No. _____

In the Supreme Court of the United States

Bharani Padmanabhan MD PhD,
Petitioner

v.

Board of Registration in Medicine,
Respondent

On Petition for a Writ of Certiorari
to the Massachusetts Appeals Court
(21-P=0527)

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-527

BHARANI PADMANABHAN

vs.

BOARD OF REGISTRATION IN MEDICINE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Bharani Padmanabhan, M.D., Ph.D., appeals from a Superior Court judgment dismissing his complaint against the Board of Registration in Medicine (board) for failure to state a claim on which relief can be granted. We affirm.

Background. The complaint, the allegations of which we take as true, Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011), asserted that in 2017, the board indefinitely suspended the plaintiff's license to practice medicine based on what the board found were various instances of substandard or improper actions as a physician. In 2019, this court decided Bloomstein v. Department of Pub. Safety, 96 Mass. App. Ct. 257 (2019), which held that a State agency had violated certain procedural provisions of G. L. c. 30A, § 11 (7) & (8), in suspending Bloomstein's construction supervisor license. Id. at

258, 261-262. The plaintiff here, believing that the board had committed the same or similar procedural violations in suspending his medical license, petitioned the board to reinstate his license.

An attorney for the board responded that the proper way for the plaintiff to proceed would be to enter into a probation agreement with the board, as contemplated in the original indefinite suspension decision. The plaintiff informed a board employee of his view that he was entitled to a ruling on his reinstatement petition by the members of the board. The board's attorney then invited the board's enforcement division to file a response to the plaintiff's petition. The enforcement division did so, and the plaintiff filed a reply. The plaintiff then made several inquiries to board members and other personnel, asking when his license would be reinstated, but he received no response.

The plaintiff then filed this action in March of 2020, seeking "an emergency order . . . to compel the [b]oard to speedily act on the pending [p]etition to [r]einstate." The complaint also alleged that, by virtue of the Bloomstein decision, the board's 2017 indefinite suspension decision was "void" and that "the plaintiff's license must be immediately restored to [a]ctive status."

On the board's motion to dismiss, a judge ruled that although the complaint was framed as one seeking injunctive relief, in substance it sought judicial review of the board's 2017 indefinite suspension decision. As such, it was untimely because G. L. c. 112, § 64, and G. L. c. 30A, § 14 (1), require that a complaint for judicial review of a final board decision be filed within thirty days of receipt of that decision. See Friedman v. Board of Registration in Med., 414 Mass. 663, 664 n.1 (1993).[1] The plaintiff, however, failed to timely seek such review of the 2017 order, and by March of 2020, the time for doing so had passed. The judge also rejected the plaintiff's argument that the board's original decision was void. This appeal followed.

Discussion. We review the sufficiency of the plaintiff's complaint de novo. Curtis, 458 Mass. at 676. Here, the judge correctly ruled that the plaintiff's action, to the extent that it sought review of the board's indefinite suspension decision, was untimely. "Filing in the Supreme Judicial Court within thirty days for judicial review is a jurisdictional requirement

[1] Indeed, in a case brought by the plaintiff before the board issued the 2017 indefinite suspension decision, the Supreme Judicial Court ruled that once the board issued a decision, the plaintiff could seek judicial review of it and would be "free to raise issues related to the procedural aspects of the disciplinary process." Padmanabhan v. Board of Registration in Med., 477 Mass. 1026, 1028 (2017). See id. n.5. The plaintiff nevertheless failed to do so in timely fashion.

and not susceptible to extension except in limited circumstances as provided in the statute." Friedman, 414 Mass. at 666. The plaintiff could not circumvent this time limit by framing his action as one seeking injunctive relief. See Ramaseshu v. Board of Registration in Med., 441 Mass. 1006, 1006-1007 (2004) (where physician waited more than seven years after license suspension and then asked court to "'investigate the circumstances leading to'" suspension, action was time barred).

