RYAN J. WELTER
v.
BOARD OF REGISTRATION IN MEDICINE.

No. SJC-13236

Supreme Judicial Court of Massachusetts, Suffolk

October 20, 2022

Dated: September 7, 2022.

Petition filed in the Supreme Judicial Court for the county of Suffolk on April 13, 2021. The case was reported by Lowy, J.

Alycia M. Kennedy (Paul Cirel also present) for the petitioner.

Samuel Furgang, Assistant Attorney General, for the respondent.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, & Wendlandt, JJ.

WENDLANDT, J.

"First, do no harm." While apocryphal, this storied quotation attributed to Hippocrates, the father of modern medicine, embodies a higher standard to which we often hold our physicians. See Travers, Primum Non Nocere: Origin of

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a Principle, 71 S.D. J. Med. 64, 65 (Feb. 2018), quoting Hippocrates, 1 Epidemics in Adams, The Genuine Works of Hippocrates (1849) ("to do good or to do no harm"). This case implicates that higher standard; it concerns the question whether due process requires that the Board of Registration in Medicine (board) find the common-law elements of fraud, including, inter alia, the elements of intent and reliance, before it may suspend a physician's license to practice medicine on the basis that the physician violated 243 Code Mass. Regs. § 2.07(11)(a)(1) (2012), prohibiting "[a]dvertising that is false, deceptive, or misleading," and 243 Code Mass. Regs. § 1.03(5)(a)(10) (2012), prohibiting "engaging in conduct which has the capacity to deceive or defraud." Because the board's regulations, which by their plain terms do not require proof of the common-law elements of fraud, are rationally related to the Commonwealth's legitimate interest in protecting public confidence in the integrity of the medical profession and thus have a rational tendency to promote the health and safety of the public, we conclude that the regulations do not offend due process. Further concluding that the board's findings that the petitioner physician violated these regulations were supported by substantial evidence and that neither the findings nor the sanction imposed were arbitrary or capricious, we affirm the board's decision.

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1. *Background*.

a. *Facts*.

The following facts were found by the administrative magistrate for the Division of Administrative Law Appeals (DALA) and are generally undisputed.

The petitioner, Dr. Ryan J. Welter, was licensed to practice medicine in Massachusetts in 2000 and has a certification in family medicine from the American Board of Family Medicine. He is the founder and manager of Tristan Medical Enterprises, P.C., which does business as New England Center for Hair Restoration (New England Hair). In 2011, Welter received an employment inquiry from Clark Tan, who attended medical school in the Philippines but who was not licensed to practice in the United States.[1] Welter does not dispute that he knew Tan was not licensed to practice in the United States. Welter consulted with the Massachusetts Medical Society (MMS), however, and concluded that MMS regulations permitted him to delegate work to Tan as a nonlicensee. Welter hired Tan as a nonprofessional assistant, and Tan worked for New England Hair between January 2015 and November 1, 2017.

Welter maintained a website for New

England Hair.[2] Although Welter was the only licensed physician who worked at New England

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Hair during the relevant time period, the website contained statements indicating that multiple doctors and surgeons worked at New England Hair, proclaiming under the heading "What Sets Us Apart" that "our surgeons" had been solving hair loss problems for years, that "Dr. Ryan Welter and Dr. Clark Tan [are] 'doctors' doctors,'" and that the center's "doctors" could correct other surgeons' work. Tan's website biography identified him as "Clark Tan, M.D.," and stated that "Dr. Tan received his medical degree from Far Eastern University Institute of Medicine" and was a diplomat at East Avenue Medical Center. The biography did not indicate that the institute and center are located outside the United States or that Tan was not a physician licensed to practice in the United States. Throughout the website, Welter and Tan were repeatedly referred to in tandem. For example, the website stated: "Dr. Ryan Welter and Dr. Clark Tan have gained recognition in the field of hair restoration for their surgical skills." The website also included Welter's biography, which stated, "Dr. Welter is board certified, trained and licensed to perform hair restoration procedures for men and women." The biography did not specify that his certification is in family medicine. Consistent with the website's suggestions that Tan was a licensed physician, Tan introduced himself to staff and patients in the offices of New England Hair as "Dr. Tan," and staff

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referred to him as "Dr. Tan."[3] Welter permitted Tan to distribute business cards to patients identifying him as "Clark Tan, M.D." Consent forms drafted or approved by Welter included language that the signer would "authorize Dr. Ryan Welter, his associate doctors and/or such assistants as may be selected by him" to perform procedures.[4]

Welter delegated initial consultations to Tan.[5] The consent form for these consultations stated that measurements of hair density "were taken by a doctor." Tan also sent an e-mail message to at least one patient considering New England Hair; the message touted the benefits of New England Hair over other clinics, stating that "[c]onsultation is done by a doctor and not by a salesperson as what typically happens in other centers."

