

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Board of Registration in Medicine,

Petitioner,

Docket No.: RM-22-0421

v.

Mary Kelly Sutton, M.D.,

Date: **FEB 24 2023**

Respondent.

Appearance for Petitioner:

Rachel N. Shute, Esq.
Board of Registration in Medicine
178 Albion Street, Suite 330
Wakefield, MA 01880

Appearance for Respondent:

Mary Kelly Sutton, M.D., *pro se*
P.O. Box 885
North Attleboro, MA 02760

Administrative Magistrate:

John G. Wheatley

RECOMMENDED DECISION

On September 8, 2022, the petitioner, Board of Registration in Medicine (Board), issued a statement of allegations ordering the respondent, Mary Kelly Sutton, M.D., to show cause why the Board should not discipline her because she was disciplined by the Medical Board of California (MBC). The Board referred the matter to the Division of Administrative Law Appeals

(DALA) for recommended findings of fact and necessary conclusions of law. Dr. Sutton filed an answer to the Board's statement of allegations on October 20, 2022.

On November 30, 2022, the Board filed a motion for summary decision. In support of its motion, the Board attached documents from the proceedings in California as exhibits 1 and 2, which I have separated into exhibits 1A-1F and 2A-2C as identified below. In addition to those documents, I have marked as exhibits the Board's statement of allegations, Dr. Sutton's answer to the Board's statement of allegations, several additional documents from the California proceedings that Dr. Sutton attached to her answer, and medical license verification for Dr. Sutton from the Board and MBC. Collectively, I have entered the following exhibits into the record for summary decision:

Ex. 1:

- A. MBC Denial by Operation of Law of Petition for Reconsideration (2nd)
- B. MBC Order Granting Stay (Mar. 15, 2022)
- C. MBC Denial by Operation of Law of Petition for Reconsideration (1st)
- D. MBC Order Granting Stay (Dec. 22, 2021)
- E. MBC Decision (Dec. 8, 2021)
- F. MBC Accusation (Sept. 15, 2020)

Ex. 2:

- A. Superior Court Order on Application for Peremptory Writ (Mar. 14, 2022)
- B. Superior Court Judgment (Mar. 14, 2022)
- C. Superior Court Peremptory Writ of Mandate (Mar. 14, 2022)

Ex. 3: Board's Statement of Allegations and Order of Reference (Sept. 8, 2022)

Ex. 4: Dr. Sutton's Answer to the Statement of Allegations (Oct. 20, 2022)

Ex. 5: Dr. Sutton's Petition for Reconsideration to MBC (Feb. 4, 2022)

Ex. 6: Exhibits in Support of Dr. Sutton's Petition for Reconsideration

Ex. 7: Dr. Sutton's Petition for Peremptory Writ of Mandate (Apr. 22, 2022)

Ex. 8: Dr. Sutton's Petition for Peremptory Writ of Mandate (May 24, 2022)

Ex. 9: Massachusetts Physician License Verification for Dr. Sutton

Ex. 10: California Licensing Details for Dr. Sutton

FINDINGS OF FACT

Based on the evidence in the record, I find the following facts to be undisputed:

1. Dr. Sutton graduated from the University of Missouri School of Medicine in 1971. She has been licensed to practice medicine in Massachusetts under certificate number 263141 since 2015. (Ex. 9.)
2. On September 15, 2020, the Executive Director of MBC brought a complaint against Dr. Sutton, alleging that she was subject to discipline for providing eight children, between 2016 and 2018, with medical exemptions for immunizations otherwise required for entry into school. The complaint raised gross negligence, repeated negligence, and/or incompetence in her care and treatment of those patients as grounds for disciplinary action. (Ex. 1F.)
3. An administrative judge in California's Office of Administrative Hearings heard the matter on June 14-16, 2021. The evidence presented to the hearing officer included the patients' medical records, Dr. Sutton's testimony, and expert opinion testimony from medical experts called by each party.¹ (Ex. 1E.)

¹ Dr. Deborah Lehman, Dr. LeTrinh Hoang, Dr. Andrew Zimmerman, and Dr. James Neunschwander.

4. After hearing, the administrative judge issued a proposed decision, dated September 28, 2021, finding that Dr. Sutton's issuance of the immunization exemptions to the eight patients at issue constituted gross negligence and repeated negligence (but not incompetence), which the judge concluded were grounds for discipline under California Business and Professions Code section 2234(b)&(c). The judge was persuaded by MBC's testifying expert, who opined that Dr. Sutton breached the standard of care by issuing medical exemptions that did not comply with applicable guidelines for vaccinations, and by issuing the exemptions without examining the patients, obtaining their medical records, or contacting their primary care physicians. (Ex. 1E.)
5. The judge found that Dr. Sutton's conduct was "egregious" and that it "posed a serious risk to her patients' health and the public health." She concluded that revocation of Dr. Sutton's medical license was appropriate discipline under the circumstances. (Ex. 1E.)
6. On December 8, 2021, the MBC adopted the administrative judge's proposed decision. (Ex. 1E.)
7. On December 22, 2021, the MBC granted a stay of execution of the decision to February 4, 2022, to allow time for Dr. Sutton to file a petition for reconsideration. (Ex. 1D.)
8. On February 4, 2022, Dr. Sutton filed a petition for reconsideration with MBC, arguing that the judge applied the incorrect standard of care, that the findings were against the weight of the evidence, that further document production by MBC was necessary for her defense, and that the action was time-barred by the statute of limitations. (Ex. 5.)
9. On March 15, 2022, MBC granted a further stay of execution to March 25, 2022, "solely for the purpose of allowing the Board time to review and consider the Petition for Reconsideration." (Ex. 1B.)

