

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Board of Registration in Medicine,
Petitioner

Docket No. RM-17-054

v.

Boris O. Bergus, M.D.,
Respondent

Appearance for Petitioner:

Karen A. Robinson, Esq.
200 Harvard Mill Square, Suite 330
Wakefield, Massachusetts 01880

Appearance for Respondent:

Jennifer Boyd Herlihy, Esq.
75 Federal Street, 10th Floor
Boston, Massachusetts 02110

Administrative Magistrate:

Bonney Cashin

Summary of Recommended Decision

Respondent's discipline by the Rhode Island Board of Medical Licensure and Discipline for misrepresenting his credentials and for advertising his medical business in a manner intended to deceive or that would tend to deceive the public, undermines public confidence and warrants appropriate disciplinary action by the Massachusetts Board of Registration in Medicine because his past discipline calls into question his ability to practice medicine.

RECOMMENDED DECISION

Pursuant to G.L. c. 112, §§ 5, 61, and 62 and 243 CMR 1.03(5), on January 27, 2017, the Petitioner, the Massachusetts Board of Registration in Medicine ("Board" or

"Massachusetts Board"), issued a Statement of Allegations ordering the Respondent, Boris O. Bergus, M.D., to show cause why he should not be disciplined for violations of Board regulations and relevant statutes, as a result of his discipline in another jurisdiction.

On January 25, 2018, the parties submitted a Joint Pre-Hearing Memorandum in which the Respondent admitted to the Board's allegations numbered 1-4.¹ Consequently, the facts alleged by the Board are not in dispute.

The parties agreed to offer three exhibits, which I entered into evidence.

Ex. 1 Rhode Island Board of Medical Licensure and Discipline Consent Order, ratified October 4, 2013.

Ex. 2 Board Letter to the Respondent, dated July 6, 2009.

Ex. 3 Affidavit of the Boris O. Bergus, M.D., with attachments, sworn to November 2017.

The Petitioner Board filed a Motion for Summary Decision on March 1, 2018.

The Respondent filed a Brief in Support of Recommended Decision on March 9, 2018.

The record closed upon receipt of the Respondent's brief.

UNDISPUTED FACTS

The following facts are not in dispute. Numbers 1-4 are repeated from the Statement of Allegations, with minor edits for clarity.

1. [Boris O. Bergus, M.D.] was born [in] 1962. He graduated from Harvard Medical School in 1988. He has been licensed to practice medicine in Massachusetts since 1991 under certificate number 79021. He lists his practice specialties as emergency medicine, general surgery, phlebology, and cosmetic surgery. He is affiliated with

¹ Allegation No. 5 calls for a legal conclusion.

Marlborough Hospital. Dr. Bergus holds medical licenses in Illinois, Maryland, New Hampshire, New Jersey, Rhode Island, and Virginia.

2. The Rhode Island Department of Health, Board of Medical Licensure and Discipline ("Rhode Island Board") disciplined Dr. Bergus.

3. Specifically, the Rhode Island Board disciplined [Dr. Bergus] for misrepresenting his credentials, including but not limited to, false claims that:

- a. he was in a program at Children's Hospital Boston from July 1991 to June 1993;
- b. he participated in a residency at Brown University for general surgery from 1989 to 1992;
- c. he was a board certified phlebologist in 1997; and
- d. he was a board certified cosmetic surgeon.

4. The Rhode Island Consent Order, [which went into effect October 4, 2013,]...sets forth the basis for [Dr. Bergus's] discipline in Rhode Island....

5. Dr. Bergus admitted to misrepresenting his credentials and to advertising his medical business in a manner either intended to deceive, or that would tend to deceive, the public in violation of Rhode Island General Laws §5-37-5.1(2). Pursuant to the Rhode Island Consent Order, he was reprimanded and placed on probation for two years, and he agreed: to pay a \$10,000 administrative fee to the Board; to attend the Professional/Problem Based Ethics ("PROBE") course and to follow the recommendations of the PROBE staff; and to retain and cooperate with Affiliated Monitors, for the purpose of reviewing for accuracy all credentialing applications and all advertising and media communications under his control. (Ex. 1).

6. Dr. Bergus completed his probationary period October 4, 2015, and he fulfilled all requirements under the Rhode Island Consent Order with no interruption in his practice. (Ex. 3).

7. In a letter dated July 6, 2009 and following receipt of a complaint, the Massachusetts Board had instructed Dr. Bergus to amend his Physician Renewal Application ("Application") and Physician Profile ("Profile") to remove the designation of board-certification in emergency medicine from the American Board of Medical Specialties ("ABMS") portions of both his Application and Profile. The Board allowed Dr. Bergus to list his American Board of Physician Specialties ("ABPS") certification in the Honors and Awards section of his Profile. The Board closed the complaint, but reserved the right to reopen it if Dr. Bergus violated any Board statute, regulations or policies in the future. (Ex. 2).

8. One of the reasons for the Rhode Island discipline, and the reason Dr. Bergus received the letter from the Massachusetts Board, concerned his representation of board certification by ABMS as opposed to ABPS. (Exs. 1, 2).