In 2016, upon learning that Tan was not a licensed physician, two of New England Hair's patients -- each of whom was a physician -- complained to the board. After Welter

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learned about the complaints, he removed all references to Tan from New England Hair's website and changed Tan's position so that he would no longer conduct consultations, assist with procedures, or have contact with patients.

b. *Procedural history.*

The board initiated a formal adjudicatory proceeding against Welter and referred the matter to DALA. After a review of the evidence and a multiday hearing, the administrative magistrate concluded that the board had met its burden of proving by a preponderance of the evidence its allegations with regard to false advertising on New England Hair's website and deceptive conduct that enabled Tan to present himself as a licensed physician from 2015 to 2017.[6]

The magistrate found that Welter had violated 243 Code Mass. Regs. § 2.07(11)(a), which prohibits "[a]dvertising that is false, deceptive, or misleading." The magistrate found the website statements referring to the plural "doctors," even if intended to be aspirational,[7] could falsely lead the reader to believe that there were multiple licensed physicians at New

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England Hair. The magistrate found that the use of the plural was compounded by Tan's biography, suggesting that Tan was a licensed physician. In placing Tan on the same level as

Welter by repeatedly referring to the two in tandem, the website deceptively implied that Tan was a licensed physician, particularly given that it obscured that he was educated and trained in the Philippines. The magistrate found, "Although the description of Tan's qualifications may have been technically accurate, even a careful reader might conclude that the East Avenue Medical Center, with its generic English name, is in the United States." The failure to disclose where Tan studied and trained prevented readers from understanding that the references to "doctors" and "surgeons" could not include Tan. The magistrate also found it misleading not to disclose that Welter's board certification was in family medicine. The magistrate explained, "Although each element of the sentence is true by itself -- Dr. Welter is board certified, he is trained in hair restoration procedures, and he does possess the appropriate licensure to do those procedures -- together the adjectives describing Dr. Welter convey the message that Dr.

Welter is board-certified in hair restoration techniques, either as a surgeon or as a plastic surgeon."[8]

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Welter argued that the false advertising regulation, 243 Code Mass. Regs. § 2.07(11)(a), required more than just an advertising claim that is false, deceptive, or misleading; he contended that case law required the consideration of the common-law fraud elements of knowledge and intent to deceive, materiality, and reliance to the other party's detriment. The magistrate concluded that there was no reason to "depart from the well-established rule of regulatory construction" that the clear meaning of the regulation's words should be applied unless doing so would lead to an illogical result, citing *Massachusetts Fine Wines &Spirits, LLC v. Alcoholic Beverages &Control Comm'n*, 482 Mass. 683, 687 (2019). The magistrate thus declined to import additional elements into the regulation's plain meaning.

The magistrate also found that Welter violated 243 Code Mass. Regs. § 1.03(5)(a)(10), which prohibits "[p]racticing medicine deceitfully, or engaging in conduct which has the capacity to deceive or defraud." The magistrate found that Welter's conduct facilitated the impression that Tan was a licensed physician, and thus had the capacity to deceive. Welter contended that Tan was, in fact, a doctor and therefore position that Welter's website would mislead readers because a

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that Welter's conduct in referring to Tan as such was accurate, but the magistrate found that the business cards, consent forms, and conduct of office staff "created a false and misleading impression concerning Tan's licensure status." The magistrate also found four mitigating factors: that

