

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Board of Registration in Medicine,
Petitioner

v.

Docket No. RM-20-0151

Dated: **DEC 15 2022**

Gabriel Luna, M.D.,
Respondent

Appearance for Petitioner:

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Administrative Magistrate

James P. Rooney

Summary of Recommended Decision

The Board of Registration in Medicine charged a doctor, who was charged criminally after a car accident, with fraudulently obtaining his medical license, engaging in conduct that has the capacity to deceive or defraud, conviction of a crime, lack of good moral character, and engaging in conduct that undermines the public confidence in the integrity of the medical profession. After a hearing, the evidence shows that the doctor was convicted of two misdemeanor charges, but that he did not leave the scene of an accident knowing that a person had been injured. He did not reveal the criminal charge in his medical license applications, but the evidence does not show an intent to procure a license by fraud. Rather, it

shows that he relied on erroneous advice of counsel and once inadvertently misunderstood what information was sought. However, his failure to inform the hospital that employed him as a resident and the Board in his subsequent license application that he sought leave from his residency to serve a two month jail sentence had the capacity to deceive them as he should have known that this information was pertinent to his employer's and the Board's decisions on his leave application and his license application respectively. The entirety of the evidence does not show that the doctor lacks good moral character.

RECOMMENDED DECISION

Introduction

On February 21, 2010, the Board of Registration in Medicine issued a Statement of Allegations charging Gabriel Luna, M.D. with fraudulently obtaining his medical license, engaging in conduct that has the capacity to deceive or defraud, conviction of a crime, lack of good moral character, and engaging in conduct that undermines the public confidence in the integrity of the medical profession.¹ These charges arose out of a car accident in Florida on July 9, 2011 that injured a motorcyclist and the fallout from that accident in which the doctor pled to two misdemeanor charges and either failed to reveal his arrest or was not entirely forthcoming about it on license applications and on a request for leave from a residency program.² Dr. Luna denies knowing that he had hit a motorcyclist and denies any fraudulent intent in the manner in which he completed his license applications and his leave application, and points out that when he realized his error, he self-reported the accident and the criminal charges to the Board.

¹ The Board also initially summarily suspended Dr. Luna. On March 6, 2020, I granted the doctor's motion to deny summary suspension. On March 19, 2020, the Board adopted my recommendation and vacated the summary suspension.

² The Board amended the Statement of Allegations on April 3, 2020 to add more detail including a charge that the doctor had left the scene of the accident without checking on the motorcycle driver.

I conducted a hearing in this matter at the Board of Registration in Medicine on June 21, 22 and 24, 2021. I marked the parties' joint prehearing memorandum that includes a list of stipulated facts as Pleading A. I admitted 36 exhibits into evidence, with the first seventeen from the Board and the remainder from the doctor. I heard testimony from Dr. Luna, Shlomit Schaal, M.D., Ph.D., the chair of the Department of Ophthalmology at UMass Memorial Hospital where Dr. Luna works, Rochine Cahill, an attorney in the Board's licensing division, Jean E. Ramsey, M.D., an ophthalmologist who worked at Boston Medical Center when Dr. Luna was a resident there, Lori Ventura, M.D., an ophthalmologist who worked in Florida with Dr. Luna, and Dr. Steven Tosi, the chair of surgery at UMass Memorial Hospital. The parties filed briefs in October 2021, which closed the record.

Findings of Fact

Based on the testimony, the stipulated facts, the exhibits presented, and the reasonable inferences drawn from them, I make the following findings of fact:

1. Gabriel Luna was born in 1981 in Tehuacan, Mexico, a rural community in the state of Puebla south of Mexico City. He graduated from a local high school and then entered a six-year medical school program at the Universidad Popular Autonoma del Estado de Puebla. In 2005, during his fourth year of medical school, he was a visiting student at the University of Miami's Bascom Palmer Eye Institute. Ophthalmologist Lori Ventura, M.D., offered to assist him if he ever decided to seek an ophthalmology residency in the United States. (Luna and Ventura testimony.)
2. In 2007, Dr. Luna graduated second in his class from medical school, and was recognized by the Dean for his "outstanding performance . . . including academic

performance, extracurricular activities and above all for his charisma, personality, and human and moral ethics.” The Dean noted that Dr. Luna provided regular free medical consultation in some of Mexico’s poorest rural areas. (Luna testimony; Ex. 23, attachment B.)