We reject the plaintiff's argument that he was entitled to raise a Bloomstein challenge to the board's 2017 decision regardless of his failure to timely seek judicial review of that decision.[2] Bloomstein itself started as an action for judicial review under G. L. c. 30A, and there is no indication that that action was untimely. See Bloomstein, 96 Mass. App. Ct. at 258. Nor can the plaintiff point to anything in the Bloomstein decision suggesting that its interpretation of G. L. c. 30A, § 11 (7) & (8), somehow permits courts to ignore another provision of G. L. c. 30A, specifically, § 14 (1), which

[2] That Bloomstein had not been decided at the time of the board's 2017 decision did not preclude the plaintiff from timely asserting the same claims under G. L. c. 30A, § 11 (7) & (8), that ultimately succeeded in Bloomstein. As the plaintiff's brief recognizes, those provisions have "had the same meaning since the effective date of the statute"; the plaintiff could have claimed violations of them in 2017.

requires timely filing of actions for judicial review of agency decisions.[3]

The plaintiff also argues that he may bring his Bloomstein challenge now because, in his view, Bloomstein "showed that his indefinite suspension order was . . . void ab initio." Again, however, nothing in Bloomstein says or even hints that a violation of the provisions of G. L. c. 30A at issue render an agency decision void. In his reply brief, the plaintiff suggests that agency proceedings conducted without subject matter jurisdiction are void, but he never explains, nor do we see, why the board lacked subject matter jurisdiction here.[4]

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[3] The plaintiff relies on language in Bloomstein that, in rejecting the agency's mootness argument, invoked the principle that "courts will address an issue that might otherwise be dismissed for mootness if [t]he issue is one of public importance, capable of repetition, yet evading review" (quotation omitted). Bloomstein, 96 Mass. App. Ct. at 259. The court went on to observe that "an agency's compliance with statutes governing its procedures for adjudications that can result in the destruction of a person's livelihood is of sufficient public importance to justify judicial review." Id. Nothing in this statement suggests that the public importance of the issue can justify ignoring the clear statutory command that actions for judicial review be timely filed. "[M]ootness [is] a factor affecting [the court's] discretion, not its power, to decide a case" (quotation omitted). Styller v. Zoning Bd. of Appeals of Lynnfield, 487 Mass. 588, 595 (2021). In contrast, the timely filing requirement is "jurisdictional." Friedman, 414 Mass. at 666.

[4] Elsewhere in his brief, the plaintiff argues that a hearing officer's August 2015 recommended decision became the board's final decision because the board did not issue its own indefinite suspension decision until more than 180 days after the recommended decision. To the extent that this argument was

Even assuming arguendo that the board's decision was procedurally erroneous, "[a]n erroneous judgment is not a void judgment." Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29, 32 (1983).

The plaintiff finally argues that his complaint also stated a valid claim for relief in the form of an order requiring the board at least to rule on his reinstatement petition. This was effectively a request for mandamus relief. "In the absence of an alternative remedy, relief in the nature of mandamus is appropriate to compel a public official to perform an act which the official has a legal duty to perform." Lutheran Serv. Ass'n of New England, Inc. v. Metropolitan Dist. Comm'n, 397 Mass. 341, 344 (1986).

Here, it might have behooved the board to rule in some more formal way on the plaintiff's reinstatement petition, or to inform the plaintiff why it would not issue such a ruling. Nevertheless, the plaintiff has not shown that the board had any legal duty to act on the petition. He points to nothing in the board's governing statutes or regulations creating such a duty. The board might well have had the discretion to act, but "a

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not already rejected in Padmanabhan, 477 Mass. at 1027, the plaintiff has not claimed that it went to the board's jurisdiction. Moreover, he was free to raise it in a timely action for judicial review once the board issued its indefinite suspension decision. See id. at 1028. He failed, however, to file such an action.

court may not compel performance of a discretionary act." Metropolitan Dist. Comm'n, 397 Mass. at 344. The complaint thus failed to state a claim for mandamus relief.[5]

Judgment affirmed.

By the Court (Blake, Sacks & D'Angelo, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: June 13, 2022.

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[5] The plaintiff's other arguments, including that the judge failed to treat the facts in his complaint as true and that the board retaliates against physicians like him on behalf of hospitals, "have not been overlooked. We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

[6] The panelists are listed in order of seniority.

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APPENDIX B

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APPENDIX C

24

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 20-00308

BHARANIDHARAN PADMANABHAN

vs.

BOARD OF REGISTRATION IN MEDICINE

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

On July 12, 2017, the Board of Registration in Medicine ("Board") indefinitely suspended the plaintiff's, Bharanidharan Padmanabhan, medical license. The plaintiff brings this action seeking injunctive relief requiring the Board to reinstate his license. The matter is before the Court on the Board's Motion to Dismiss the complaint pursuant to Mass. R. Civ. P. 12(b)(6). For the following reasons, the Board's Motion to Dismiss is **ALLOWED**.

