FILED
JUNE 16, 2008
NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MEDICAL EXAMINERS

In the Matter of:

SANTUSHT PERERA, M.D.
25 MA 06664200

ORDER VACATING STAY

This matter was reopened before the State Board of Medical Examiners on June 11, 2008, for the limited purpose of considering whether to grant or deny a motion made by respondent seeking the entry of a stay of our prior Order filed on June 5, 2008, Adopting in Part and Modifying in Part the Initial Decision of ALJ Ken R. Springer. The stay was sought so as to afford respondent an opportunity to reopen the matter and to testify before the Board, and to present witness testimony for the Board to consider, on the issue of mitigation of penalty.

Upon consideration of written and oral arguments of counsel, and of testimony offered by respondent addressing the reasons why neither he nor anyone on his behalf appeared before the Board on May 21, 2008 (the date on which this matter was heard), we unanimously conclude that there is no present reason to afford respondent what would be, in essence, a second opportunity to appear before the Board and offer evidence in mitigation in penalty. Respondent had one such opportunity on May 21, 2008, and then made a voluntary and informed decision not to personally

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appear before this body, and not to approach any witnesses and ask that they appear on his behalf before the Board. We find no good cause to now afford him a second opportunity for a mitigation hearing, and therefore deny his application for a stay. We set forth below in greater detail summaries of the procedural history of this matter and of the arguments and testimony that we considered on June 11, 2008, and the basis for our determination to deny respondent's present application.

Procedural History

The procedural history of this matter, through the date on which we considered argument on the exceptions to ALJ Springer's Initial Decision and then held a hearing on the issue of penalty to be assessed, is set forth at length within the Final Order of this Board Adopting in Part and Modifying in Part ALJ Springer's Initial Decision (and within portions of the Initial Decision which were in turn adopted by operation of said Order) and will not be restated herein. Prior to May 21, 2008, both parties received written notice that the Board would conduct a bifurcated hearing, first considering argument on the exceptions filed by the parties and then, provided that any basis for disciplinary sanction was found to exist against respondent, considering the issue of penalty to be assessed. Both parties were thus given notice that the Board would conduct a hearing on the issue of penalty assessment on May 21, 2008, at which hearing respondent would be afforded an opportunity

to present both testimony and written statements for the Board to consider in mitigation of penalty. On May 19, 2008, respondent, through his counsel, submitted a letter to the Executive Director of the Board on which he listed twenty-six (26) proposed character witnesses who he stated might be called to testify on Dr. Perera's behalf on May 21, 2008. Respondent was also provided with notice by Deputy Attorney General Jespersen outlining the evidence that the Attorney General intended to introduce on the issue of sanction, to include notice that the Attorney General intended to call Ms. Edith Bickoff, the significant other of the deceased patient whose care was in issue, at the hearing. Notwithstanding the fact that respondent had notice that he would be afforded an opportunity to present mitigation evidence to the Board on May 21, 2008, respondent did not attend the proceedings, nor did any of the 26 identified character witnesses appear (or offer any written statements on respondent's behalf) on said date. Respondent's counsel did then move to adjourn the Board's consideration of penalty to be imposed, however that motion failed to secure the affirmative votes of a quorum of the Board and therefore was not granted (see discussion within our prior Order at p. 22 and within fn 12).

On May 21, 2008, we orally announced our determinations upon penalty on the record, to include our determination that respondent's license was to be suspended for a period of two years

(a minimum of six months of which is to be served as an active period of suspension) commencing on June 6, 2008. Our determinations were memorialized within a written Order filed on June 5, 2008.

By letter dated June 4, 2008, respondent asked anew that he be allowed to appear before the Board at its meeting on June 11, 2008 in order to be heard on mitigation. Respondent's counsel represented in his letter that Dr. Perera intended to call three to four witnesses to testify on his behalf in mitigation, and requested that the Board stay its determination on penalty until after Dr. Perera presented his witnesses and his own testimony. In a subsequent communication to Mr. Roeder, respondent clarified that his request was limited only to the issue of mitigation. Respondent's request was opposed by the Attorney General, who suggested, among other items, in a written reply dated June 5,2008 that respondent's request was nothing but an attempt to "thwart a just and expeditious resolution of the case."