3. Dr. Luna spent one year conducting research in Mexico City and, in 2009, he applied for and was accepted for a residency in internal medicine at Florida Hospital in Orlando, Florida. In June 2010, he moved to Orlando to begin his residency. (Luna testimony.)

4. During his year of this residency in internal medicine, Dr. Ventura invited Dr. Luna to spend the following year at the Bascom Palmer Eye Institute conducting clinical research. He accepted and moved to Miami in October 2011. (Luna and Ventura testimony.)

5. Between the end of his internal residency in June 2011 and his move to Miami in October of that year, Dr. Luna stayed in Orlando to await the issuance of a visa that would allow him to make the transfer to the University of Miami. (Luna testimony.) “While it could have been awkward [for Dr. Luna to leave] his Internal Medicine residency after his first year, the program director held [him] in such high esteem that he offered [Dr. Luna] the chance to continue to work in Orlando” until he left for Miami. (Exs. 30 and 31.) During this period, he served as a night resident at Florida Hospital working sixteen hour shifts from Sunday to Friday beginning at 5:00 p.m. (Luna testimony.)

6. On Friday morning, June 8, 2011, Dr. Luna’s 60 hours of work that week was scheduled to end. The night of June 7, 2011 had been extremely busy, and hence he

finished his shift with considerable administrative tasks still to complete. He decided to stay to finish them, which took him until past midnight Friday. He then drove home, after having been at work for 30 hours. (Luna testimony.)

7. At around 1:58 a.m. on Saturday, July 9, 2011, as Dr. Luna was making a left turn onto the street where he lived, Millenia Lakes Boulevard, two motorcyclists were entering the intersection. He struck one of them, fracturing a leg of William Pugh. The accident was witnessed by the other motorcyclist, Blaise Timpanaro. (Exs 16, 18, and 23.)

8. Dr. Luna felt an impact to his car, but did not realize he had hit anyone. He continued driving down the block until he reached his apartment building 0.4 miles away. He did not notice the minor damage to the left side of his car because he did not walk by it when he got out of the car and went to his apartment. One half hour later, the Orlando police came to his apartment to question him. They informed him of the accident and that a man had been injured. He asked the officers to tell him what had happened and told them he was sorry for the accident. The police told him to contact his insurance company, which he did, and the insurance company had the minor damage to the left side of his car repaired. (Luna testimony.)

9. At 2:50 a.m, Dr. Luna wrote out the following statement that he testified was based on what he had been told by the police:

I was driving on Millenia Blvd. coming from Millenin Blvd. I was about to turn left on Millenia Lakes Blvd. When I saw a motorcycle coming so I waited [until] he passed through then I turned left but another motorcycle that was coming very fast hit the front of my car while I was turning left. I was afraid. I wanted to call 911 and help the person injured. I got home and police arrived at my home.

(Ex. 16.)

10. At 2:30 a.m., Mr. Timpanaro gave a written statement to the police. He described the accident as follows:

I was following Billy on Millenia Blvd. Going thru a green light at the intersection of Millenia Blvd. and Millenia Lakes Blvd when a white Mazda 6 tried turning left in front of us coming from the opposite way. Billy tried to avoid it by locking up the bikes brake but the car was . . . into the road in front of us and the back tire ended up hitting the front left of the white Mazda. I swerved myself out of the way.

(Ex. 16.)³

11. Dr. Luna recalled that the officer told him he should not have left the scene. The officer recommended that he hire a criminal lawyer, which he did, hiring Attorney Corey Cohen. Sometime later, Attorney Cohen told Dr. Luna that he had contacted the Orange County District Attorney's Office and was told that no criminal charges would be filed against the doctor. (Luna testimony; Ex. 23.)

