

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

House Bill 899 (Delegate Kach)
Health and Government Operations

State Board of Physicians - Disciplinary and Licensure Procedures - Revision

This bill alters disciplinary and licensure procedures for the State Board of Physicians (MBP). Specifically, the bill increases the evidentiary standard for disciplinary procedures from “preponderance of the evidence” to “clear and convincing evidence.” A licensee whose license has been summarily suspended by the board may elect to have the hearing officer make final findings of fact and conclusions of law and, where indicated, determine the disciplinary action that should be imposed on the licensee. This decision must be final and cannot be altered by the board. A licensee who elects to have a hearing officer make such a determination may not appeal to the Secretary of Health and Mental Hygiene or the Board of Review but may seek judicial review. The bill also authorizes a licensee to seek expungement of his or her disciplinary record. The board must adopt regulations governing the process for seeking expungement and the circumstances under which it will expunge a disciplinary record. The bill also authorizes physicians to earn up to 10 continuing education credits for providing *pro bono* services.

Fiscal Summary

State Effect: None. The changes are procedural in nature and do not directly affect governmental finances.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: After holding any necessary disciplinary hearing, the hearing officer must refer the findings, conclusions, and, if any, the disciplinary action that should be imposed against the licensee to the board for appropriate action. If a hearing officer notifies the board that he or she has concluded that there are grounds for disciplinary action, within 15 days after receiving the notice the board must pass an order, which must include the final findings of fact and conclusions of law made by the hearing officer, and implement the disciplinary action that the hearing officer determined should be imposed on the licensee. When the board passes an order, the board may not alter the findings of fact and conclusions of law made by the hearing officer or implement a disciplinary action that is different from the disciplinary action the hearing officer determined should be imposed on the licensee.

Uncodified language in the bill requires the board, by December 31, 2013, to issue a request for proposal for a statewide organization certified by the Accreditation Council for Continuing Medical Education to provide a yearly continuing medical education program for licensed physicians on issues of importance to public health.

Current Law: Except as otherwise specified in the Administrative Procedure Act (APA), before the board takes disciplinary action against a licensee, the board must give the licensee an opportunity for a hearing. The hearing officer must give notice and hold the hearing in accordance with APA. The factual findings of a hearing officer must be supported by a preponderance of the evidence. The individual may be represented by counsel at the hearing. After performing any necessary hearing, the hearing officer must refer proposed factual findings to the board for the board's disposition.

Following the filing of charges, if a majority of the quorum of the board finds that there are grounds for disciplinary action, the board must pass an order in accordance with APA. After the charges are filed, if the board finds, on an affirmative vote of a majority of its quorum, that there are no grounds for action, the board must immediately dismiss the charges and exonerate the licensee. The board must expunge all records of the charges three years after the charges are dismissed. If a physician executes a document releasing the board from any liability related to the charges, the board must immediately expunge all records of the charges. In each instance, the board may not take any further action on the charges.

Chapter 252 of 2003 (SB 500) specified that the evidentiary standard for disciplinary hearings against physicians is by a "preponderance of the evidence" but required that factual findings must be supported by "clear and convincing evidence" for certain charges based on failure to meet appropriate standards of care. Chapter 5 of the special

session of 2004 (HB 2) repealed language regarding “clear and convincing evidence” and reasserted the “preponderance of the evidence” standard.

Physicians must meet continuing medical education (CME) requirements when renewing (or reinstating) their license. Current CME requirements for physicians are 50 approved credit hours (Code of Maryland Regulations 10.32.01.09) during the two-year period immediately preceding renewal or reinstatement.

Background: The mission of MBP is to assure quality health care in Maryland through the efficient licensure and effective discipline of health providers under its jurisdiction, by protecting and educating clients/customers and stakeholders and enforcing the Maryland Medical Practice Act. The board has regulatory authority over physicians, physician assistants, radiographers, radiation therapists, nuclear medicine technologists, radiologist assistants, respiratory care practitioners, polysomnographic technologists, athletic trainers, and perfusionists.

According to the board, if the board summarily suspends a license, the licensee is entitled to a post-deprivation hearing before the full board within 14 days of the order. The board currently schedules and holds those hearings within that timeframe. The licensee is also entitled to request a full evidentiary hearing through the Office of Administrative Hearings (OAH) within 30 days of the issuance of the summary suspension order and to request an OAH proposed order within 30 days of the hearing. The board notes that respondents do not routinely take advantage of these expedited procedures. In calendar 2010, 2011, and 2012, there were 27, 15, and 18 summary suspensions, respectively. To date in calendar 2013, there have been two summary suspensions.

The Maryland State Medical Society (MedChi) indicates that summary suspension cases can take longer than a year to resolve from the time a physician first receives notice until all appeals have concluded. According to MedChi, allowing a physician *the option* of having a hearing officer make the final decision on a case, rather than making a recommendation to MBP and then waiting for the board to take final action, could reduce the amount of time it takes for a summary suspension case to be completed by approximately three to four months.

Standard of Review for Disciplinary Hearings: Prior to 2003, the evidentiary standard for the board was “clear and convincing evidence.” The 2001 sunset evaluation of the board conducted by the Department of Legislative Services noted that this heightened standard made prosecutors reluctant to take cases. The report noted that “preponderance of the evidence” is the standard of proof that is utilized in civil litigation, which requires proof that the fact sought to be proven is more probable than not. The evidence offered to prove a fact must be found by the trier of fact to be more credible and convincing than the evidence submitted in opposition. On the other hand, a clear and convincing evidence

standard is a heightened legal standard requiring a determination by a reasonable certainty of the fact in controversy. The sunset evaluation report recommended that statutory language regarding “clear and convincing evidence” be repealed and replaced with the “preponderance of the evidence” standard, the legal standard for disciplinary decisions by all other health occupations boards in the State.

According to the Federation of State Medical Boards, a state board should be authorized to use preponderance of the evidence as the standard of proof in its role as trier of fact for all levels of discipline. Of the 53 total medical boards (including the District of Columbia, Guam, and Puerto Rico), 35 have a preponderance of the evidence standard (including Delaware, the District of Columbia, and Pennsylvania), while 13 have a clear and convincing evidence standard (including Virginia and West Virginia). Three states have varied levels of standard of proof, while two states have no statutorily defined standard of proof.

Continuing Education: Several other health occupations boards allow their licensees to obtain at least some continuing education credit for *pro bono* work, including the State boards of Audiologists, Hearing Aid Dispensers, and Speech-Language Pathologists; Dental Examiners; Dietetic Practice; and Examiners in Optometry.

Additional Information

Prior Introductions: None.

Cross File: SB 550 (Senator Jennings) - Education, Health, and Environmental Affairs.

Information Source(s): Maryland State Medical Society, Federation of State Medical Boards, Office of Administrative Hearings, Department of Health and Mental Hygiene, Department of Legislative Services

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