions, requesting, in part, that she be given leave to await the Respondent's Opposition to and the Magistrate's ruling on the Motion for Summary Decision before addressing the Respondent's Urgent Motions. On December

¹ When a Party is of the opinion that there is no genuine issue of fact relating to one or more of the claims, he may move for summary decision as to the claim(s). 801 CMR 1.01(7)(h).

² A Motion to Show Cause why Board Filed to Communicate and a Motion to Show Cause why Board Breached Promise to Stay were also filed.

19, 2022, the Respondent filed a Response to the Objection to Respondent's Urgent Motions. She also filed, on January 3, 2023, a Motion for DALA to Vacate the January 17, 2023 Date for Respondent to respond to the Motion for Summary Decision and a Motion for DALA to Compel Complaint Counsel to Respond to three sets of Discovery.

On January 10, 2023, the Administrative Magistrate issued an Order on the twelve motions of the Respondent that were outstanding. He deemed six of the motions to be similar to those that he had previously denied and determined that the further arguments raised by the Respondent did not warrant a different outcome. He also denied the Motion to Quash the Motion for Summary Decision as the Respondent cited the Rules of the Superior Court which do not apply to proceedings before DALA. The Magistrate also denied the Respondent's discovery motions as they were seeking materials "that go far beyond the issues that are before DALA...." The Motions to Show Cause were denied as the Magistrate declined "to interject in the parties' external communications in the manner requested by the respondent." The Magistrate allowed the Motion to Vacate the deadline for responding to the Motion for Summary Decision, in part, and extended the deadline until January 31, 2023.³

On February 24, 2023, the Administrative Magistrate issued a Recommended Decision ruling on the Motion for Summary Decision, and ruling, too, on the merits of the Board's SOA charges. On March 24, 2023, the Respondent filed Objections to the Recommended Decision, as well as a request to DALA to withdraw that Recommended Decision.⁴ The Board determines that the Objections are limited to issues fully and adequately addressed by the Magistrate in the Recommended Decision.⁵ On May 4, 2023, Complaint Counsel submitted a Memorandum on Disposition.

The Board has reviewed the Recommended Decision, the Objection, and the Memorandum on Disposition. On the basis of its review, the Board adopts the Recommended Decision, which is attached hereto and incorporated by reference.

³ On January 12, 2023, the Respondent filed further discovery requests.

⁴ This request, which the Magistrate treated as a Motion for Reconsideration, was denied April 4, 2023.

⁵ The Board has noted the Respondent's Objections and has provided an adequate statement of reasons for its decision; the Board is not required to answer each specific objection in its decision. *Arthurs v. Board of Registration in Medicine*, 383 Mass. 289, 418 N.E.2d 1236 (1981).

Discussion

The Magistrate granted summary decision in this matter and determined that the allegations in the SOA have been proven. The Magistrate, relying on the California Board's findings, determined that the Respondent issued immunization exemptions to eight children for improper reasons and without completing appropriate examinations. He analyzed the statutory authority for the Respondent's discipline in California for "gross negligence" and "repeated negligence" and found them analogous to the provisions of G.L. c. 112, sec. 5(c) and 243 CMR 1.03(5)(a)(3), under which a physician may be disciplined for "gross negligence on a particular occasion or negligence on repeated occasions." He also noted that Massachusetts also requires certain immunizations for children entering school, absent a religious exception, or a physician's certification that he has "personally examined such child" and believes the child's health would be endangered by the immunization. G.L. c. 76, sec 15. The Magistrate concludes that the Respondent is therefore subject to reciprocal discipline in Massachusetts based on the discipline imposed by the California Board. See Ramirez v. Board of Registration in Medicine, 441 Mass. 479 (2004) and Anusavice v. Board of Registration in Dentistry, 451 Mass 786, 798 (2008). In adopting the Recommended Decision, the Board endorses the Magistrate's conclusions finding the basis for the California discipline to be similar to that for which a physician may be disciplined pursuant to Massachusetts law. When there is no significant difference between another state's reasons for discipline and grounds for discipline in Massachusetts, the doctrine of collateral estoppel prevents physicians from relitigating the underlying facts in Massachusetts. Haran v. Board of Registration in Medicine, *supra*.

The Board may impose any sanction consistent with its policies and precedent and based on the out-of-state fact, not the out-of state sanction. See In the Matter of Robert Schlossman, M.D., Adjudicatory No. 85-12-RO (Final Decision & Order November 5, 1986). Nonetheless, the Board notes that the California Board imposed a revocation of the Respondent's license only after it found that the Respondent's conduct was "egregious" and that it "posed a serious risk to her patients' health and the public health."

