

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals
14 Summer St., 4th Floor
Malden, MA 02114
(781)397-4700
Fax: (781)397-4720
www.mass.gov/dala

Board of Registration In Medicine,
Petitioner

v.

Marcus Cooper,
Respondent

Docket No: RM-19-0283

SUMMARY OF RECOMMENDED DECISION

There is no genuine dispute that the Respondent was convicted of criminal charges that call into question his ability to practice medicine, demonstrate that he lacks good moral character and constitute conduct that undermines the public confidence in the integrity of the medical profession. Therefore, although his appeal of those convictions is pending, I allow the Petitioner's Motion for Summary Decision and recommend that the Board impose the discipline it believes appropriate after it considers any mitigating factors that the Respondent presents to the Board.

RECOMMENDED DECISION ALLOWING PETITIONER'S MOTION FOR SUMMARY DECISION

I. Procedural history

On May 30, 2019, the Petitioner issued a Statement of Allegations in this case. It also issued an Order to Use Pseudonyms and Impound Identities and Medical Records and referred the matter to this agency. Paragraph 2 of the Statement of Allegations alleged that the Respondent was convicted of photographing an unsuspecting nude or partially nude person in violation of G.L. c. 272, § 105(b) and of disorderly conduct in violation of G.L. c. 272, § 53. On June 6, 2019, DALA acknowledged receipt of the case and on June 11, 2017 issued a Notice of Pre-hearing Conference scheduled for July 9, 2019. At the parties' request, the Pre-hearing Conference was re-scheduled until September 18, 2019.

On September 18, 2019, I held the Pre-hearing Conference. At the conference, the Petitioner filed the Motion for Summary Decision at issue. I ordered the Respondent to file his

Response to the Statement of Allegations on or before October 15, 2019 and his opposition to the Motion for Summary Decision on or before October 22, 2019.

On October 15, 2019, the Respondent filed his Response to the Statement of Allegations. In paragraph 2 of his response, the Respondent admitted that he had been convicted and noted that his “conviction was under appeal.” He also asserted that he had “a good faith expectation of success on the merits.” The Respondent also noted that the charges he had been convicted of were “misdemeanor[s] and not felonies.” In paragraphs 3 and 4 of his Response to the Statement of Allegations, the Respondent admitted that he had been sentenced as a result of the criminal convictions. He alleged that he was appealing an order requiring GPS tracking and had provided a mental health evaluation to the court.

On October 24, 2019, I allowed the Respondent’s assented to Motion to Extend the Time to file his Opposition to the Motion for Summary Decision and, on November 1, 2019, he filed his opposition. The Respondent argues in his opposition that, because he was convicted of misdemeanors and his conviction is under appeal, the Motion for Summary Decision should be denied and discovery deadlines established in this case. After carefully reviewing the arguments of both parties, I disagree and allow the Petitioner’s Motion for Summary Decision.

II. Analysis

801 CMR 1.01 (7)(h) provides:

Motion for Summary Decision.

When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues.

Summary decision in an administrative proceeding is the functional equivalent of summary judgment in a civil proceeding. See *Jack King and National Refrigeration, Inc. v. Office of the Attorney General, Fair Labor Division*, LB-12-367 (DALA Jan. 29, 2014), citing *Caitlin v. Bd. of Registration of Architects*, 414 Mass. 1, 7 (1992); *Calnan v. Cambridge Retirement Bd.*, CR-08-589 (DALA Feb. 17, 2012). Summary decision is appropriate when there are no genuine issues of material fact and the case may be decided as a matter of law. *King, supra*, citing *Caitlin, supra* at 7. A fact is only “material” if it might affect the outcome of the case. *King, supra*, citing *Lockridge v. Univ. of Maine System*, 597 F.3d 464, 469 n.3 (1st Cir. 2010), citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). An issue of material fact is only “genuine” if a fact-finder could reasonably resolve the dispute in favor of either party. *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004).

The Petitioner, as the moving party, has the burden to establish the absence of any genuine issues of material fact. 801 CMR § 1.01(7)(h); *Beatty v. NP Corp.*, 31 Mass. App. Ct. 606, 607 (1991) (evidence “may be in the form of affidavits, depositions, interrogatories, admission and sworn pleadings”). Inferences from these materials must be drawn in the light most favorable to the opposing party. *Beatty*, 31 Mass. App. Ct. at 607. However, a magistrate does not make credibility determinations at the summary decision stage. *Id.* Therefore, if the moving party’s evidence establishes a material fact, the opposing party must in turn “set forth specific facts showing that there is a genuine issue for trial.” Mass. R. Civ. P. 56(e) (“mere allegations or denials” are not sufficient). Absent such countervailing materials from the opposing party, summary decision may properly be granted on the basis of the moving party’s undisputed evidence. *King, supra*; citing *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 715 (1991).

