

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF HEALTH
THREE CAPITOL HILL
PROVIDENCE, RHODE ISLAND 02908**

Department of Health

v.

**Tadeusz Sztykowski, DA 00020
Respondent.**

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COMPLIANCE ORDER

I. INTRODUCTION

This matter arose pursuant to a compliance order (“Compliance Order”) issued on December 13, 2016 pursuant to R.I. Gen. Laws § 23-1-20¹ by the Department of Health (“Department”) to Tadeusz Sztykowski (“Respondent”). The Respondent is licensed pursuant to R.I. Gen. Laws § 5-37.2-1 *et seq.* as a Doctor of Acupuncture and Oriental Medicine. The Respondent requested a hearing on the Compliance Order and a hearing was held on January 23, 2017. At that time, the Respondent filed a motion to vacate the Compliance Order. On February 10, 2017, the Department filed an objection with the Respondent filing a reply on February 14, 2017.

¹ R.I. Gen. Laws § 23-1-20 Compliance order.

Whenever the director determines that there are reasonable grounds to believe that there is a violation of any law administered by him or her or of any rule or regulation adopted pursuant to authority granted to him or her, the director may give notice of the alleged violation to the person responsible for it. The notice shall be in writing, shall set forth the alleged violation, shall provide for a time within which the alleged violation shall be remedied, and shall inform the person to whom it is directed that a written request for a hearing on the alleged violation may be filed with the director within ten (10) days after service of the notice. The notice will be deemed properly served upon a person if a copy of the notice is served upon him or her personally, or sent by registered or certified mail to the last known address of that person, or if that person is served with notice by any other method of service now or later authorized in a civil action under the laws of this state. If no written request for a hearing is made to the director within ten (10) days of the service of notice, the notice shall automatically become a compliance order.

II. JURISDICTION

The administrative hearing was held pursuant to R.I. Gen. Laws § 42-18-1 *et seq.*, R.I. Gen. Laws § 23-1-1 *et seq.*, and R.I. Gen. Laws § 23-1-22.

III. ISSUE

Whether the Compliance Order shall be sustained, modified, or withdrawn.

IV. TESTIMONY AND MATERIAL FACTS

Dr. James McDonald, Chief Administrative Officer of the Medical Board, testified on behalf of the Department. He testified that if someone receives an overseas medical degree and wants to practice medicine in the United States, he or she will need to do an American residency and have gone to a medical school that is recognized by the United States. He testified that the Respondent is not licensed as a medical doctor pursuant to R.I. Gen. Laws § 5-37-1 *et seq.* (Board of Medical Licensure and Discipline) in Rhode Island so does not have prescription authority to prescribe medicine and controlled substances. He testified that he does not agree with the representations in the Respondent's November 18, 2016 email that many drugs are dangerous for long term use (Department's Exhibit Three (3), pages 1 and 2) since many drugs are for maintenance and are not dangerous for long term use. He testified that many drugs maintain a condition such as ensuring the body's metabolism is normal and that does not mean the drug is toxic. He testified that sometimes a person may need a synthetic medicine, e.g. for high blood pressure, but it is not addictive. He testified that people take drugs for diabetes or low cholesterol. He testified that the term "iatronic" means physician induced harm, but not all medicines cause harm. He testified that the Respondent's representation of pledging an oath "to do no harm" as a doctor is not the oath that a doctor would take. He testified that none of the staff at the Respondent's office are licensed physicians. He testified that the use of the term withdrawing from drugs is misleading because it implies all drugs are toxic. He testified that as a doctor he received

training about weaning patients from drugs. He testified that neither email mentions anything about acupuncture.

On cross examination, Dr. McDonald testified that he, himself, did not study acupuncture and is not familiar with acupuncture and oriental medicine. He testified that the idea of integrative medicine is used by various practitioners, not just acupuncturists.

The Respondent provided an affidavit in which he indicated that he is modifying his letterhead and professional paperwork to make clear that he is licensed as an M.D. in Europe. He indicated that the emails only went to his patients who are aware of his licensing status and to his knowledge no one has come to his office believing on the basis of those emails that he is licensed as a physician. He represented that he has hired consultants to review existing materials and modify them as necessary.