Welter (1) changed his website after learning of the complaints, (2) changed Tan's position after learning that the board disagreed with his construction of the delegation regulation, (3) had no history of discipline, and (4) had a reputation for honesty and integrity in his church community. The board, after considering the parties' objections, adopted the magistrate's findings of fact and conclusions of law. Following consideration of the parties' memoranda on disposition, the board issued an indefinite suspension of Welter's license to practice medicine, which it immediately stayed upon Welter's entering into a probation agreement pursuant to which Welter arranged and paid for monitoring of his credentialing applications, advertising, and media communications. The board indicated that Welter could petition for termination of the suspension after two years of monitoring. In determining its sanction, the board noted that false and deceptive statements on a physician's website deprive those seeking medical care of the opportunity to make informed choices

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as consumers and that false and deceptive statements on a consent form bar patients from giving informed consent. Welter filed a petition for review of the board's order in the county

court, pursuant to G. L. c. 112, § 64, and a single justice reserved and reported the matter to the full court. Welter urges the court to reverse or revise the board's decision on several grounds: (1) the suspension of his medical license violates his substantive due process right to practice medicine, (2) the board's construction of its regulations is incorrect, (3) the board's decision was arbitrary or capricious as contrary to the evidence, and (4) the sanction was arbitrary or capricious as excessive. We address each in turn.

2. *Discussion*.

a. *Standard of review*.

A person whose license to practice medicine has been suspended, revoked, or cancelled by the board may petition this court to "enter decree revising or reversing the decision of the board, in accordance with the standards for review provided in [G. c. 30A, § 14 (7)]." G. L. c. 112, § 64.[9] Section 14 (7), in

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turn, instructs us to set aside or modify the decision only if the substantial rights of a party may have been prejudiced because the agency decision is "(1) in violation of constitutional provisions; (2) in excess of the board's authority; (3) based on an error of law; (4) unsupported by substantial evidence; or (5) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." *Duggan v. Board of Registration in Nursing*, 456 Mass. 666, 673 (2010), citing G. L. c. 30A, § 14 (7). A plaintiff bears "a heavy burden," for we "give due weight to the [board's] expertise, as required by § 14 (7)." *Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 263-264 (2001).

b. *Substantive due process*.

"[T]he right to engage in any lawful occupation is an aspect of the liberty and property interests protected by the substantive reach of the due process clause of the Fourteenth Amendment to the United States Constitution and analogous provisions of our State Constitution." *Blue Hills Cemetery, Inc. v. Board of Registration in Embalming &Funeral Directing*, 379 Mass. 368, 372 (1979) (*Blue Hills Cemetery*). But "[t]he right to engage in a particular occupation is not a 'fundamental right infringement of which deserves strict judicial scrutiny.'" *Id*. at 371 n.6, suspension; accordingly, G. L. c. 30A, § 14, provides the correct standard of review. See G. L. c. 112, § 64.

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quoting *Commonwealth v. Henry's Drywall Co.*, 366 Mass. 539, 542 (1974). For nonfundamental rights, such as the right at issue here, "[t]he due process clause of the Fourteenth Amendment to the United States Constitution demands that a statute [or regulation] bear a 'reasonable relation to a permissible legislative objective.'" *Blue Hills Cemetery*, *supra* at 373, quoting *Pinnick v. Cleary*, 360 Mass. 1, 14 (1971). "Under the analogous provisions of our State Constitution, we must determine whether [the statute or regulation] 'bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.'" *Blue Hills Cemetery*, *supra*, quoting *Sperry &Hutchinson Co. v. Director of the Div. on the Necessaries of Life*, 307 Mass. 408, 418 (1940). Although "the State and Federal standards are phrased in virtually identical terms, we have noted that '[t]he Constitution of a State may guard more jealously against the exercise of the State's police power.'" *Blue Hills Cemetery*, *supra* at 373 n.8, quoting *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, 348 Mass. 414, 421 (1965). Here, however, we have little difficulty in concluding that the challenged regulations bear a real and substantial relation to a permissible legislative objective related to the general welfare, satisfying both the Federal and State Constitutions.