12. The record contains an undated traffic citation concerning the accident. It charged the doctor with leaving the scene of an accident with injuries, and stated that it was being "filed as a felony information." The doctor testified that he was not aware of the citation until a copy was shown to him by Board Investigator Susan Dye in 2017. (Luna testimony; Exs. 15 and 24.)

13. From October 2011 to October 2012, Dr. Luna performed research at the Bascom Palmer Eye Institute on glaucoma, which is a disease his grandfather had. (Luna testimony.) His mentors during this period, Dr. Ventura and Vittorio Porciatti, D.Sc.,

³ The two statements appear not to have been taken by the same officer. Only the officer who took Dr. Luna's statement listed his ID number. However, the officer who took each statement signed it. Both signatures are unreadable, but look different. See Ex. 16.

thought that “[f]rom the outset [he] possessed the dedication, professionalism, and empathy of a physician, as he devoted himself completely to our patients and the study of Ophthalmology.” (Ex. 31.) Dr. Luna then applied and was accepted for an ophthalmology residency at Boston Medical Center. (Luna testimony.)

14. Dr. Luna began his residency at BMC in October 2012. He submitted to the Board of Registration in Medicine an evaluation form filled out by George Everett, M.D., the Program Director at Florida Hospital where he had worked in 2010 and 2011. Dr. Everett checked “superior” next to a box asking for his opinion on Dr. Luna’s character and ethics. Overall, he considered Dr. Luna to have “outstanding intelligence, integrity, professionalism and knowledge.” (Luna testimony; Ex. 23, attachment A.)

15. Dr. Luna applied for and received a limited medical license from the Board of Registration in Medicine in 2012. He sought advice from Attorney Cohen about answering a question in the limited license application regarding whether he had ever been charged with a crime. Attorney Cohen told him he need not report the car accident because it was just a traffic offense, and he had not been charged with a crime.⁴ (Luna testimony; Ex. 24.)

16. On Thursday, May 9, 2013, when Dr. Luna went for a status adjustment interview at a U.S. Citizenship and Immigration Services field office, he was arrested on a Florida warrant over charges filed on January 9, 2013. He was arraigned in Massachusetts, released the same day, and advised to go to Florida to address the charges pending there.

⁴ The first limited license application completed by Dr. Luna was not placed into evidence. I assume however that it included the same question that tripped up Dr. Luna on his later applications.

He flew to Florida the following day, turned himself in, and contacted Attorney Cohen.⁵ He was arraigned and released on one third degree felony – leaving the scene of an accident with injuries – and two misdemeanors – culpable negligence with personal injury and leaving the scene of an accident involving property damage.⁶ Dr. Luna does not remember the arraignment. All he remembers is that he was charged criminally with respect to traffic offenses. He does not remember that one of the charges was a felony. (Luna testimony, stipulations 9 and 10, Ex. 20.)

17. On September 18, 2013, Dr. Luna completed an application to renew his limited license. Question 16 asked “[h]ave you been charged with a criminal offense, other than a minor traffic offense?” (Ex. 1.) Dr. Luna again consulted with Attorney Cohen, who told him he need not report the charges against him because they were just traffic offenses.⁷ (Luna testimony.) He therefore responded “no” to this question. (Ex. 1.) The

⁵ Dr. Luna’s brother, Juan Carlos, was killed in a car accident in Mexico on May 1, 2013. The BMC residency program was sympathetic and willing to give him time off, but his visa did not allow him to travel out of the country for the funeral. Instead, he took sick time the day he went to the immigration office and bereavement leave for two days to fly to Florida and back. (Luna testimony.)

⁶ “An applicant for naturalization,” such as Dr. Luna, “bears the burden of demonstrating that, during the statutorily prescribed period, he or she has been and continues to be a person of good moral character.” 8 CFR 316.10(a)(1). “An applicant shall be found to lack good moral character if during the statutory period the applicant . . . [c]ommitted one or more crimes involving moral turpitude.” 8 CFR 316.10(b)(2)(I). Although the immigration authorities were aware of the charges against Dr. Luna, and presumably the outcome of his case, he has been granted U.S. citizenship.

