

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
1 Congress Street, 11th Floor
Boston, MA 02114
www.mass.gov/dala

Board of Registration in Medicine,
Petitioner

v.

Docket No. RM-14-309

Thomas M. Horiagon, M.D.,
Respondent

Appearance for Petitioner:

James Paikos, Esq.
Board of Registration in Medicine
200 Harvard Mill Square
Suite 300
Wakefield, MA 01880

Appearance for Respondent:

Michael J. Racette, Esq.
Morrison Mahoney
250 Summer Street
Boston, MA 02210

Administrative Magistrate:

Kenneth Bresler

SUMMARY OF RECOMMENDED DECISION

The Board of Registration in Medicine (BRM) may proceed against Dr. Thomas M. Horiagon on the basis of discipline against him in Colorado, as laid out in the Statement of Allegations, but not at this time on the basis of discipline against him in four other states, which the Statement of Allegations did not allege.

RECOMMENDED DECISION

The respondent, Thomas M. Horiagon, M.D., now challenges one thing: whether the petitioner, the Board of Registration in Medicine (BRM), may proceed against him on the basis of discipline against him in Iowa, California, Pennsylvania, and Indiana. (Tr. 25-26.)

I held a hearing on March 12, 2015, which has been transcribed. The sole witness was Robert M. Bouton, a BRM investigator. Dr. Horiagon was not present.

I have accepted into evidence 16 exhibits. Dr. Horiagon made a closing argument in lieu of a post-hearing brief. The BRM submitted a brief.

Findings of Fact

1. On June 11, 2014, BRM issued a Statement of Allegations with this factual allegation: “The Respondent has been disciplined by the Colorado Medical Board (Colorado Board) on multiple occasions.” The Statement of Allegations incorporated the Colorado Board’s orders as Attachments A, B, and C.

2. Attachment A was a Stipulation and Final Agency Order that the Colorado Board approved on February 21, 2014. In that order, Dr. Horiagon admitted and an Inquiry Panel of the Colorado Board found that Dr. Horiagon was licensed to practice medicine in Colorado; he had a medical condition that was being treated and monitored and that kept him from performing medical services skillfully and safely; and Dr. Horiagon engaged in unprofessional conduct, including his treatment of Patients A, B, and C. Dr. Horiagon received probation for five years. (Statement of Allegations, Attachment A, pp. 2-4.)

3. Attachment B was an Interim Cessation of Practice Agreement that the Colorado Board approved on July 24, 2012. An Inquiry Panel of the Colorado Board found reasonable grounds to believe that the public health, safety, or welfare required emergency action. The

parties agreed on an interim cessation of Dr. Horiagon's right to practice, instead of summary suspension, which was stayed, pending further evaluation and investigation of Dr. Horiagon to determine if further actions were warranted. Dr. Horiagon agreed not to perform any act requiring a Colorado Board license while the agreement was in effect. The duration of the interim agreement was until the parties reached a final disposition of the case or an order for summary suspension entered. (Statement of Allegations, Attachment B.)

The agreement provided:

Nothing in this Interim Agreement shall constitute disciplinary action, a finding that the Respondent has engaged in unprofessional conduct, or any admission by Respondent of unprofessional conduct.

(Statement of Allegations, Attachment B, p. 2.)

4. Attachment C was the Second Interim Practice Agreement, which the Colorado Board approved on September 18, 2012. This agreement resembled the previous one, but allowed Dr. Horiagon to work as a physician advisor for a private company, advising case managers about compliance with Medicare rules. Dr. Horiagon was not permitted to treat patients clinically. The second agreement contained a provision that nothing in it constituted disciplinary action.

(Statement of Allegations, Attachment C.)

5. At the December 15, 2014 prehearing conference, the sole issue was whether some actions by the Colorado Board constituted discipline against Dr. Horiagon. (Joint Motion to Cancel, or in the Alternative, to Continue January 26, 2015 Pre-Hearing Conference.)

6. By January 23, 2015, the parties had agreed that the Colorado Board had disciplined Dr. Horiagon. (Joint Motion; Tr. 8.)