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Welter argues that the board deprived him of substantive due process by indefinitely suspending his license to practice medicine without first finding the elements of common-

law fraud, specifically that he had an intent to deceive and that patients relied on any misleading statements to their detriment. See *Masingill v. EMC Corp.*, 449 Mass. 532, 540 (2007), quoting *Kilroy v. Barron*, 326 Mass. 464, 465 (1950) ("To recover for fraudulent misrepresentation, a plaintiff 'must allege and prove that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to [her] damage'"). See also Restatement (Second) of Torts § 525 (1977) ("One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation"). He asserts that suspending his license without these findings "in no way promotes or protects the public health and is not rationally related to that end." The board contends that its action was rationally related to public health and safety, in light of the board's "broad authority to 'protect the image of the medical profession,'" which "is not limited to disciplining

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conduct involving direct patient care, criminal activity, or deceit." *Sugarman v. Board of Registration in Med.*, 422 Mass. 338, 343 (1996), quoting *Raymond v. Board of Registration in Med.*, 387 Mass. 708, 713 (1982). We agree with the board.

The board has "broad authority to regulate the conduct of the medical profession," and this authority "includes its ability to sanction physicians for conduct which undermines public confidence in the integrity of the medical profession" even where the physicians did not "engage in any wrongdoing" or "deceit." *Sugarman*, 422 Mass. at 342-343. Holding physicians to a high standard in their advertising and other conduct is rationally related to that end. See *Commonwealth v. Brown*, 302 Mass. 523, 527 (1939), quoting *McMurdo v. Getter*, 298 Mass. 363, 367 (1937) ("Learned professions 'are characterized by . . . the adherence to a standard of ethics higher than that of the market place . . ."). It is instructive that the United States Supreme Court has recognized, at least as it pertains to the legal profession, which similarly is held to a higher standard than the general marketplace, that "advertising by the professions poses special risks of deception -- 'because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.'" *In re R.M.J.*,

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455 U.S. 191, 200 (1982), quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977). The same concern for the public in connection with the selection of physicians permits the board to impose a high standard on physicians. Thus, the board may, consistent with due process, place the burden on physicians to ensure that their advertising not only is technically accurate, but also is not deceptive or misleading; similarly, the board may demand that physicians conduct themselves in a manner that does not have the capacity to deceive or defraud without offending the State or Federal Constitution.[10]

c. *Board's construction of regulations*.

Welter next contends that the board committed legal error by construing its regulations so as not to require proof of the common-law

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elements required to prove fraud. "We interpret a regulation in the same manner as a statute, and according to traditional rules of construction." *Massachusetts Fine Wines &Spirits, LLC*, 482 Mass. at 687, quoting *Warcewicz v. Department of Envtl. Protection*, 410 Mass. 548, 550 (1991). The first rule of construction is that "we look to the text of the regulation, and will apply the clear meaning of unambiguous words unless doing so would lead

to an absurd result." *Massachusetts Fine Wines & Spirits, LLC*, *supra*. See *DeCosmo v. Blue Tarp Redev., LLC*, 487 Mass. 690, 699 (2021) ("If the regulation is plain and unambiguous, it should be interpreted according to its terms"). Fatal to Welter's claim is the fact that neither regulation expressly requires proof of fraud; instead, the regulations prohibit "[a]dvertising that is false, deceptive, or misleading," 243 Code Mass. Regs. § 2.07(11)(a)(1), and "engaging in conduct which has the capacity to deceive or defraud," 243 Code Mass. Regs. § 1.03(5)(a)(10). Whether something is advertising "that is" deceptive or misleading and whether conduct "has the capacity to deceive" are objective inquiries that do not necessarily depend on intent, knowledge, materiality, or reliance.[11] Accordingly, we decline Welter's

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invitation to inject these elements from the common law where they are absent from the plain words of the regulations. See *Pyle v. School Comm. of S. Hadley*, 423 Mass. 283, 285 (1996) ("Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent"); *New England Med. Ctr. Hosp., Inc. v. Commissioner of Revenue*, 381 Mass. 748, 750 (1980) (where "statutory language . . . is sufficiently clear . . . we need not seek further enlightenment from other sources"). Our conclusion is further buttressed by neighboring provisions that expressly require intent or knowledge. See *Commonwealth v. Keefner*, 461 Mass. 507, 511 (2012), quoting *Wolfe v. Gormally*, 440 Mass. 699, 704 (2004) ("Significantly, a statute [or regulation] must be interpreted 'as a whole'; it is improper to confine interpretation to the single section to be construed"). For example, 243 Code Mass. Regs. § 1.03(5)(a)(1) (2012) expressly prohibits "*[f]raudulent* procurement of [a physician's] certificate of registration or its renewal" (emphasis added), and 243 Code Mass. Regs. § 1.03(5)(a)(6) (2012) expressly bars "*[k]nowingly* permitting, aiding or abetting an unlicensed person to perform activities requiring a license" (emphasis added). The absence of these elements in the regulations in question is thus further indication that our construction is proper.