⁷ Attorney Cohen’s letter discusses only the advice he gave before criminal charges were filed. (Ex. 24.) Dr. Luna was aware that the letter did not discuss the advice the attorney gave after charges were filed, but he did not try to have Attorney Cohen add to his letter because Dr. Luna had discharged this attorney before his case ended, they were not on good terms, and it took many efforts for him to get any letter at all from Attorney Cohen. (Luna testimony.)

Board understands this question to mean that an applicant need not report speeding tickets, but must report a drunk driving charge. (Cahill testimony.)

18. A plea deal on the Florida charges was worked out. On June 18, 2014, Dr. Luna pled no contest to the two misdemeanor charges and the prosecution withdrew the felony charge. The plea form noted that, as to the charge of culpable negligence resulting in injury, Dr. Luna's "conduct was careless, but not intentional." The doctor agreed to serve 60 days in the Orange County Jail, be subject to twelve months of probation, pay \$78,533 in restitution to the Orlando hospital at which Mr. Pugh was treated, pay \$600 in restitution to Mr. Pugh, and perform 150 hours of community service. By then, Dr. Luna had discharged Attorney Cohen and hired Attorney Warren Lindsey. His new attorney told him that the jail sentence could be served by participating in a work release program and spending his night in a facility that was essentially a dorm. (Luna testimony; Exs. 14, 19, and 20.)

19. The plea deal into which Dr. Luna entered meant that he would need two months off from his BMC residency. The Florida judge who accepted the plea had picked August 1, 2014 as the sentencing date. The doctor hoped to address two problems at the same time while on leave. The other problem involved his mother. She had been diagnosed with breast cancer in December 2013 and then had a double mastectomy and chemotherapy in Mexico. She was advised to follow up with radiation treatment, but refused to do so in Mexico. She was willing to undergo treatment in the United States, but only if Dr. Luna was there to help her. The doctor thought he would have time to help her while he was on work release, and so planned to have her come to Florida when he was there. (Luna testimony.)

20. The BMC program had already noticed that Dr. Luna was having family-related issues. In a June 4, 2014 evaluation, Wuqaas Munir, M.D., noted that “due to family health issues, you feel an extra burden distracting from your ability to handle the complexities of residency.” (Ex. 5.)

21. On June 30, 2014, Dr. Luna filed a request for leave of absence from BMC from July 31, 2014 to September 28, 2014. The form asked him to check a box that applied to the reason he was requesting leave. The form listed possible health-related reasons. It did not list the need to serve time in jail as a potential reason for leave. The doctor thought it was unlikely that he could be granted leave to serve a jail sentence. He circled the word “parent” in a line that described the reason for a leave to care for a parent who has a serious health condition. He did not check the box associated with this line. Instead, he checked “other” and wrote “personal/family matter.” By that he meant that his brother’s death and his criminal case were a personal issue, and his mother’s health was a family issue. He did not explain this to his supervisors at BMC, partly because he was not asked to do so and also because he was ashamed. (Luna and Ramsey testimony; Ex. 6.)

22. On July 22, 2014, BMC approved leave for Dr. Luna under the Family and Medical Leave Act. (Ex. 8.) Dr. Luna did not receive a copy of this letter until discovery after the Board filed the Statement of Allegations.⁸ He did not care whether his leave

⁸ A crossed-out address in the address line of the letter may explain this. See Ex. 8.

was paid. (Luna testimony.) BMC's GME office⁹ advised him to use sick time during the leave period. It filled out a leave planning form that treated the doctor's leave as a combination of sick leave and vacation. (Luna testimony; Ex. 7.) Unbeknownst to Dr. Luna, BMC had to report his leave to the Board of Registration in Medicine because it would mean an extension of his residency. Dr. Jean Ramsey's September 24, 2104 letter to the Board described Dr. Luna's leave as "due to an immediate family member's sudden illness."¹⁰ (Luna and Ramsey testimony; Ex. 9.)