V. MOTION TO VACATE

A. Arguments

The Respondent filed a motion to vacate the Compliance Order to which the Department objected. The Respondent argued that the Compliance Order is duplicative of the Notice of Charges and Administrative Hearing ("Notice") issued in October, 2016 against the Respondent since the Notice alleges a violation by the Respondent in his use of the term, "M.D." The Respondent argues that the Compliance Order unfairly prejudices the Respondent in advance in the administrative hearing on the Notice and prejudices the issue of the use of M.D since it could be found after the hearing on the Notice that the Respondent did not violate R.I. Gen. Laws § 5-37.2-1(13) and (16) by the use of the term "M.D." which could contradict the finding in the Compliance Order. The Respondent argued that the Compliance Order should be withdrawn and its allegations added to the Notice. The Respondent further argued that the Compliance Order

required immediate compliance which is impossible. The Respondent represented that he is taking steps to address the Department's concerns, but immediate compliance is impossible since existing materials need to be reviewed and modified if needed. The Respondent further argued that correspondence from the Department in 1997 in response to a 1996 investigation by the Medical Board Licensure and Discipline ("Board") indicated that the Respondent could indicate that he is licensed as an M.D. in Poland so that the Compliance Order is estopped. The Respondent argued that there is no new evidence for the Department to reconsider, and since the 1996 matter was closed, the Respondent has identified himself as an M.D. licensed in the EU (European Union) and as a Doctor of Acupuncture and Oriental Medicine.

The Department objected to the motion to vacate on the grounds that the allegations in the Notice and the Compliance Order are different since the Notice relates to specific business forms and the Compliance Order is directed at specific advertising. The Department argued that it is its prerogative whether to amend the pending Notice or to issue a compliance order. The Department argued that while immediate compliance might be impossible, the remedy is not to vacate, but to modify the time period for compliance. The Department argued that there is no reason to vacate since the Respondent admitted that he needs time to bring his advertising in to compliance. The Department argued that the Compliance Order is not estopped by the 1997 letter.

B. Discussion of the Motion to Vacate

The Compliance Order refers to specific advertising which is different than the allegations in the Notice regarding the use of M.D. in a business form. The Compliance Order references two (2) emails sent out by the Respondent on certain dates and applies to that type of literature as opposed to the Notice's business forms. Thus, the Compliance Order and Notice do not contain duplicative charges.

The Department issued the Notice against the Respondent pursuant to R.I. Gen. Laws § 5-37.2-1 *et seq.* The Department issued the Compliance Order pursuant to R.I. Gen. Laws § 23-1-20. In terms of the alleged violations in the Compliance Order, the Department could have chosen to move to amend the Notice or issue another notice of hearing. However, the Department is not barred from bringing a Compliance Order on new alleged violations even though there is an outstanding notice of hearing. The Notice and Compliance Order are not duplicative. Any finding about the use of the term, "M.D." in the Notice would rely on different facts than those alleged in the Compliance Order.

The Respondent attached to its motion a letter dated July 17, 1997 from the Respondent's attorney to the Board offering to resolve a matter that the Board was investigating regarding the Respondent. The July 17, 1997 letter referenced a February 25, 1997 letter whereby the Respondent made an offer regarding the use of the term, "M.D." The February 25, 1997 letter was not attached, but based on the July, 1997 letter, the offer related to including after the Respondent's use of the term, "M.D.," the term, "(licensed in Poland)." The Respondent attached a November 18, 1997 letter from the Board to the Respondent indicating that the Investigating Committee had closed the investigation. The Respondent represented that since the 1997 letter, he has indicated on his materials that he is only licensed in Europe.

In the Compliance Order, the issue is not how the Respondent refers to himself as an M.D., but rather the Department argued that the Respondent did not indicate his actual licensing as a Doctor of Acupuncture and Oriental Medicine and implied he and his staff are licensed in Rhode Island to practice medicine. Thus, the Department found in its Compliance Order that the Respondent is not explaining what license he has and implying he is licensed as a physician.

The Respondent argued that the Department was collaterally estopped and barred by *res judicata* from bringing another action against the Respondent because of the 1997 letter. *Foster-Glocester Reg'l Sch. Comm. v. Bd. of Review*, 854 A.2d 1008 (R.I. 2004) held that a matter is collaterally estopped when the parties are the same or in privity with the parties of the previous proceeding, a final judgment on the merits has been entered in the previous proceeding, and the issue in the question are identical in both proceedings. Here, there was no final judgment on the merits entered in the prior investigation of the Respondent, but rather the Board closed the investigation. Also there was no final judgment on the merits, but rather a letter closing the investigation. Finally, the issues in the Compliance Order relate to emails sent in 2016 and whether the emails are in statutory compliance so that the current issues are different from what was the apparent concern over a different use by Respondent of the term, "M.D." in 1996. *Res Judicata* serves as a bar to a second cause of action where there exists the same parties, same issues, and a finality of judgment in an earlier action. *Garganta v. Mobile Village, Inc.*, 730 A.2d 1 (R.I. 1999). Again there was no finality of judgment in the 1997 matter and the issues are different. Neither collateral estoppel nor *res judicata* apply to this matter.