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Our construction of G. L. c. 93A, § 2 (a), which prohibits "deceptive acts or practices," is instructive. We have concluded that G. L. c. 93A, § 2 (a), focuses on whether the advertising or conduct itself is objectively deceptive, not whether there was an intent to deceive or whether anyone was subjectively deceived. See *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 394 (2004) ("Whether conduct is deceptive is initially a question of fact, to be answered on an objective basis" and "does not require proof that a plaintiff relied on the representation, or that the defendant intended to deceive the plaintiff, or even knowledge on the part of the defendant that the representation was false" [citations omitted]). Accordingly, we have concluded that a practice is "deceptive" if it "could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted." *Id.*, quoting *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 777 (1980).

Similarly, examining a regulation of the Board of Registration of Chiropractors "prohibit[ing] 'deceptive, confusing, misleading, or unfair' advertising," we rejected the argument that the regulation required showing that a consumer was actually deceived. See *Langlitz v. Board of Registration of Chiropractors*, 396 Mass. 374, 382 (1985) ("Advertisements which are inherently misleading or deceptive are prohibited by [233

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Code Mass. Regs. § 4.11], irrespective of any resulting harm to the public"). Accordingly, we rejected the argument that a violation of the regulation required testimony that a member of the public was actually deceived by an advertisement. *Id.*

Accordingly, we conclude that the challenged regulations are unambiguous -- they do not require any showing as to the common-law elements of fraud, namely intent,

knowledge, materiality, or reliance. Instead, they require only an objective assessment whether the advertisement is "deceptive" or "misleading," 243 Code Mass. Regs. § 2.07(11)(a)(1), and whether the conduct at issue has the "capacity to deceive," 243 Code Mass. Regs. § 1.03(5)(a)(10).

d. *Whether the board's decision was arbitrary or capricious or contrary to the evidence*.

Welter further contends that his advertising was not deceptive and his conduct did not have the capacity to deceive. He maintains that the website and conduct were not deceptive because the references to "doctors" and "surgeons" were aspirational; it was not inaccurate to describe Tan, who was medically trained in the Philippines, as a doctor; and Welter is board certified. The scope of our review under the Administrative Procedure Act, G. L. c. 30A, § 14, is limited: "we will uphold the [agency's] decision 'as long as the findings by the authority are supported by substantial evidence in the record considered

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as a whole.'" *Costello v. Department of Pub. Utils.*, 391 Mass. 527, 539 (1984), quoting *1001 Plays, Inc. v. Mayor of Boston*, 387 Mass. 879, 885 (1983). "'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1 (6). "[A]n agency's conclusion will fail judicial scrutiny if 'the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary.'" *Cobble v. Commissioner of the Dep't of Social Servs.*, 430 Mass. 385, 390-391 (1999), quoting *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466 (1981).

Applying this standard, the record amply supports the board's finding. The website and conduct in question, even if technically accurate, reasonably could be found to have been deceptive or misleading, 243 Code Mass. Regs. § 2.07(11)(a)(1), and to have the capacity to deceive, 243 Code Mass. Regs. § 1.03(5)(a)(10). See *Aspinall*, 442 Mass. at 394-395 (in G. L. c. 93A context, "advertising need not be totally false in order to be deemed deceptive" because it "may consist of a half truth, or even may be true as a literal matter, but still create an overall misleading impression through failure to disclose material information"). A reasonable prospective patient could reasonably read the website and believe that New England Hair employed multiple doctors, that Tan was licensed to practice in

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the United States, and that Welter was board certified in hair restoration. And a reasonable prospective patient could further be misled as to Tan's licensing status by the consent forms, the business cards, and the practice of calling Tan a doctor. Indeed, the two complaining patients, who themselves were physicians, were misled precisely in this manner.

e. *Whether the board's sanction was arbitrary or capricious*.

