

81
34 12/02/18

COMMONWEALTH OF MASSACHUSETTS

Middlesex, SS.

Board of Registration in Medicine

Adjudicatory Case No. 2010-030

In the Matter of DAVID B. HERZOG, M.D.)))))
-----------------------------------------------	-----------------------

STATEMENT OF ALLEGATIONS

The Board of Registration in Medicine (Board) has determined that good cause exists to believe the following acts occurred and constitute a violation for which a licensee may be sanctioned by the Board. The Board therefore alleges that David B. Herzog, M.D. (Respondent) has practiced medicine in violation of law, regulations, and/or good and accepted medical practice, as set forth herein. The investigative docket number associated with this order to show cause is Docket No. 10-364.

Biographical Information

1. The Respondent was born on October 18, 1946. He graduated from the National Autonomous University of Mexico School of Medicine in 1973. He is certified by the American Board of Psychiatry and Neurology and is also certified in the subspecialty of child and adolescent psychiatry. He has been licensed to practice medicine in Massachusetts under certificate number 38347 since 1975. He has privileges at Massachusetts General Hospital, McLean Hospital, and Newton-Wellesley Hospital. He is also licensed to practice medicine in the state of Florida. He currently practices psychiatry in Boston and Newton, Massachusetts as well as in Florida.

Factual Allegations

2. Patient A is a fifty-four year old female.
3. From about 1985 to 1987, the Respondent treated Patient A.
4. From on or about July 5, 2009 to on or about July 29, 2010, the Respondent treated Patient A for an eating disorder.
5. From on or about July 5, 2009 to on or about July 29, 2010, the Respondent violated the boundaries of the physician-patient relationship during his treatment of Patient A.
6. From on or about July 5, 2009 to on or about July 29, 2010, the Respondent would hug Patient A at the beginning and at the end of each session.
7. From on or about July 5, 2009 to on or about July 29, 2010, during the majority of most therapy sessions, the Respondent focused on and discussed personal and social topics with Patient A.
8. The Respondent talked about his golf handicap.
9. The Respondent talked about Patient A's husband's golf handicap.
10. The Respondent talked about courses at which he and Patient A's husband had each played golf.
11. The Respondent talked about people who were his friends.
12. The Respondent talked about people who were Patient A's friends.
13. The Respondent asked Patient A to introduce him to one or more persons in her social circle.
14. From on or about July 5, 2009 to on or about July 29, 2010, the Respondent failed to keep adequate medical records of his treatment of Patient A.

15. On or about December 28, 2009, the Respondent visited Patient A in another state and took her out to lunch at a restaurant.

16. On or about December 28, 2009, after leaving the restaurant, the Respondent put his arms around Patient A, rubbed his hand up and down Patient A's back, tried to kiss her, and intertwined his fingers with Patient A's fingers.

17. In May, June, and July 2010, the hugs which the Respondent gave Patient A at the end of the sessions became longer.

18. In May, June, and July 2010, during sessions, the Respondent would try to kiss Patient A on the lips.

19. During Patient A's two sessions in July of 2010, the Respondent gave Patient A a bear hug upon greeting her and rubbed his hands up and down her back when she left the session.

20. On or about August 2, 2010, the Respondent took Patient A out to lunch at a restaurant in Massachusetts.

21. On or about August 2, 2010, prior to entering the restaurant, the Respondent French kissed Patient A.

22. On or about August 2, 2010, in the restaurant, the Respondent held and kissed Patient A.

23. On or about August 2, 2010, during the car ride from the restaurant, the Respondent touched various parts of Patient A's body, including sliding his hand under her shorts.

24. On or about August 9, 2010, Patient A told Dr. Herzog that she was leaving him as a patient to which the Respondent stated that he wanted to remain friends and keep in touch.

- 25. On or about August 21, 2010, the Respondent went to Patient A's home in Massachusetts.
- 26. On or about August 21, 2010, while at Patient A's home, the Respondent kissed Patient A on her mouth.
- 27. On or about August 21, 2010, while at Patient A's home, the Respondent took off his and Patient A's shirts.
- 28. On or about August 21, 2010, while at Patient A's home, the Respondent got on top of Patient A and put his hands on Patient A's crotch.
- 29. On or about August 21, 2010, while at Patient A's home, the Respondent put his mouth on Patient A's breast.
- 30. On or about August 21, 2010, while at Patient A's home, the Respondent took off his and Patient A's underwear.
- 31. On or about August 21, 2010, while at Patient A's home, the Respondent performed cunnilingus on Patient A.
- 32. On or about August 21, 2010, while leaving Patient A's home, the Respondent told Patient A that he hoped their sexual encounter had not harmed her.
- 33. On or about September 19, 2010, Patient A and the Respondent met in a public place where Patient A read the Respondent a letter regarding the impact his actions had on her.
- 34. As a result of the Respondent's actions, Patient A felt exploited and used.
- 35. According to the American Psychiatric Association's *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatrists*, Section 2, ¶ 1, "Sexual activity with a current or former patient is unethical."

51
38 12/02/10

Legal Basis for Proposed Relief

A. Pursuant to G.L. c. 112, §5, ninth par. (c) and 243 CMR 1.03(5)(a)3, the Board may discipline a physician upon proof satisfactory to a majority of the Board that he engaged in conduct that places into question the Respondent's competence to practice medicine, including but not limited to gross misconduct in the practice of medicine, or practicing medicine fraudulently, or beyond its authorized scope, or with gross incompetence, or with gross negligence on a particular occasion or negligence on repeated occasions.