The Respondent argued that the Compliance Order asked the impossible of immediate compliance. R.I. Gen. Laws § 23-1-22² provides that if after a hearing on a compliance order, the

² R.I. Gen. Laws § 23-1-22 provide as follows:

Hearing. If a person upon whom a notice of violation has been served under the provisions of § 23-1-20 or if a person aggrieved by any notice of violation requests a hearing before the director within ten (10) days of the service of notice of violation, the director shall set a time and place for the hearing, and shall give the person requesting a hearing at least five (5) days written notice of the hearing. After the hearing, the director may make findings of fact and shall sustain, modify, or withdraw the notice of violation. If the director sustains or modifies the notice, that decision shall be deemed a compliance order and shall be served upon the person responsible in any manner provided for the service of the notice in § 23-1-20. The compliance order shall state a time within which the violation shall be remedied, and the original time specified in the notice of violation shall be extended to the time set in that order.

decision sustains the compliance order the decision shall indicate the time in which to remedy the violation and the original compliance order shall be modified to reflect the new time period.

While the Department could have moved to amend the Notice rather than to issue the Compliance Order, the Department chose to issue a Compliance Order based on new information.

VI. DISCUSSION

The parties did not dispute that the Respondent sent out the two (2) promotional emails identified in the Compliance Order. There is no dispute that the Respondent is not licensed pursuant to R.I. Gen. Laws § 5-37-1 *et seq.* as an M.D. in Rhode Island. It has been represented and apparently agreed that the Respondent received a medical degree in Europe.³ Dr. McDonald testified that the Respondent's staff are not licensed as physicians. There was no evidence that the Respondent's staff members are licensed as either physicians or as Doctors of Acupuncture and Oriental Medicine. There are no requirements in the statute that anyone be actually deceived or misled by the emails for the emails to be in violation of the statute.

R.I. Gen. Laws § 5-37.2-1 *et seq.* provides for the licensing of Doctors of Acupuncture and Oriental Medicine. R.I. Gen. Laws § 5-37.2-15 provides various grounds to suspend, revoke, or deny a license application for said license. The statute provides in part as follows:

Suspension, revocation, or refusal of license – Grounds.

The department may either refuse to issue or may suspend or revoke any license for any one or any combination of the following causes:

(4) Advertising by means of knowingly false or deceptive statement;

(13) Advertising in an unethical or unprofessional manner;

(16) Failure of a licensee to designate his or her school of practice in the professional use of his or her name by the term "doctor of acupuncture and Oriental medicine."

³ It is unclear whether the Respondent is licensed as a M.D. in Europe or just received his medical degree in Europe. There are representations in the papers filed that he received his medical degree in Poland. It is not clear if this means he is also licensed as a M.D.

A. The Compliance Order

1. R.I. Gen. Laws § 5-37.2-15(16)

The Compliance Order references a November 18, 2016 and a November 29, 2016 promotional email sent by the Respondent. While the Respondent referred to himself as a “trained M.D. from Europe,” in the emails, he failed to designate himself as a “Doctor of Acupuncture and Oriental Medicine” in the professional use of his name at the end of both emails, “Dr. Tad & Staff.”

The Respondent also refers to himself as becoming a doctor in the November 16, 2016 email without specifying his school of practice. The November 16, 2016 email also states, “my doctors and I” without indicating what kind of doctor the Respondent is and without indicating that his staff are not licensed physicians. The November 29, 2016 email states, “[a]ll doctors working at [Respondent’s office]” when there is no one on staff licensed as a physician. It is unclear whether anyone on the staff is licensed as an acupuncturist.

2. R.I. Gen. Laws § 5-37.2-15(4)

It is prohibited to advertise by means of knowingly false or deceptive statements. Both emails imply that the Respondent’s staff are doctors without clarifying what kind of doctor (if any). E.g. “my doctors and I.” The emails also imply that the Respondent is a licensed physician as it fails to include the type of professional license he actually holds and the emails refer to Respondent training as a doctor in Europe and making oaths as a doctor.

3. R.I. Gen. Laws § 5-37.2-15(13)

It is prohibited to advertise in an unethical and unprofessional manner. The emails fail to designate the Respondent’s professional license when he is discussing his medical studies and calling himself a doctor so the emails fail to put the discussion of use of medicine and drugs within

that context. R.I. Gen. Laws § 5-37.2-2 provides the following definitions in terms of the Respondent's license:

(1) "Acupuncture" means the insertion of needles into the human body by piercing the skin of the body, for the purpose of controlling and regulating the flow of energy and blood in the body.