7. At the hearing, the sole issue was whether BRM could introduce exhibits 10 through 16, which are unrelated to the Colorado Board's discipline. (Tr. 8-9.)

8. I accepted exhibits 10 through 16 into evidence without ruling on their relevance. (Tr. 14-15.)

9. Exhibit 10 is a consent agreement between Dr. Horiagon and the Iowa Board of Medical Examiners, dated April 26, 2007. Exhibit 11 is a press release from the Iowa Board, dated April 27, 2007.

10. Exhibit 12 is an Order Issuing Public Letter of Reprimand from the Medical Board of California against Dr. Horiagon; the order is dated July 24, 2009. Exhibit 13 is the actual Public Letter of Reprimand, dated May 28, 2009.

11. Exhibit 14 is a Final Order by the Pennsylvania State Board of Medicine against Dr. Horiagon, effective April 27, 2010.

12. Exhibit 15 is Stipulated Findings of Fact, Stipulated Conclusions of Law, and Order between the Indiana Medical Licensing Board and Dr. Horiagon.

13. Exhibit 16 is a Practitioner Profile from the Federation of State Medical Boards, summarizing various state medical boards' actions against Dr. Horiagon.

Discussion

The BRM's brief seems to rely on Dr. Horiagon's positions in his answers to the Statement of Allegations. Dr. Horiagon modified his positions since filing his answers, before and during the hearing. He no longer contests that the BRM may proceed against him as it proposed in its Statement of Allegations. The BRM may so proceed. However, the BRM may not proceed at this time against Dr. Horiagon on the basis of his discipline in Iowa, California, Pennsylvania, and Indiana, which is not in the Statement of Allegations.

On June 11, 2014, the BRM filed a Statement of Allegations relating to Dr. Horiagon's discipline in Colorado. On March 12, 2015, the BRM introduced exhibits about Dr. Horiagon's

discipline in Iowa, California, Pennsylvania, and Indiana.

The parties did not reveal when Dr. Horiagon learned that the BRM planned to proceed against him on the basis of his discipline in Iowa, California, Pennsylvania, and Indiana. The BRM did not explain why it had not included in its Statement of Allegations Dr. Horiagon's discipline in those other states. The BRM did not amend its Statement of Allegations, even orally, and did not state that it wished to proceed against Dr. Horiagon on the basis of discipline against him in those other states. I do not have before me even an oral request from the BRM; I have exhibits from Iowa, California, Pennsylvania, and Indiana and an implicit request from the BRM that it may discipline Dr. Horiagon based on those exhibits.

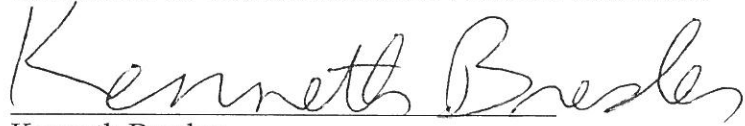
The Statement of Allegations did not need to have the precision of a criminal charging document, but Dr. Horiagon did need sufficient notice of the BRM's grounds for attempting to discipline him. *Langlitz v. Board of Registration of Chiropractors*, 396 Mass. 374, 377 (1985). Nonetheless, two additional problems (besides the implicit nature of the request) remain with the BRM's wish to proceed against Dr. Horiagon on the basis of discipline against him in Iowa, California, Pennsylvania, and Indiana. One, the parties did not reveal when Dr. Horiagon learned that the BRM planned to so proceed. I cannot say that he had sufficient notice. Two, while a Statement of Allegations need not be as precise an indictment, neither can the variation between a Statement of Allegations and what the BRM tried to prove in the hearing be vast. In this case, the variation was too great.

Conclusion and Order

The BRM may discipline Dr. Horiagon as it proposes in its Statement of Allegations on the basis of the discipline against him in Colorado. I do not bar the BRM from initiating proceedings against Dr. Horiagon on the basis of discipline against him in Iowa, California,

Pennsylvania, and Indiana.

DIVISION OF ADMINISTRATIVE LAW APPEALS

A handwritten signature in cursive script, reading "Kenneth Bresler". The signature is written in dark ink and is positioned above a horizontal line.

Kenneth Bresler
Administrative Magistrate

Dated: **JUN - 4 2015**