23. When Dr. Luna went to Florida in August 2014, he was surprised to find that he was sent to a jail, not a dorm-like setting. He did work during the day, but he then immediately returned to jail. Consequently, his mother did not come to Florida for radiation treatment. Dr. Luna was released early on September 12, 2014. He spent the rest of the month performing community service in the Boston area at a VA hospital. He continued to volunteer at that hospital after completing his 150 hours of community service. (Luna testimony; Ex. 23.)

24. On September 16, 2014, Dr. Luna completed another limited license renewal application to cover his third year of residency. He again responded no to the question asking whether he had ever been charged with a criminal offense. As to question 6A, which asked whether he had ever been granted a leave of absence, he answered yes. He

⁹ GME office is not explained in the record. It appears to stand for graduate medical education. See <https://www.bmc.org/medical-professionals/graduate-medical-education-gme>.

¹⁰ At the time, Dr. Ramsey was unaware that Dr. Luna needed time off to serve a jail sentence connected to a car accident. She testified that she would simply be speculating to say what BMC would have done if it had known this when considering Dr. Luna's leave request. (Ramsey testimony.)

described the reason for the leave as “personal/family.” He did not think the Board was asking for details. He did not report that the family related reason for his leave had fallen through. (Luna testimony; Ex. 2.)

25. In August 2015, Dr. Luna filled out an application for a full medical license. The Board received his application on August 25, 2015. He responded to question 2 asking whether he had been granted a leave of absence that he had been granted such a leave and it was for “personal/family” reasons. Question 10 asked whether he had “ever been charged with a criminal offense.” It did not contain an exclusion for traffic-related offenses. Dr. Luna did not notice that this question was broader than the similar one he had responded to on the limited license applications. He answered no. (Luna testimony; Ex. 3.)

26. Since March 2016, Dr. Luna has been employed by UMass Memorial Hospital as a clinician and a surgeon. He is also an assistant professor at UMass medical school. He is the chief quality officer in the Department of Ophthalmology and is regarded by the chair of the department as the hospital’s most experienced cataract surgeon and one of its top doctors. He has been nominated for a national award for compassionate

ophthalmologists.¹¹ During his time at the hospital, Dr. Luna has not been the subject of either patient or staff complaints. (Luna, Schall, and Tosi testimony.)

27. While undergoing the credentialing process at UMass, Dr. Luna realized he should have revealed the traffic accident and the criminal charges to the Board when filling out his license applications. On May 25, 2016, he sent a letter to the Board self-reporting the accident and the criminal case that followed. He attributed the accident to being “highly stressed and sleep deprived for several weeks due to an arduous work schedule.”¹² He acknowledged that driving home in such a condition was “extremely poor judgment on my part due to lack of sleep and stress, and it was wrong. To that extent, I take full responsibility for my actions.” (Luna testimony; Ex. 23.)

¹¹ In the doctor’s amended answer to the Statement of Allegations, he quoted from Dr. Schall’s nomination of him for this award. Dr. Schall wrote:

Dr. Luna is well known in our institution for his exceptional dedication to providing outstanding clinical and surgical care to the underserved patients of many backgrounds who currently reside in Central and Western Massachusetts. Beginning from his humble roots in Mexico, Dr. Luna has embarked on a life-long commitment to community service as a physician, and an advocate for the poor and the underserved.

His relentless efforts have led to our ability to provide better care to underserved patients and to avoid delays in their treatment.

¹² In letter of support of Dr. Luna, Dr. Ventura and Vittorio Porciatti, D. Sc., of the Bascom Eye Institute stated that “it was clear the accident occurred under extreme conditions of double night shifts and an altered sleep schedule. Sleep deprivation is a major cause of motor vehicle accidents as it can impair the human brain as much as alcohol.” (Ex. 30 and 31.)

28. Dr. Luna has been licensed to practice medicine in Massachusetts since December 17, 2015. His license has been renewed in 2017, 2019, and 2021.¹³ (Luna testimony; stipulation.)