BACKGROUND

The following factual allegations are taken from the complaint and documents incorporated therein. See *Golchin* v. *Liberty Mut. Ins. Co.*, 460 Mass. 222, 224 (2011) (in reviewing a motion to dismiss, the Court may consider documents attached to the motion where plaintiff relied upon them in framing the complaint).

In July 2014, the Board issued a statement of allegations against the plaintiff alleging, in part, that he had misdiagnosed patients and mismanaged their medications. The Board referred the matter to the Division of Administrative Law Appeals ("DALA"). Between January and March 2015, DALA conducted an evidentiary hearing over the course of eight days. The DALA magistrate issued a recommended decision on August 7, 2015 and later amended that decision on

August 30, 2016 after a request for clarification from the Board. In the Amended Recommended Decision, the magistrate found that the plaintiff acted below the standard of care by misdiagnosing two patients, improperly maintaining patient records, and prescribing controlled substances without having a Massachusetts Controlled Substances Registration.[1] See Defendant's Memorandum in Support of its Motion to Dismiss ("Defendant's Memorandum"), Exh. 1 at 99-100.

On May 11, 2017, the Board issued its Final Decision and Order ("Order"). The Board stated that the plaintiff had "rendered substandard care to two patients, maintained substandard medical records for seven patients, and dispensed controlled substances after his Massachusetts Controlled Substances Registration (MCSR) expired." See Defendant's Memorandum, Exh. 3 at 1. "Based on the [plaintiff's] committing two acts of negligence . . . and engaging in a pattern of negligent record-keeping," the Board suspended the plaintiff's medical license indefinitely. *Id.* at 5. The Board stated that the plaintiff had the right to appeal the decision within thirty days pursuant to G. L. c. 30A, § 14. It further stayed the suspension for sixty days to allow the plaintiff to enter into a Board-approved probation agreement. The plaintiff neither appealed the decision nor entered into a probation agreement. On July 12, 2017, the Board informed the plaintiff that the stay had been lifted and his license suspended.

On November 3, 2019, the plaintiff filed a Petition for Reinstatement of Active License with the Board, claiming that the Board's findings were erroneous and that the Board had violated its own regulations by imposing an indefinite suspension without providing written reasons. In response, the Board's counsel sent the plaintiff the May 11, 2017 Order and referred him to the instructions within the Order as to how to pursue a stay of his license suspension.

[1] The magistrate also found that a number of allegations against the plaintiff were unsubstantiated.

Counsel noted that until the plaintiff completed the conditions listed in the Order, the Board would not consider staying the suspension of his license.

On March 18, 2020, the plaintiff filed the instant action seeking injunctive relief.

DISCUSSION

In reviewing a motion to dismiss under Mass. R. Civ. P. 12(b)(6), the Court accepts as true the factual allegations in the plaintiff's complaint, as well as any favorable inferences reasonably drawn from them. *Ginther* v. *Commissioner of Ins.*, 427 Mass. 319, 322 (1998). A complaint must state factual "allegations plausibly suggesting (not merely consistent with) an entitlement to relief" for the claim to have "enough heft to show that the pleader is entitled to relief." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . ." *Id.* Applying this standard, the Court concludes that the plaintiff's complaint must be dismissed.

"Under G. L. c. 112, § 64, a person whose license to practice medicine has been [suspended or] revoked may petition the [Supreme Judicial Court] to 'enter a decree revising or reversing the decision of the board, in accordance with the standards for review provided' in G. L. c. 30A, § 14(7)." *Weinberg* v. *Board of Registration in Med.*, 443 Mass. 679, 685 (2005), quoting *Fisch* v. *Board of Registration in Med.*, 437 Mass. 128, 131 (2002). "Such a petition [for judicial review] . . . must be filed within thirty days from the time the party receives notice of the final decision of the agency." *Friedman* v. *Board of Registration in Med.*, 414 Mass. 663, 664 & n. 1 (1993); see also G. L. c. 30A, § 14(1).