As a sanction for Welter's conduct, the board indefinitely suspended his license but immediately stayed the suspension upon Welter's entry into a two-year probationary agreement pursuant to which Welter arranged and paid for monitoring of his credentialing applications, advertising, and media communications.[12] On appeal, Welter maintains that the board's sanction was excessive and thus arbitrary or capricious. In particular, he contends that because the board did not prove its more serious allegations against him, see note 6, *supra*, the sanction was disproportionately harsh when compared to sanctions in other comparable cases.

A court cannot substitute its discretion for an agency's, "nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own

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evaluation of the circumstances the penalty

appears to be too harsh." *Vaspourakan, Ltd. v. Alcoholic Beverages Control* Common, 401 Mass. 347, 355 (1987), quoting *Levy v. Board of Registration &Discipline in Med.*, 378 Mass. 519, 529 (1979). "A court will interfere with the agency's discretion in this area 'only . . . in the most extraordinary of circumstances.'" Vaspourakan, supra, quoting Levy, supra at 528-529. assessing whether the sanction is arbitrary or capricious, we search for comparable cases. See *Herridge v. Board of* Registration in Med., 420 Mass. 154, 166-167 (1995), S.C., Mass. 201 (1997) (finding board did not abuse its discretion where "the sanction imposed was not disproportionate sanctions imposed in other cases" of similar conduct). In pressing his claim that the sanction imposed on him was excessive, Welter chiefly relies on Matter of Reynolds, Adjudicatory Case No. 89-11-ST (Aug. 16, 1989).[13] In that case, the physician employed an unlicensed medical school graduate and failed to disclose three malpractice suits on his license renewal; the physician received a reprimand and a fine. The

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Reynolds decision is distinguishable because the disciplined physician in that matter believed the graduate had a license; here, Welter knew that Tan was not a licensed physician but nonetheless presented Tan in a manner to suggest to the public that Tan was licensed in the United States. Welter also relies on a decision of a single justice of this court, reversing a five-year revocation of a license by the board as being excessive, and thus arbitrary or capricious and an abuse of discretion. See Brockington vs. Massachusetts Bd. of Registration in Med., Supreme Judicial Ct., No. SJ-2012-0510 (Suffolk County Oct. 30, 2014). In that case, the board sanctioned the physician on the basis that his actions amounted to "gross misconduct" under G. L. c. 112, § 5, and 243 Code Mass. Regs. § 1.03(5) (2012). *Id.* at 3. But the board did not explain why it adopted a "gross misconduct" standard. *Id.* at 10. Moreover, the single justice determined that the five-year license revocation seemed "significantly inconsistent with prior sanctions," and thus arbitrary and an abuse of discretion "[i]n the absence of an adequate explanation of why the case warrant[ed] this level of discipline in comparison to other cases." *Id.* The single justice concluded, based on comparable cases, that the years of revocation should have been reduced, or else the board should have imposed the lesser sanction of

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license suspension. *Id.* at 12.[14] Here, we are not addressing a five-year revocation. Importantly, the board has explained both its reasoning in imposing the sanction based on a comparable case as well as the reasons for deviation from the cases upon which Welter relies, the most recent of which are from 2006.

More specifically, the board primarily relied on Matter of Bergus, Adjudicatory Case No. 2017-004 (June 27, 2019). In the Bergus case, as with the present case, the board imposed an indefinite suspension stayed upon entry into a probation agreement.[15] The physician misrepresented to a health care facility the circumstances surrounding the end of his residency program, incorrectly informed a health maintenance organization that he was board certified in a specialty when he was not, and inaccurately claimed in an advertisement that he had received board certification in areas where he had not. The physician had already agreed with the Rhode Island Board of Medical Licensure and Discipline to pay a $10,000 administrative fee, receive a reprimand, and be placed on probation for two years during which time he attended an ethics course and retained and

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cooperated with monitors. Matter of Bergus, Adjudicatory Case No. RM-17-054 (Aug. 9, 2018).

In its decision, the board explained that Welter's statements and conduct deprived patients of the opportunity to make informed choices and to give informed consent. At oral argument, the board further explained its

rationale for the sanction imposed on Welter, which it acknowledged deviated in severity from the earlier cases relied on by Welter; in particular, the board argued that the broader reach of, and the public's increasing reliance on, Internet advertising in connection with selecting a physician merited the sanction imposed on Welter.