29. Dr. Luna is described as a “role model doctor” by a fellow UMass ophthalmologist Haijiang Lin, M.D., Ph.D. He wrote on February 11, 2020, that Dr. Luna is:

incredibly knowledgeable in the field of ophthalmology, he is an excellent surgeon, hardworking, trust-worthy, and caring to patients. He also has great bedside manners and communication skills, and he is able to connect with his patients in an empathetic and compassionate manner. Dr. Luna is honest, reliable, and sincere to all his colleagues.

(Ex. 25.)

30. Similarly, Darlene Bocash-Winn, the Clinical Operations and Ambulatory Services Manager for the UMass Department of Ophthalmology wrote a letter of support in which she stated that:

I have worked with Dr. Luna for three years and I have always found Dr. Luna to be completely trust-worthy, honest and dependable. He demonstrates the highest level of integrity in dealing with patients and staff, and his judgment is exemplary. He also brings an emotional intelligence to his work that benefits everyone around him. Dr. Luna also interacts well with people from all walks of life and inspires almost immediate rapport and confidence.

(Ex. 26.)¹⁴

¹³ In 2017 license renewal application, Dr. Luna initially answered “no” to a question about whether he had been investigated in connection with his license. The Board’s investigation of him had already begun, however. Quickly recognizing his error, he changed his answer and acknowledged the ongoing investigation. (Luna testimony.) The Board described this chain of events in its Statement of Allegations, but has not pursued it.

¹⁴ Dr. Luna received other letters of support from those who work with him at UMass Memorial: Sharon Furbish, the Senior Executive Assistant to the Chair of

31. Another assistant professor of ophthalmology, Juan Ding, OD., Ph.D., who is also a patient of Dr. Luna's, wrote in a letter of support saying that:

I have always found Dr. Luna to be a person of good moral character. Dr. Luna is an admirable clinician and surgeon among his peers who provides exceptional patient care to all his patients. I have referred numerous patients with cataracts and glaucoma to him, and he has helped these patients to see again. We have many complicated patients at UMass, including difficult cataract surgery cases, and Dr. Luna is the go-to surgeon on my referral list. Not only is he an excellent surgeon, his patient care and genuine interest in all his patients are also impressive. In fact, I am a patient of Dr. Luna myself, and I am witness to his dedication and professionalism to his outstanding patient care first hand.

(Ex. 32.)

32. Another colleague who is a patient of Dr. Luna's is registered nurse Jeremiah Morgan, RN, BSN, who wrote of his experience working with Dr. Luna in the operating room as follows:

Dr. Luna was a pleasure to work with, kind, courteous, generous with his time and attention. His integrity and honesty were refreshing and a much welcomed addition to the operating room. Dr. Luna was lavish with his praise of the staff who assisted him and always made everyone feel like they were an integral part of the team. There was never a day that passed without Dr. Luna saying thank you to each individual who had helped him take care of his patients.

(Ex. 33.)¹⁵

Ophthalmology (Ex. 27), Jacquelyn Volke, the Senior Administrative Secretary of the Chair of Ophthalmology (Ex. 28), Jaime Hayes, another Senior Administrative Secretary (Ex. 29), and Enid Rodriguez, a Surgical Technician at UMass Memorial (Ex. 35).

¹⁵ Lead Certified Ophthalmic Assistant at UMass Memorial, Sheri Granger, also wrote favorably of Dr. Luna's care of her aunt who had an eye injury. (Ex. 34.)

Discussion

A. *Criminal Offense*

I begin with the 2011 auto accident because that is ultimately the source of the charges the Board of Registration in Medicine has brought against Dr. Luna.

The Board has the authority to discipline a physician for “[c]onviction of any crime.” 243 CMR 1.03(5)(a)7. Dr. Luna has been convicted of two misdemeanor crimes in connection with his 2011 auto accident: culpable negligence with personal injury and leaving the scene of an accident involving property damage. He did in fact drive his car negligently so as to cause Mr. Pugh to suffer a broken leg and he did presumably damage Mr. Pugh’s motorcycle in doing so. That is not in dispute. What is in dispute is the severity of his actions and how that should impact the sanction the Board may choose to impose.