The plaintiff's complaint alleges that the Board "violated state regulation 243 [Code Mass. Regs. §] 1.03 by indefinitely suspending plaintiff's medical license in the official absence of gross negligence or repeated negligence, and further violated G. L. c. 30A, § 11(8) by imposing an indefinite suspension without providing a written reason for this massive departure from the DALA Magistrate's 'amended' decision, which the Board officially adopted." See Complaint at 1. Although framed as an action for injunctive relief, what the plaintiff here seeks is judicial review of the Board's decision. See *School Comm. of Franklin* v. *Commissioner of Educ.*, 395 Mass. 800, 807-808 (1985). Such review could have been obtained had the plaintiff properly filed a petition under G. L. c. 112, § 64 within thirty days of the Board's May 11, 2017 Order.[2] See *Friedman*, 414 Mass. at 664-665. Having failed to do so, the plaintiff cannot circumvent the thirty-day limitation period by framing his action as one for injunctive relief. See *Ramaseshu* v. *Board. of Registration in Med.*, 441 Mass. 1006, 1006–1007 (2004) (dismissing action of plaintiff who waited seven years to seek review under G. L. c. 112, § 64 of the Board's indefinite suspension of his license); see also *Grady* v. *Commissioner of Correction*, 83 Mass. App. Ct. 126, 133 (2013) (where plaintiff wrongfully filed appeal under G. L. c. 249, § 4, he was still subject to thirty-day deadline for filing an appeal under G. L. c. 30A, § 14).[3]

The plaintiff contends that, pursuant to *Bloomstein* v. *Department of Public Safety*, 96 Mass. App. Ct. 257 (2019), the Board's Order violated G. L. c. 30A, § 11(8) by imposing an indefinite suspension without providing a written reason, and therefore, the Court should grant

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[2] Indeed, the Supreme Judicial Court, in a rescript decision on a petition for certiorari filed by the plaintiff, noted that he could "pursue judicial review of the final decision of the board . . . pursuant to G. L. c. 112, § 64. . . . In that appeal, he will be free to raise issues related to the procedural aspects of the disciplinary process and the length of time that process took in his case." *Padmanabhan* v. *Board of Registration in Med.*, 477 Mass. 1026, 1028 (2017).

[3] The Board incorrectly asserts that the plaintiff is barred from bringing his claim under the doctrine of claim preclusion. The plaintiff's argument that the Board failed to comply with 243 Code Mass. Regs. § 1.03 and G. L. c. 30A, § 11(8) could not have been brought in the proceeding before the Board (prior to the issuance of the Board's Order) nor has it been litigated since. That such an argument has never been adjudicated by a court, however, is attributable to the plaintiff's failure to timely appeal the Board's Order.

the plaintiff the requested relief.[4] The plaintiff's reliance on *Bloomstein* is misplaced. In *Bloomstein*, the Appeals Court considered a plaintiff's appeal of the suspension of his construction supervisor license *under G. L. c. 30A, § 14. Id.* at 258. As noted, the plaintiff here failed to timely appeal under G. L. c. 112, § 64 and G. L. c. 30A, § 14. Thus, unlike *Bloomstein*, the plaintiff here cannot seek judicial review of the Board's decision based on an alleged violation of G. L. c. 30A, § 11(8). See *Herrick* v. *Essex Reg'l Ret. Bd.*, 68 Mass. App. Ct. 187, 190 (2007) ("[w]ith extremely rare exceptions . . . failure to timely file is . . . typically an absolute bar to a plaintiff's ability to obtain judicial review of a final agency action).[5]

ORDER

For the reasons stated above, it is **ORDERED** that the Board's motion to dismiss is **ALLOWED**.

Date: March 10, 2021

Beverly J. Cannone
Justice of the Superior Court

[4] G. L. c. 30A, § 11(8) provides that "[e]very agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision, unless the General Laws provide that the agency need not prepare such statement in the absence of a timely request to do so."

[5] The plaintiff also asserts that because the Board violated 243 Code Mass. Regs. § 1.03 and G. L. c. 30A, § 11(8), its Order is void, and therefore, the Court should reinstate his license. Even if the Board's decision was erroneous, it was not void. See *Bowers* v. *Board of Appeals of Marshfield*, 16 Mass. App. Ct. 29, 32 (1983). Contrary to the plaintiff's assertion, the Appeals Court in *Bloomstein*, while it did find error in the board's decision, did not declare it void.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

BOARD OF REGISTRATION
IN MEDICINE

IN THE MATTER OF

Michael Langan, M.D.