Although we agree with Welter that the Bergus case is not squarely on all fours with the present case, given our highly deferential standard, we cannot say that the sanction here was arbitrary or capricious.[16]

3. *Conclusion*.

For the reasons stated, we affirm the order of the board.

So ordered.

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Notes:

[1] Tan was not eligible to be licensed to practice in the United States because he completed his medical residency abroad.

[2] The website was created by an outside consultant based on information Welter provided and with his approval.

[3] Welter explained that he referred to Tan as "Dr. Tan" because Tan was a medical school graduate.

[4] Welter did not employ any licensed associate doctors.

[5] Initial consultations are handled by nonmedically trained salespeople in some other hair restoration practices; Welter reviewed Tan's assessments following initial consultations. Further, when Tan met with patients alone, Welter would review Tan's notes and schedule the patient for a follow up if he had any concerns. The hair procedures themselves were scheduled for times when Welter was physically present at New England Hair.

[6] The administrative magistrate also concluded that the board had not met its burden of proving its allegations related to improper delegation of medical services, fraudulent filing of license renewal applications, or the creation and maintenance of false medical records. The magistrate referred to the allegations of improper delegation as the "most serious allegation."

[7] Welter maintained that he referred to "doctors" because it had been his intent to hire additional doctors.

[8] The board explained at oral argument that there is no board certification in hair restoration, but it takes the reasonable reader might not know that there is no certification in hair restoration.

[9] Welter's argument that we should review the board's decision pursuant to the certiorari statute, G. L. c. 249, § misreads the holding of *Hoffer v. Board of Registration in Med.*, 461 Mass. 451 (2012). In *Hoffer*, the court conducted review under G. L. c. 249, § 4, rather than G. L. c. 112, § 64, because the petitioner did not challenge the decision suspending her license, but rather an order denying a stay of her suspension, which the court analyzed as analogous to a denial of reinstatement of an already suspended or revoked license. *Id*. at 456. By contrast, Welter challenges the decision of

[10] Notably, other jurisdictions hold physicians to similarly high standards. See, e.g., *Barnett v. Maryland State Bd. of Dental Examiners*, 293 Md. 361, 370-371 (1982) (upholding board's finding that advertising statements were "of a character tending to deceive or mislead the public" where reasonable person could be convinced there was "possibility" that lay person would make wrong conclusion); *Gale v. North Dakota Bd. of Podiatric Med.*, 1997 ND 83, ¶ 39 (upholding board's finding where "a reasoning mind could reasonably find [the doctor's] advertisement contained representations that in reasonable probability would cause an ordinary, prudent person to misunderstand or be

deceived"); *In re Campbell*, 19 Wash.2d 300, 311 (1943) (upholding revocation of license even in absence of evidence that anyone was actually deceived where "the advertisements speak for themselves and reveal their own peculiar tendency to deceive the public"). We see nothing in either the Federal or State Constitution that would require the board to hold physicians licensed to practice medicine in the Commonwealth to a less exacting standard.

[11] Given the disjunctive nature of the regulation, we need not reach the issue whether "conduct which has the capacity to . . . defraud" requires proof of the common-law elements. 243 Code Mass. Regs. § 1.03(5)(a)(10).

[12] Given the probationary agreement, we do not address here whether imposition by the board of an indefinite suspension (absent an agreed-upon probationary period) for Welter's conduct would be excessive.

[13] Welter also cites consent orders involving fraudulent conduct where the offending physician received a reprimand and a fine. See, e.g., Matter of Asis, Adjudicatory Case No. 2006-065 (Dec. 20, 2006) (insurance fraud); Matter of Prasad,

Adjudicatory Case No. 2006-018 (Apr. 16, 2006) (altering patient medical records to conceal accidental administration of overdose and making misrepresentations concerning event to medical peer review committee).

[14] On remand, the board revoked the physician's license, but allowed him to petition for reinstatement after three years upon demonstration of his competency to practice medicine. Matter of Brockington, Adjudicatory Case No. 2008-017 (Apr. 16, 2015).

[15] The board in the Bergus case also imposed a $10,000 fine. Matter of Bergus, Adjudicatory Case No. 2017-004.

[16] Contrary to Welter's contention, the board properly considered mitigating factors in determining its sanction.