Respondent's motion was initially considered and ruled upon by Board President Mario A. Criscito. After entertaining oral arguments of counsel in a telephone conference call on June 5, 2008, and upon obtaining a representation from respondent that he would voluntarily agree not to engage in any practice of medicine or surgery from the close of business on June 6, 2008 (i.e., the time at which the suspension of respondent's license was to have

commenced) until the matter was heard and reconsidered by the Board, Dr. Criscito entered an Interim Order staying the Board's Final Order of June 5, 2008.[1]

On June 11, 2008, the Board initially considered oral arguments presented by counsel on respondent's application for a stay. Respondent's counsel argued, among other items, that fundamental fairness dictated that respondent be afforded an opportunity to present mitigation witnesses and testimony to the Board before any suspension of his license became effective. Mr. Keating stated that he had a limited number of witnesses and that the presentation of those witnesses would not "take a great deal of time," and pointed out again that his intent was not to retry the case.

The Attorney General argued that the Board should not take the extraordinary step of reopening its record, absent being presented with an extraordinary reason to do so. D.A.G. Jespersen argued that Dr. Perera had presented no good reason - let alone any

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[1] Respondent's motion was presented to the Board President alone, acting in his executive capacity, in order to afford respondent an opportunity to be heard before the suspension of respondent's license effected by the Board's prior Order was to have commenced. Counsel for both parties were advised that the request for a stay would need to be presented to the full Board on June 11, 2008, and that the Board would then first determine whether to ratify Dr. Criscito's decision to enter a stay. Counsel were further advised that respondent would thereafter be afforded an opportunity to present mitigation witnesses and his own mitigation testimony to the Board only if the Board first adopted the action taken by Dr. Criscito.

extraordinary circumstance - why he had not appeared on May 21, 2008, or why no live testimony or documentary evidence had been presented by Dr. Perera in mitigation on that date, and thus suggested that there was no reason to grant his application for a stay and for an opportunity to presently offer evidence in mitigation of penalty to the Board. D.A.G. Jespersen argued that it would set an inappropriate precedent to allow Dr. Perera to proceed on June 11th given that Dr. Perera had already been given a full and fair opportunity to present evidence to the Board but had unilaterally elected not to avail himself of the chance to be heard. Finally, DAG Jespersen pointed out that it was respondent, and not the Attorney General, who had insisted that the proceeding occur on May 21, 2008, and that respondent's counsel had refused to consent to a request made by the Attorney General that the hearing be adjourned until June 11, 2008 so that the Attorney General could have additional time to prepare his exceptions to the ALJ's opinion.[2]

Following conclusion of the oral arguments of counsel, the Board requested that Dr. Perera address the Board under oath and provide a statement addressing the issue why he failed to

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[2] As recounted in our Order, although Dr. Perera's counsel refused to grant the Attorney General's request and instead insisted that the proceeding occur on May 21, only the Attorney General complied with the requirements of the Rules of Administrative Procedure for timely submission of exceptions. See Order filed June 5, 2008, p. 2-3, fn 1.

appear at the Board meeting on May 21, 2008 and why he was not then prepared to proceed in the mitigation phase of the hearing. Dr. Perera was sworn and testified that he did not appear because he was "hoping" that the Board would adopt the Initial Decision of ALJ Springer (which had included a recommendation that the Board suspend Dr. Perera's license for a period of two months), and in essence "took a chance" that the Board would not modify ALJ Springer's findings. Dr. Perera further testified that, although he had identified potential witnesses to testify on his behalf in mitigation, he did not speak with any of those witnesses in advance of May 21, 2008, as he did not want to "drag them in and bring them down for this kind of unpleasant activity."

Dr. Perera acknowledged, on cross examination, that he was aware that this matter was to be heard by the Board on May 21, 2008, aware that he could be present on that date, and aware that the Board would then consider the issue of mitigation of penalty. On questioning by Board members, Dr. Perera acknowledged that his counsel had advised him that there was a chance that the Board could overturn ALJ Springer's decision, acknowledged that he was told by Mr. Keating that if the Board conducted a mitigation hearing, he would need to be present, and acknowledged that it was his own personal decision not to appear. Dr. Perera also acknowledged that he had been asked to have witnesses available to testify on his behalf in mitigation.