ORDER

At its meeting of April 16, 2015, the Board of Registration in Medicine ("Board") considered the Licensee's Petition to Invalidate Suspension ("Petition") and all supporting documents, attached thereto and/or incorporated by reference. After reviewing all of the documentation and hearing from the Licensee and counsel, the Board took the matter under advisement.

At its meeting of May 7, 2015, the Board reconsidered this matter and unanimously DENIES the Petition and REAFFIRMS, *nunc pro tunc*, its February 6, 2013 vote finding the Licensee in violation of his Letter of Agreement and suspending his medical license.

In doing so, the Board notes that the Licensee has a long history with this Board, dating back to, at least, 2005 when the Licensee and Physician Health Services reported a positive test for Oxycodone, a controlled substance. In January 2007, Physician Health Services reported that the Licensee submitted an invalid urine specimen that was outside the acceptable temperature range. As a result of this report, the Licensee entered into a Voluntary Agreement Not to Practice ("VANP") with the Board. Subsequent to the Licensee's entrance into the VANP, Physician Health Services reported two positive tests for a controlled substance: one in January 2007 (Oxycodone) and one in January 2008 (Oxymorphone). In October 2008, the Board allowed the Licensee's Petition to Terminate the VANP, contingent upon the Licensee's entrance into a Letter of Agreement ("LOA"). Subsequent to the approval of the LOA, Physician Health Services reported three positive tests for ethyl glucuronide ("EtG") and ethyl sulfate ("EtS") at low levels over the course of two years. Given the low levels of these positive tests, incidental exposure could not be ruled out.

In June of 2011 Physician Health Services reported positive EtG and EtS tests at levels of 11,700 ng/mL and 2,070 ng/mL, respectively. In early July of 2011, Physician Health Services reported positive EtG and EtS tests at levels of

13,700 ng/mL and 2,270 ng/mL, respectively. These higher levels raised concerns for the Board since they were significantly higher than the low levels of EtG and EtS reported in the past. Also in July 2011, Physician Health Services reported a positive phosphatidylethanol ("PEth") test. (It was later determined that there was a chain of custody issue related solely to this PEth test, and the Board disregarded it as part of its decision-making.)

Due to the above test results, Physician Health Services requested that the Licensee undergo an inpatient evaluation to determine the significance of these positive tests; the Licensee refused to do so. Given its concerns about the level of the positive EtG and EtS tests, the Board requested that the Licensee enter into a VANP until such time as the Licensee was evaluated. The Licensee refused to do so. As a result of the Licensee's refusal to immediately undergo an evaluation, which would have provided the Board with relevant information as to his fitness to practice medicine, the Complaint Committee found him in violation of his LOA, which was confirmed by the full Board. The Licensee subsequently underwent the inpatient evaluation in September of 2011.

Pursuant to the inpatient evaluator's recommendations, additional requirements were added to the Licensee's LOA, including, in relevant part, more frequent attendance at support group meetings. In February 2012, the Licensee agreed to these additional requirements and an Addendum to the LOA was approved. In October 2012, Physician Health Services reported that the Licensee had misrepresented attending meetings. In November 2012, Physician Health Services reported a positive test for EtG at a level of 1540 ng/mL and EtS at a level of 490 ng/mL. In December 2012, the Licensee entered into a VANP and was asked to produce documentation that he had, in fact, attended all required support group meetings. In February 2013, the Board considered the Licensee's compliance with his LOA. At that time, the Licensee did not produce documentation that he attended all required support group meetings, and, in fact as outlined below, the Board had documentation before it that he had not done so. As this was the Licensee's second violation of his LOA, the Board suspended his medical license.

In addition to this long history, the Board considered each of the Licensee's arguments for rescinding its vote finding him in violation of the LOA and suspending his medical license.

The Board notes that while the Licensee asserts that he has provided *prima facie* evidence that Physician Health Services committed a criminal act involving the PEth test obtained on July 1, 2011, the Licensee has not, in fact, produced any such evidence. The only documentation produced by the Licensee shows that there was a chain of custody issue involving the test. The Board was aware of this when it considered the Licensee's compliance with his LOA. As noted above, the Board disregarded the PEth test and the PEth test did not serve as a basis for the Board's suspension of the Licensee's medical license.