B. Pursuant to 243 CMR 1.03(5)(a)18, the Board may discipline a physician upon proof satisfactory to a majority of the Board that said physician committed misconduct in the practice of medicine.

C. Pursuant to *Levy v. Board of Registration in Medicine*, 378 Mass. 519 (1979); *Raymond v. Board of Registration in Medicine*, 387 Mass. 708 (1982), the Board may discipline a physician upon proof satisfactory to a majority of the Board that said physician lacks good moral character and has engaged in conduct that undermines the public confidence in the integrity of the medical profession.

D. Pursuant to G.L. c. 112, §5, ninth par. (h) and 243 CMR 1.03(5)(a)11, the Board may discipline a physician upon proof satisfactory to a majority of the Board that said physician has violated of a rule or regulation of the Board. Specifically:

1. 243 CMR 2.07(13)(a), which requires a physician to:
 - a. maintain a medical record for each patient, which is adequate to enable the licensee to provide proper diagnosis and treatment; and
 - b. maintain a patient's medical record in a manner which permits the former patient or a successor physician access to them.

51
39 12/02/10

The Board has jurisdiction over this matter pursuant to G.L. c. 112, §§ 5, 61 and 62. This adjudicatory proceeding will be conducted in accordance with the provisions of G.L. c. 30A and 801 CMR 1.01.

Nature of Relief Sought

The Board is authorized and empowered to order appropriate disciplinary action, which may include revocation or suspension of the Respondent's license to practice medicine. The Board may also order, in addition to or instead of revocation or suspension, one or more of the following: admonishment, censure, reprimand, fine, the performance of uncompensated public service, a course of education or training or other restrictions upon the Respondent's practice of medicine.

Order

Wherefore, it is hereby **ORDERED** that the Respondent show cause why the Board should not discipline the Respondent for the conduct described herein.

By the Board of Registration in Medicine,



Peter Paige, M.D.
Chairman

Date: December 1, 2010

SENT CERTIFIED MAIL 12-1-10 - jmf

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss

Board of Registration in Medicine

Adjudicatory No. 2010-030

In the Matter of
David B. Herzog, M.D.
Registration No. 38347

RESIGNATION

I, David B. Herzog, M.D., being duly sworn, depose and state:

1. I desire to resign my license to practice medicine in the Commonwealth of Massachusetts pursuant to the terms of 243 CMR 1.05(5)(a).
2. My resignation is tendered voluntarily.
3. I realize that this resignation is a final act that deprives me of all privileges of registration and is not subject to reconsideration or judicial review.
4. I will resign any other licenses contemporaneously with my resignation in Massachusetts, and I will make no attempt to seek licensure elsewhere.
5. I understand that my resignation is a disciplinary action that is reportable to any national data reporting agency, pursuant to G.L. c. 112, §2.

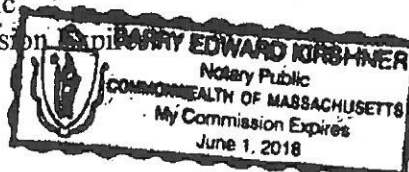
Signed under the penalties of perjury this 10th day of October, 2012.

David B. Herzog
, M.D.

Then personally appeared before me the above-named David Herzog, M.D. who signed the foregoing resignation in my presence and acknowledged said resignation to be his free act and deed.

Dated: 10-10-12

Barry Edward Kirshner
Notary Public
My Commission Expires



**COMMONWEALTH OF MASSACHUSETTS
BOARD OF REGISTRATION IN MEDICINE**

Middlesex, ss.

Adjudicatory Case No.
2010-030

In the Matter of)
)
David B. Herzog, M.D.)
_____)

Order

On the date referenced below, at a duly convened meeting of the Board of Registration in Medicine (the "Board"), the Board considered the statement of the above-named physician setting forth the terms of resignation attached hereto and pursuant to 243 CMR 1.05(5)(a), during the pendency of the above-captioned proceeding.

Having determined that the resignation is in conformity with the requirements of 243 CMR 1.05(5)(a), and, after hearing from the victim in this matter, the Board has taken the most serious, immediate and impactful action allowed by law in order to protect the public and prevent this physician from ever practicing medicine again in the Commonwealth or any other state and accepts the resignation effective immediately.

The Respondent shall provide a complete copy of this Resignation and Order within (10) days by certified mail, return receipt requested, or by hand delivery to the following designated entities: any in- or out-of-state hospital, nursing home, clinic, other licensed facility, or municipal, state, or federal facility at which he practices medicine; any in-or out-of-state health maintenance organization with whom he has privileges or any other kind of association; any state agency, in- or out-of-state, with which he has a provider contract; any in- or out-of-state medical employer, whether or not he practices medicine there; and the state licensing boards of all states in which he has any kind of license to practice medicine, and the Drug Enforcement Administration Boston Diversion Group and the DPH Drug Control Program. The Respondent shall also provide this notification to any such designated entities with which he becomes associated for the duration of this Resignation and Order. The Respondent is further directed to certify to the Board within ten (10) days that he has complied with this directive.

Date: October 17, 2012

Candace Lapidus Sloane, MD

Candace Lapidus Sloane, M.D.
Board Chair