One of the Board’s main concerns when it applied to summarily suspend Dr. Luna’s license was that the doctor had not stayed at the scene of the accident to provide aid to Mr. Pugh. A knowing failure of a doctor involved in an accident to provide aid to someone who was injured would be antithetical to the standards of the medical profession and would be of obvious concern to the Board. This was the gist of the felony “leaving the scene of an accident with injuries.” The Florida prosecutor dropped this charge and agreed as part of the plea that Dr. Luna’s “conduct was careless, but not intentional.” That is, the prosecutor agreed that the evidence did not show that the doctor deliberately left the accident scene knowing that someone had been injured.

The only real evidence that the doctor knew he had been in an accident that likely injured someone was the statement he gave to the police – or as he put it, the statement

he wrote based on the description of events proposed to him by the police. In that statement, he admitted to seeing a motorcycle pass through the intersection at which he intended to turn left. He then wrote that he failed to see a second motorcyclist, and when he entered the intersection that motorcycle "was coming very fast hit the front of my car while I was turning left. I was afraid. I wanted to call 911 and help the person injured."

The doctor has denied that this statement is really his recollection, saying that he simply wrote down what the police told him they thought had happened. While I am generally doubtful of attempts to back away from contemporaneous statements, this one, given by a sleep-deprived person, is wholly problematic. The basic premise that Dr. Luna struck the second motorcyclist is simply unlikely. If that had happened, then Mr. Timpanaro would have already driven his motorcycle through the intersection and would not have seen the accident at all. Yet, he gave a thorough description of what happened, in which he made clear that he saw it all because he was driving behind Mr. Pugh.

Mr. Timpanaro was able to describe the type of car Dr. Luna drove - a white Mazda 6, a description that presumably gave the police the information they needed to locate Dr. Luna. He also recalled that he and Mr. Pugh had a green light, which made Dr. Luna entering the intersection a surprise to both of them. Because they were so near the intersection themselves, Mr. Timpanaro had to swerve out of the way, while Mr. Pugh hit his brakes and spun his bike around, which led to his rear wheel hitting the Mazda. (Finding 10.)

Mr. Timpanaro's description is at odds with the statement Dr. Luna gave to the police. The officer who took Dr. Luna's statement was not the same officer who took Mr. Timpanaro's. What Dr. Luna's statement appears to reflect then is one police

officer's preliminary idea of what had happened. The Florida prosecutor's office did not seem to think that the doctor's statement was particularly solid evidence that he knowingly left the scene of an accident for it took a surprisingly long time – one and one-half years – to charge him. Had it sought to prove the felony it charged, it would have had to show that Dr. Luna "willfully" left the accident scene.¹⁶ Then, as part of a plea deal, it dropped the most serious charge that the doctor had knowingly left the scene of an accident that had injured someone and, as part of the plea, acknowledged that it could not have proven willfulness for it agreed that the doctor's "conduct was careless, but not intentional." (Finding 18.)

I do not make much of the tail end of Dr. Luna's statement – "I was afraid. I wanted to call 911 and help the person injured" or his testimony at the hearing that he probably panicked.¹⁷ He gave the first statement just after he had been informed by the police that he had caused an accident that had injured someone and he had expressed his sorrow about it. I see no more reason to believe it than I do the rest of the statement that is demonstrably untrue. The statement reflected his guilty feeling about what had happened rather than an accurate reflection of events. The evidence is that he had

¹⁶ The pertinent Florida statute provides that:

The driver of a vehicle involved in a crash occurring on public or private property which results in injury to a person other than serious bodily injury shall immediately stop the vehicle at the scene of the crash, or as close thereto as possible, and shall remain at the scene of the crash A person who willfully violates this paragraph commits a felony of the third degree.

Fla. Stat. ch. 316.027(2)(a).