(3) "Doctor of Acupuncture and Oriental Medicine" means a person licensed under the provisions of this chapter to practice the art of healing known as acupuncture and Oriental medicine.

(4) "Oriental medicine" means a form of health care, based on classical Chinese medical concepts and modern Oriental medical techniques, that employs Chinese medical diagnosis such as pulse, tongue, palpatory, and observational diagnosis, as well as acupuncture therapies and diagnostic techniques based on newer scientific models for the assessment, treatment, prevention, and cure of any disease with the purpose of full health restoration. The techniques and modalities of Oriental medicine include acupuncture, electro-acupuncture, laser acupuncture, moxibustion (heat therapy), cupping, TDP and infrared lamps, Tuina, Qi Gong, Gwa/sha, thermography, herbal GMP standardized therapy, homeopathy and supplement therapy, chinese dieting therapy, breathing exercises, and life-style change consultations.

While it is understood that acupuncturists come from a different school of thought and the practice of medicine than a licensed physician, the emails imply that the Respondent is a licensed physician who apparently believes most prescription drugs are dangerous. There is no context regarding his actual licensing in regard to any discussion regarding the use of prescription medicine.

B. Violations

The Respondent must amend his emails to include his professional designation. He cannot refer to his staff as doctors as they are not licensed pursuant to R.I. Gen. Laws § 5-37-1 *et seq.* If any of his staff are licensed acupuncturists that could be incorporated into the promotional materials; otherwise to refer to his staff as doctors when they are not is in violation of the statute. The Respondent indicated that he has retained a consultant to ensure that his promotional materials are in statutory compliance.

VII. FINDINGS OF FACT

1. The Respondent is licensed as a Doctor of Acupuncture and Oriental Medicine pursuant to R.I. Gen. Laws § 5-37.2-1 *et seq.*
2. On or about December 13, 2016, the Department issued a Compliance Order to the Respondent.
3. A hearing was held on January 23, 2017 with the parties timely filing briefs by February 14, 2017.
4. The Respondent is not licensed as a physician pursuant to R.I. Gen. Laws § 5-37-1 *et seq.*
5. The Respondent's staff are not licensed as physicians pursuant to R.I. Gen. Laws § 5-37-1 *et seq.*
6. The facts contained in Section VI are reincorporated by reference herein.

VIII. ORDER

Based on the forgoing, it is recommended that within 30 days of the execution of this Order, the Respondent is ordered to comply with the following:


1. Respondent shall refrain from advertising or marketing that is false, deceptive or misleading, or that is likely to deceive, defraud or harm the public.
2. Respondent shall cease and desist from holding himself out as a licensed physician.
3. In his professional name, Respondent shall designate his school or practice by the term, "Doctor of Acupuncture and Oriental Medicine."
4. In Respondent's professional communications, including but not limited to advertising, marketing, and promotional materials for the Centers for Integrative Medicine and Healing, Respondent's professional school or practice shall be designated by the term "Doctor of

Acupuncture and Oriental Medicine.”

5. In Respondent’s professional communications, including but not limited to advertising, marketing, and promotional materials for the Centers for Integrative Medicine and Healing, Respondent’s staff members who are licensed to practice acupuncture and Oriental medicine shall be designated by the term “Doctor of Acupuncture and Oriental Medicine.”

Furthermore, the motion to vacate is denied.

Entered this day 2nd March, 2017.

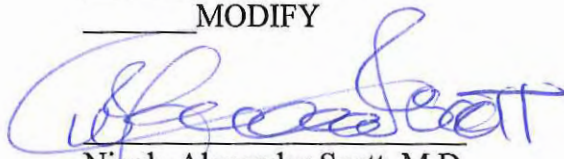

Catherine R. Warren, Esquire
Hearing Officer

ORDER

I have read the Hearing Officer’s Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

☒ ADOPT
☐ REJECT
☐ MODIFY

Dated: 3/3/17


Nicole Alexander-Scott, M.D.
Director

CERTIFICATION

I hereby certify on this 6th day of March, 2017 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and certified mail, return receipt request to Stephen P. Harten, Esquire, Ratcliffe Harten Burke & Galamaga, LLP, 40 Westminster Street, Suite 700, Providence, RI 02903 and Adelita Orefice, Esquire, Donoghue Barrett & Singal, One Cider Street, Suite 300, Providence, RI 02903 and by hand-delivery to Julie Sacks, Esquire, Department of Health, Three Capitol Hill, Providence, RI 02908.