Similar to the California Board, this Board has an obligation to protect the public health, safety and welfare. Levy v. Board of Registration in Medicine, *supra*. When determining the appropriate sanction, the Board takes into consideration the degree of deviation from the standard of care, the number of patients involved, and mitigating circumstances. In the Matter of Ernest Osei-Tutu, M.D., Adjudicatory Case No. 2007-04 (Final Decision & Order, February 25, 2009) Where there has been substantial deviation from the standard of care and multiple patients involved, the Board frequently had

determined that revocation is the appropriate sanction. Id. See also In the Matter of Suzanne Rothchild, Adjudicatory Case Nos. 2006-021 & 2008-02 (Final Decision & Order July 16, 2013), In the Matter of Viorel Boborodea, M.D., Adjudicatory Case No. 04-61-DALA (Final Decision & Order March 15, 2006) and In the Matter of Sunil R. Lahiri, M.D., Adjudicatory Case No. 94-33-DALA (Final Decision & Order December 28, 1994) Where there is a less serious deviation from the standard of care, but repeated acts of negligence and more than one patient involved, the Board frequently has determined that suspension from practice is the appropriate sanction, with return to practice conditioned upon entry into a monitoring agreement. See In the Matter of N. Raj Birudavol, M.D., Adjudicatory Case No. 02-16-DALA (Final Decision & Order July 21, 2004).

The Respondent has had opportunity to present mitigating evidence before the Board makes its discipline. She has not done so. However, the Board takes notice of supportive affidavits which are attached to her Answer. The Board is also aware that the Respondent has appealed the California Board's discipline. However, the Board is not required to wait until the physician has exhausted her appellate options before it can take action against her license to practice medicine. In the Matter of Russel Aubin, D.O., Adj. Case No. 2006-007 (Partial Final Decision January 10, 2007)⁶

Sanction

There is no dispute that then Respondent was disciplined for "gross negligence" and "repeated negligence" by the California Board and that these basis for discipline are similar to the provisions of G.L. c. 112, sec. 5(c) and 243 CMR 1.03(5)(a)(3), under which a physician may be disciplined for "gross negligence on a particular occasion or negligence on repeated occasions." The California Board found that the Respondent's conduct was "egregious" and that it "posed a serious risk to her patients' health and the public health." Similar to the California Board, this Board has an obligation to protect the public health, safety and welfare. Levy v. Board of Registration in Medicine, *supra*. Therefore, this Board hereby REVOKES the Respondent's license to practice medicine.

The Respondent shall provide a complete copy of this Final Decision and Order, with all exhibits and attachments within ten (10) days by certified mail, return receipt requested, or by hand delivery to the following designated entities: any in- or out-of-state hospital, nursing home,

⁶ See e.g., Board of Registration in Medicine v. Greineder, Docket No.: RM-00-238 (Mass. Div. of Admin. Law App. August 27, 2001) (allowing motion for summary decision where physician was in the process of appealing his conviction for homicide); Board of Registration in Medicine v. Mukherjee, Docket No.: RM-07-247 (Mass. Div. of Admin. Law App., July 17, 2007)(denying physician's motion to stay administrative proceeding while he awaited the results of his criminal appeal).

clinic, other licensed facility, or municipal, state, or federal facility at which she practices medicine; any in- or out-of-state health maintenance organization with whom she has privileges or any other kind of association; any state agency, in- or out-of-state, with which she has a provider contract; any in- or out-of-state medical employer, whether or not she practices medicine there; the state licensing boards of all states in which she has any kind of license to practice medicine; the Drug Enforcement Administration - Boston Diversion Group; and the Massachusetts Department of Public Health Drug Control Program. The Respondent shall also provide this notification to any such designated entities with which she becomes associated for the duration of the revocation. The Respondent is further directed to certify to the Board within ten (10) days that she has complied with this directive. The Board expressly reserves the authority to independently notify, at any time, any of the entities designated above, or any other affected entity, of any action it has taken. The Respondent has the right to appeal this Final Decision and Order within thirty (30) days, pursuant to G.L. c. 30A, §§14 and 15, and G.L. c. 112, § 64.

Date: July 13, 2023

A handwritten signature in black ink, appearing to read 'Julian Robinson', written over a horizontal line.

Julian Robinson, M.D.

Chair