Board Determination

We are unanimous in our conclusion that no good cause exists to presently afford Dr. Perera an opportunity to offer testimony of witnesses or his own testimony on the issue of mitigation, and we therefore decline to adopt Dr. Criscito's Interim Order staying the implementation of our prior Order of June 5, 2008 for the purpose of affording Dr. Perera an opportunity to present evidence in mitigation of penalty. The record before us is now markedly different and more developed than the record that was considered by Dr. Criscito on June 5, 2008. It is now abundantly clear that Dr. Perera knew that a mitigation hearing was scheduled to be heard by the Board on May 21, 2008, knew that he could be present at that hearing, knew he could testify at that hearing, and knew that he could call witnesses to testify on his behalf at that hearing. Rather than appear, however, Dr. Perera voluntarily elected to "take a chance" that the Board would adopt ALJ Springer's decision.[3] By doing so, Dr. Perera necessarily forfeited his opportunity to present mitigation evidence to the Board.

While we are aware that the decision we make herein has

[3] It should be noted that, even had we adopted in its entirety ALJ Springer's decision, it is still the case that we would have then proceeded to conduct a hearing on the issue of penalty to be assessed. Thus, Dr. Perera still would have been afforded the opportunity to present testimony and evidence for the Board to consider in mitigation of penalty even if the scenario he was "hoping" for in fact occurred.

the practical effect of precluding Dr. Perera from presenting mitigation evidence that we would have been free to present for our consideration on May 21, 2008, we are convinced that the result is fair and equitable, and strikes an appropriate balance between our desire to afford a licensee with the opportunity to present mitigation evidence to the Board and our need to be able to manage our docket and control scheduling of hearings. Even accepting respondent's suggestion that fundamental fairness dictates that a licensee to be disciplined by this Board be given an opportunity to present mitigation evidence to the Board, it surely is not the case that any right to present such evidence should be at the place and time of respondent's choosing. In this case, all requirements of due process were satisfied when Dr. Perera was given notice that he would be afforded the opportunity to be heard and to present mitigation evidence to the Board on May 21, 2008. By making a conscious and informed decision not to appear at the time of the scheduled hearing, Dr. Perera necessarily waived his right to present any additional mitigation evidence to the Board.[4]

Given the determinations set forth above, we presently vacate the Stay Order which had been entered by Dr. Criscito on

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[4] It should be noted that, when meting out penalty, the Board did consider the testimony offered by respondent before the OAL. See Order filed June 5, 2008, p. 24.

June 6, 2008.[5] The Board's prior Order in this matter, filed on June 5, 2008, is deemed to be in full force and effect - among other items, it is therefore the case that the two year suspension of respondent's license effected by that Order (which is to include, at a minimum, a six month period of active license suspension) is also presently in full force and effect.[6]

WHEREFORE, it is on this 16th day of June, 2008

ORDERED:

1. Respondent's motion for a stay of the Order of the Board Adopting in Part and Modifying in Part the Initial Decision of ALJ Springer is hereby denied. The Stay Order entered on June 6, 2008 by Board President Criscito is vacated, and the Board's

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[5] The Interim Stay Order had provided that this matter was to be reopened not only to afford Dr. Perera an opportunity to present testimony in mitigation of penalty, but also to afford the Attorney General an opportunity to argue that the Board reconsider its penalty determinations and consider augmenting the penalties that had been ordered. That provision had been included at the urging of the Attorney General, who had argued that if the matter was to be reopened, it should be reopened as to both parties. Given that the Attorney General did not independently move or ask for reconsideration, our decision to vacate the stay entered by Dr. Criscito effectively mooted the request of the Attorney General to argue for reconsideration, and we therefore did not reopen this matter to either respondent or to the Attorney General.

[6] Given that respondent had, in advance of the entry of the Stay Order entered by Dr. Criscito, provided a representation (within a letter from his attorney) that he would not engage in any practice of medicine or surgery from the close of business on June 6, 2008 until further Order of the Board, we are satisfied that the suspension may be deemed to have commenced at the close of business on June 6, 2008, and that there is accordingly no need to adjust the dates of said suspension.

Order Adopting in Part and Modifying in Part the Initial Decision of ALJ Springer, filed on June 5, 2008, is in full force and effect.

NEW JERSEY STATE BOARD
OF MEDICAL EXAMINERS

By: Mario A. Criscito, M.D.

Mario A. Criscito, M.D.
Board President