10. No action was taken on Dr. Sutton's petition for reconsideration before the stay of execution expired, and the MBC therefore deemed her petition "denied by operation of law." (Ex. 1A.)
11. MBC revoked Dr. Sutton's medical license effective March 25, 2022. (Exs. 1E, 10.)
12. Dr. Sutton has sought judicial review of the MBC's decision with the California Superior Court by filing a "Petition for Peremptory Writ of Administrative Mandate Pursuant to CCP § 1094.5" on April 22, 2022, and a "Petition for Peremptory Writ of Administrative Mandate Pursuant to CCP §§ 1085 and 1086" on May 24, 2022. (Exs. 7, 8.)
13. On September 8, 2022, the Massachusetts Board issued a statement of allegations against Dr. Sutton alleging that she was disciplined by the MBC and is subject to reciprocal discipline under 243 Code Mass. Regs. § 1.03(5)(a)(12). (Ex. 3.)
14. On October 20, 2022, Dr. Sutton filed an answer to the Board's statement of allegations. Dr. Sutton admits that the MBC revoked her California medical license, but disputes its findings and conclusions as well as the discipline it imposed. (Ex. 4.)

CONCLUSIONS OF LAW

The Board may discipline a physician because of discipline imposed by another State's licensing authority, provided that the reasons for that discipline are "substantially the same" as those that would subject the physician to discipline in Massachusetts. 243 Code Mass. Regs. § 1.03(5)(a)(12). When there is no significant difference between another state's reasons for discipline and the grounds for discipline cognizable in Massachusetts, the doctrine of collateral estoppel prevents physicians from relitigating the underlying facts or questions decided against them in the foreign jurisdiction. *Haran v. Board of Registration in Med.*, 398 Mass. 571, 575 (1986); *Matter of Meyers*, Adjudicatory Case No. 2012-027 (BORIM May 22, 2013). In reciprocal discipline cases, therefore, the issue is whether another licensing authority has

disciplined the physician for reasons substantially similar to those provided under Massachusetts law, not whether the other licensing authority's findings are correct.² *Board of Registration in Med. v. Merchia*, RM-18-0020, Recommended Decision at 5 (DALA Aug. 8, 2019) ("The matter before the Division of Administrative Law Appeals is . . . not the underlying facts upon which the other jurisdiction disciplined the licensee, but rather the other Board's decision to discipline and whether the grounds for the discipline are substantially similar to any detailed in G.L. c. 112, § 5 or 243 CMR 1.03(5).").

There is no dispute that Dr. Sutton was disciplined in California by the MBC. The MBC disciplined her for "gross negligence" and "repeated negligence" based on its determination that she issued immunization exemptions to eight children for improper reasons and without completing appropriate examinations. The MBC cited § 2234 of the California Business and Professions Code as the legal basis for discipline, which provides:

"The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

....

(b) Gross negligence.

(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts."

² Dr. Sutton argues against application of collateral estoppel on the ground that the MBC did not meet its burden of proof to establish either negligence or gross negligence and did not complete a sufficient investigation. Although she may disagree with MBC's view of the evidence, these evidentiary considerations do not justify relitigating the underlying facts. Dr. Sutton does not, for example, claim lack of notice or that she was denied a right to a hearing by the MBC. See *Ramirez v. Board of Registration in Med.*, 441 Mass. 479, 484 (2004) (physician did not challenge authenticity of order, contend he was denied notice or right to a hearing, or argue that he was not disciplined by another state).

This statute is analogous to the provisions of G. L. c. 112, § 5(c) and 243 Code Mass. Regs. § 1.03(5)(a)(3), under which a physician may be disciplined for “gross negligence on a particular occasion or negligence on repeated occasions.” I note that Massachusetts also requires certain immunizations for children entering school, absent religious exemption or a physician’s certification indicating that the physician has “personally examined such child” and believes the child’s health would be endangered by the immunization. See G. L. c. 76, § 15. The MBC’s reasons for imposing discipline in California, therefore, are substantially similar to grounds for imposing discipline on a physician under Massachusetts law. Accordingly, Dr. Sutton is subject to reciprocal discipline in Massachusetts based on the discipline imposed by the MBC.

I acknowledge that Dr. Sutton has sought judicial review of the MBC’s decision, which is pending in California Superior Court. The MBC’s disciplinary decision is a final adjudication, however, and the Board may therefore proceed with reciprocal discipline notwithstanding her pending appeal in California. See, e.g., *Matter of Aubin*, Adjudicatory Case No. 2006-007 (BORIM Jan. 10, 2007) (Rhode Island medical board’s decision was final despite further appeal and Board could proceed with reciprocal discipline). If her appeal is successful, Dr. Sutton may seek a redetermination or modification of any sanctions imposed by the Board based on the outcome of her appeal in California.

For the forgoing reasons, the Board’s motion for summary decision is granted. I note that Dr. Sutton has an opportunity to present mitigating evidence before the Board makes its decision on discipline. She has, for example, attached some supportive letters to her answer to the Board’s statement of allegations. If she has further mitigating evidence, she may present it to the Board for consideration.

CONCLUSION

I recommend that the Board impose upon Dr. Sutton the discipline it deems appropriate considering the findings and conclusions of the Medical Board of California in its disciplinary decision.

DIVISION OF ADMINISTRATIVE LAW APPEALS



John G. Wheatley
Administrative Magistrate