The Licensee has not filed any documentation in the past, or in connection with his Petition, that demonstrates that any third-party sanctioned or fined Physician Health Services or any testing laboratory, or that any Physician Health Services or any testing laboratory employee or officer has been criminally charged in connection with the positive PEth test. In the absence of any such documentation being filed with the Petition, this assertion by the Licensee provides no basis for rescinding the Board's suspension.

The Licensee continues to assert that the PEth test was the sole reason for his suspension. Rather, it was the Licensee's refusal to undergo an evaluation in order to determine his fitness to practice and his subsequent misrepresentation about attendance at support group meetings that led to his suspension. Neither the Board's December 21, 2011 nor the February 6, 2013 Orders references the PEth test as a basis for the Board's actions. The PEth test was not a basis, nor has it ever been a basis, for any action taken by the Board against the Licensee.

The Licensee also asserts that his First Amendment rights were violated as he was not allowed to attend support group meetings that were secular in nature. This assertion is contradicted by a letter, dated June 24, 2013 written by Physician Health Services to the Appignani Legal Center, clarifying that secular options were available. Moreover, the Licensee never raised any concerns with the Board about a religious objection to any support group, until after the Board suspended his medical license.

In fact, when the Licensee signed the February 1, 2012 Addendum to his LOA, which required his increased participation in support group meetings, the Licensee was represented by competent counsel and did not raise any objections at that time. If the Licensee or his counsel had raised such concerns, the Board would have honored his request and worked with counsel to identify specific secular support group meetings. Furthermore, the Board did not find the Licensee in violation of his LOA (as amended) based on the type of support group meetings he allegedly attended (secular or twelve-step). The Board did not object to the fact that the Licensee submitted documentation that he attended a secular support group; rather the Board suspended the Licensee for misrepresenting that he attended support groups on specific dates. Moreover, the Board notes the timing of the Licensee's objections: the Licensee had an opportunity to raise any concerns that he might have had, but he did not until after the Board found him in violation of his LOA, a contract that he signed while represented by counsel.

The Licensee further asserts that Physician Health Services inappropriately reported that he was not attending the required support group meetings; in fact, the Licensee suggests that Physician Health Services engaged in criminally fraudulent behavior in doing so. In considering this assertion, the

Board notes the provisions of the February 6, 2013 Order, suspending the Licensee's medical license, which are reiterated below.

(1) On October 23, 2012, Physician Health Services informed the Board, in writing, that the Licensee was non-compliant with his Physician Health Services contract in that he repeatedly represented to them that he participated in required peer support group meetings that he did not, in fact, attend.

(2) Physician Health Services, at the request of the Board, supplemented its October 23, 2012 report in a January 15, 2013 letter. In this letter, Physician Health Services reported that the Licensee reported attending a physician support group at Bournewood Hospital beginning in February 2012. Physician Health Services further reported that, in a meeting with the Licensee on October 19, 2012, the Licensee admitted that he only began attending the physician group meetings at Bournewood Hospital on September 5, 2012.

(3) Among the additional documents submitted by Physician Health Services were copies of the Licensee's self-reports of attendance at meetings. These self-reports indicate that the Licensee reported attendance at a physicians group meeting at Bournewood Hospital for the following dates: February 29, 2012; April 4, 2012; April 11, 2012; April 18, 2012; April 25, 2012; May 2, 2012; May 9, 2012; May 16, 2012; May 23, 2012; May 30, 2012; June 13, 2012; June 20, 2012; and June 27, 2012. This is inconsistent with the Licensee's October 2012 statement to PHS that he admitted to beginning to attend the physician group meetings at Bournewood Hospital on September 5, 2012.

(4) Also included in the supplemental materials submitted by Physician Health Services was a January 15, 2013 communication to Physician Health Services that confirmed the Licensee's attendance at the Bournewood Hospital meetings for only the following dates: September 5, 2012; September 12, 2012; September 19, 2012; September 26, 2012; and October 17, 2012. This is inconsistent with the Licensee's self-report to PHS that he attended a physician support group at Bournewood Hospital between February 29, 2012 and June 27, 2012.