9. Dr. Bergus is certified by ABPS in Emergency Medicine. He is not certified by the ABMS. (Ex. 3).

10. At least for rates applicable to the 2013 and 2014 calendar years, physicians eligible to receive "Section 1202" rates from MassHealth for primary care services include those in a subspecialty recognized by either the ABMS or ABPS. (Ex. 3).

11. On January 6, 2017, the Massachusetts Board referred this matter to the Division of Administrative Law Appeals for recommended Findings of Fact and necessary Conclusions of Law.

12. On February 17, 2017, Dr. Bergus filed an answer to the Statement of Allegations.

CONCLUSION AND RECOMMENDATION

The Massachusetts Board is authorized to discipline physicians in the Commonwealth of Massachusetts by G. L. c. 112, § 5. *Levy v. Bd. of Reg. in Med.*, 378 Mass. 519 (1979); *Sugarman v. Bd. of Reg. in Med.*, 422 Mass. 338, 342-344 (1996). To protect the image of the medical profession, and to maintain the public's confidence in a physician's professional judgment, the Board may discipline a physician if he has engaged in conduct that undermines public confidence in the medical profession. *Raymond v. Bd. of Reg. in Med.*, 387 Mass. 708, 713 (1982) (disciplining physicians for lack of good moral character and for conduct that undermines public confidence in integrity of profession is reasonably related to promotion of public health, welfare and safety).

The Board has the authority to reciprocally discipline a physician if he has "been disciplined in another jurisdiction in any way by the proper licensing authority for reasons substantially the same as those set forth in M.G.L. c. 112, § 5(c) and 243 CMR 1.03(5)." 243 CMR 1.03(5)(a)(12). Under these circumstances, the Board does not need to re-litigate the underlying facts that resulted in the out-of-state discipline. *Ramirez v. Bd. of Reg. in Med.*, 441 Mass. 479 (2004).

The Rhode Island Board disciplined Dr. Bergus for both misrepresenting his credentials and for advertising his medical business in a manner either intended to deceive, or that would tend to deceive, the public in violation of Rhode Island General Laws §5-37-5.1(2). The conduct for which the discipline was imposed in Rhode Island is

substantially the same as that described under 243 CMR 1.03(5)(a)(10) for "[p]racticing medicine deceitfully, or engaging in conduct which had the capacity to deceive or defraud." 243 CMR 1.03(5)(a)(10).

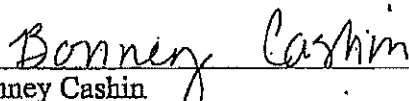
Dr. Bergus admitted to the Board's allegations. No material factual issues are in dispute. Therefore, the Board may discipline Dr. Bergus. When it considers the appropriate discipline to impose, Dr. Bergus argues that the Board should consider several mitigating factors. These factors demonstrate, he contends, that discipline that would restrict his license to practice medicine is not warranted. First, regarding his prior discipline, Dr. Bergus accepted the jurisdiction of the Rhode Island Board, admitted his error, and agreed to be reprimanded. Second, he completed all probationary requirements, which included paying an administrative fee to the Rhode Island Board, attending an ethics course and following the staff recommendations, and retaining and cooperating with Affiliated Monitors in its review of the accuracy of all credentialing applications, advertisements, and media communications. Third, Dr. Bergus completed the required probationary period over two years ago and is licensed in good standing in Rhode Island. Fourth, he has remained free from complaints or disciplinary actions in Rhode Island since entering into the Consent Order. Finally, he has had no interruption in his practice of medicine.

One of the reasons for his Rhode Island discipline and the letter from the Massachusetts Board, dated July 6, 2009, is that Dr. Bergus listed on both his Application and Profile that he was ABMS-certified in emergency medicine. For a physician to receive "Section 1202" rates from MassHealth for primary care services, he needs to have a recognized subspecialty from an approved certifying organization. The Massachusetts

Board told Dr. Bergus to remove the ABMS certification in emergency medicine from his Application and Profile, but allowed him to list his ABPS certification in emergency medicine on his Profile in the Honors and Awards Section. ABPS is now recognized by MassHealth as being the same as ABMS for billing purposes, and Dr. Bergus's ABPS certification qualified him for "Section 1202" rates. Dr. Bergus argues that it would be improper for him to be reciprocally disciplined for violating Rhode Island's regulation, when ABPS certification is now recognized by Massachusetts for Medicaid billing purposes. Moreover, the Board allowed him to list ABPS certification in a different section of his Profile, which appears on the Board's website. I note that the Rhode Island Consent Order stated that "CMS Medicaid regulations qualify specialists for higher reimbursement if they are certified by ABMS...or ABPS certification boards..." (Ex. 1.)

Dr. Bergus' misrepresentations of his credentials and advertising his business in a manner either intended to deceive, or that would tend to deceive, the public calls into question his ability to practice medicine and warrants appropriate disciplinary action by the Massachusetts Board. I recommend that the Motion for Summary Decision be allowed and that the Board impose appropriate discipline against Dr. Bergus, after considering the mitigating factors he raised.

DIVISION OF ADMINISTRATIVE LAW APPEALS


Bonney Cashin
Administrative Magistrate

DATED: **AUG - 9 2018**