There is no genuine dispute as to the following material facts: On September 1, 2015, the Respondent was accused of trying to take pictures of a woman in a stall located in a woman's restroom at the University of Massachusetts Medical Center. The Respondent denied those accusations. (Respondent's Written Statement, Resp. Ex. A¹). As a result of those accusations, the Respondent was charged and convicted, following a jury trial in the Worcester District Court, of disorderly conduct and of photographing an unsuspecting nude person. He was sentenced on May 24, 2019. (Worcester Dist. Ct. Docket, Pet. Ex. 2). In fact, the Respondent admitted that he was convicted and alleged he had appealed the convictions in his Response to the Statement of Allegations.²

The Board of Registration in Medicine ("Board") may discipline a physician who: "has been convicted of a criminal offense which reasonably calls into question his ability to practice medicine." G.L. c. 112, § 5(g). Using the authority granted it by the Legislature in G.L. c. 112, § 5, the Board adopted 243 CMR 1.03(5)(a)(7). That regulation provides that a "conviction of any crime" may be the basis of a complaint for discipline against a physician. *See Kobrin v. Board of Registration in Medicine*, 444 Mass. 837, 846-47 (2005). In addition, the Supreme Judicial Court has held that the Board may also discipline a physician who lacks good moral character and engages in conduct that undermines the public confidence in the integrity of the medical profession. *See Raymond v. Board of Registration in Medicine*, 387 Mass. 708, 713 (1982); *Levy v. Board of Registration in Medicine*, 378 Mass. 519, 527-28 (1979). There is no genuine issue of material fact

¹ References to "Ex." are to the exhibits attached to the Petitioner's Motion for Summary Decision and Respondent's Opposition.

² On December 5, 2019, the Petitioner's counsel submitted a letter stating that, on information and belief, the Respondent did not appeal his convictions. On the same date, the Respondent's attorney submitted a letter stating that the criminal appeal was filed. On December 6, 2019, the Petitioner's attorney responded to that letter. For purposes of this decision, taking these assertions in the light most favorable to the opposing party, I proceed as though the Respondent has appealed the criminal convictions identified in the statement of allegations. Mass. R. App. Proc. 3(a)(1).

requiring an evidentiary hearing in this case, because there is no dispute that the Respondent was convicted of a crime. *See Kobrin, supra* at 848 (2005).

The Respondent's arguments that he is entitled to an evidentiary hearing, because he was convicted of misdemeanors and because his appeal is pending ignore the law and he cites no authority for either proposition.³ The Legislature did not limit the Board's authority to discipline physicians to those physicians convicted of a felony. "The board has the authority to protect the image of the profession." *Raymond, supra* at 713.

The Respondent understandably does not attempt to argue that his convictions arising from taking photographs of unsuspecting nude or partially nude persons do not call into question his ability to practice medicine, demonstrate that he lacks good moral character, or constitute conduct that undermines the public confidence in the integrity of the medical profession. Good moral character includes "the elements of simple honesty, fairness, respect for the rights of others and for the laws of State and Nation." *See In the Matter of Sherwin H. Raymond, M.D.*, Board of Registration in Medicine, Adj. Case #243, 15 (Memorandum of Decision, July 29, 1981) (quoting *State ex rel. McAvoy v. Louisiana State Board of Medical Examiners*, 238 La. 502, 516 at n.2 (1959).

Likewise it is settled that the fact the Respondent appealed his criminal conviction does not entitle him to an evidentiary hearing. *Board of Registration In Medicine v. Michael Brown, M.D.* DALA RM-07-1080 Recommended Dec. Mar. 1, 2008, Adj. Case No. 2007-052. As the Supreme Judicial Court has noted:

³ I note the Respondent's assertion, contained in his attorney's letter dated December 5, 2019, that a hearing officer continued the summary suspension hearing concerning the Respondent's license as a massage therapist and/or operate a massage facility, but I do not find the assertion pertinent to this case, which involves the discipline of a physician and the statutes and regulations associated with such a proceeding.

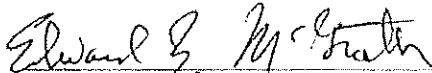
In Massachusetts, the rendering of a guilty verdict and the resulting imposition of a sentence essentially constitute a final judgment in a criminal case, immediately whereupon the consequences may be imposed on the defendant, even if an appeal is taken.

Commonwealth v. Hernandez, 481 Mass. 582, 595 (2019), citing *DiMasi v. State Board of Retirement*, 474 Mass. 194, 201 (2016).

III. Conclusion

For the reasons set out above, the Motion for Summary Decision is **ALLOWED** and I recommend that Board discipline the Respondent as it deems appropriate after considering those mitigating factors, if any, presented to the Board by the Respondent.

DIVISION OF ADMINISTRATIVE LAW APPEALS


Edward B. McGrath
Chief Administrative Magistrate

DEC 11 2019

Date:
Notice sent to:
Lawrence Perchick, Esq.
Joseph Leone, Esq.
Debra G. Stoller, Esq.