(5) On January 9, 2013, the Licensee, through his legal representative, submitted a document to the Board's Physician Health and Compliance Unit, which he claimed was the list of meetings he submitted to PHS to demonstrate his attendance at meetings. This document includes listings for a physician group meeting at Bournewood Hospital for the following dates: April 4, 2012; April 11, 2012; April 18, 2012; April 25, 2012; May 2, 2012; May 9, 2012; May 16, 2012; May 23, 2012; May 30, 2012; June 13, 2012; June 20, 2012; June 27, 2012; and October 3,

2012. This statement is inconsistent with the Licensee's earlier statements.

(6) In a January 16, 2013 email from the Licensee, which was submitted to the Physician Health and Compliance Unit by the Licensee's legal representative, the Licensee states that he did not attend this group until September 5, 2012. In this email, the Licensee also states that he never informed Physician Health Services that he attended physician support group meetings at Bournewood Hospital until September 5, 2012 and that he never identified anyone named Melissa as his contact for this group meeting. These statements are contradictory to the documents referenced in items (2) and (3) above.

(7) The Licensee has not submitted any documentation that he attended all of the required meetings, and, in fact, the documentation that he has submitted evidences that he did not.

As stated above, the Licensee's self-reports were contradicted by the Licensee himself. The Licensee submitted self-reports to Physician Health Services that he was attending a physician support group meeting at Bournewood Hospital from February 2012 to June 2012. The Licensee later submitted documentation that he attended a physicians' support group from April 2012 to October 2012. However, the Licensee later stated, in writing, that he did not attend this group until September 2012.

The Licensee has not submitted any new documentation that contradicts any of the documents cited to above and found in the Board's February 6, 2013 Order of Suspension. In the absence of such documentation, there is no basis for rescinding the Board's vote based on this argument.

The Board further notes that its February 6, 2013 Order of Suspension set forth clear criteria for any Petition to Stay Suspension. In his Petition, the Licensee focuses on the fact that he completed one of those requirements: that he complete an independent psychiatric evaluation, including behavioral health assessment, by a Board-approved evaluator. The Licensee's argument for invalidating his suspension rests on the evaluative report completed by the Board-approved evaluator.

However, the Licensee overlooks the other criteria set forth in the Board's February 6, 2013 Order for any Stay of Suspension: the Board's approval of a worksite monitoring plan and substance use monitoring plan. The Board notes that the Licensee has not submitted any such monitoring plans with his Petition. Rather, the Licensee focuses on the Board-approved evaluator's conclusion that he no longer has a substance use disorder. The Board, however, notes that the evaluator, as she should, left it to the discretion of the Board to determine whether further monitoring was required. The evaluator noted that should the

Board determine that monitoring was required it should be with an entity other than Physician Health Services.

As the evaluator recognized, it is the Board that has the ultimate decision-making authority to determine whether a physician who has been suspended has demonstrated that he is fit to return to the practice of medicine. An evaluation by a Board-approved evaluator is one source of data considered by the Board in making these determinations.

The Board also takes into consideration the results of recent random urine screens, opinions of healthcare providers and other documentation demonstrating sobriety. The Licensee did not provide any such current documentation with his Petition. The Licensee provided, at the Board's April 16, 2015 meeting, a letter from his healthcare provider, dated April 3, 2015, that did not provide specifics about any testing that had been done in the last eight months.

As the Board set forth specific criteria for a stay of suspension in its Order of Suspension, the Licensee's return to the practice of medicine was conditioned upon those criteria; therefore the Board retained discretion in allowing any Petition to Stay Suspension.[1] The Licensee has not met those conditions, and, as noted above, he has not provided any documentation warranting rescission of the Board's Order to suspend his medical license.

The Board's primary responsibility is to protect the patients of the Commonwealth. In the absence of current documentation demonstrating the Licensee's sobriety and fitness to practice medicine, the Board is left without any adequate assurance of the Licensee's ability to practice medicine at this time.

On the basis of all of the above, the Board denies the Petition and reaffirms its vote, *nunc pro tunc*, taken on February 6, 2013, finding the Licensee in violation of his LOA and suspending his medical license.

The Licensee may file a new Petition to Stay Suspension upon submission of proof of abstinence from alcohol and controlled substances for twelve consecutive months. Furthermore, the Licensee must propose a suitable practice monitoring plan and a substance use monitoring plan with any new Petition to Stay Suspension.

Date: May 7, 2015

Kathleen Sullivan Meyer

Kathleen Sullivan Meyer, Esq.
Vice Chair

[1] See Hoffer v. Board of Registration in Medicine, 461 Mass. 451 (2012).

SENT CERTIFIED MAIL 5/8/15 MS