¹⁷ Board counsel, in her questioning of Dr. Luna, represented that the doctor had told the Board that he had panicked.

worked 75 hours in a five-day stretch, including 30 hours straight, before he attempted to drive home, and sleepily drove through a red light not noticing the approaching motorcycles. One of them had time to brake before impact and was able to slow his cycle down sufficiently that the collision between the rear wheel of the motorcycle and the left side of the Mazda caused only minor damage to the car. Dr. Luna's testimony that he felt only an impact from the collision, but did not realize it was a car accident seems consistent with what appears to have been a low speed collision, and is also consistent with a sleepy inability to recognize that there had been a collision. His testimony that he must have panicked appears to reflect a later effort to piece together what happened rather than an actual memory of what had occurred.

Thus, the Board may discipline Dr. Luna for the two misdemeanor charges that he pled to arising out of the car accident, but importantly the evidence fails to show that the doctor left the scene of this accident knowing he had injured someone. Rather, the accident shows the consequences of the excessive amount of work the doctor had put in that week, the sleepiness he experienced while driving home, and his failure to realize at the time that he should not have tried to drive home, a failing he recognized in his self-report to the Board. I would add that the Board may also take into account the mitigating evidence that is contained in the letters of support the doctor received, which reflect his day-to-day wide awake behavior at work is far different than the night of the car accident.

B. *Fraud and Capacity to Defraud*

The Board charged Dr. Luna with fraud in two ways: fraudulent procurement of his medical license and engaging in conduct that has the capacity to deceive or defraud.

Regarding the license charge, there is no question that Dr. Luna's answers on his limited license applications for 2013 and 2014 as to whether he had been charged with a crime were inaccurate because he had been charged by then with crimes related to his 2011 car accident and he knew of the charges. Furthermore, his answer on the 2015 application to a question about whether he had ever taken a leave of absence was opaque. His statement that he had taken a leave for "personal/family" reasons failed to disclose that one reason for his leave was to serve a jail sentence in Florida that was a consequence of his plea to two of the charges leveled against him.

The Board relies on self-reporting by license applicants. Applicants are consequently obliged to provide accurate information on their license applications. By Board rule, they must "sign and swear to the contents" of their applications. *See* 243 CMR 2.03(1)(j). Impliedly then, applicants have an obligation to make sure that their application responses are factually accurate. Dr. Luna's responses as to the criminal charges in his limited license renewal applications were not accurate, and his response in 2104 regarding his leave was at best a half-truth. Thus, the Board may have had grounds to discipline him for violating one of its rules, 243 CMR 1.03(5)(a)(11),¹⁸ or failing "to furnish the Board . . . information . . . to which the Board is legally entitled, 243 CMR 1.03(5)(a)(16).

¹⁸ The statute giving the Board disciplinary authority provides also that an inaccurate statement made on a license application must not only be false but also "known to the applicant to be false." *See* M.G.L. c. 112, § 61, ¶ 6. This may be a more difficult element to prove.

1. *Fraudulent License Procurement*

But the Board has not taken this path. Instead, it has chosen to charge him with “[f]raudulent procurement of his or her certificate of registration or its renewal.” 243 CMR 1.03(5)(a)(1). It has also charged him with “engaging in conduct that has the capacity to deceive or defraud.” 243 CMR 1.03(5)(a)(10). These two provisions are different, as explained in a recent Supreme Judicial Court decision, *Welter v. Board of Registration in Medicine*, 490 Mass. 718 (2022). Dr. Welter ran a hair restoration clinic. He hired a man who had been trained as a doctor in the Philippines, but was not licensed in Massachusetts. His advertising referred to both men as doctors. The Board charged him with advertising that had the capacity to deceive or defraud. The doctor argued that the Board failed to prove certain elements of common law fraud, namely that he intended to deceive his clients and that the clients relied on his misleading statements to their detriment. The SJC rejected this argument declaring that whether the doctor had engaged in conduct that has the capacity to deceive or defraud was an “objective inquir[y] that do[es] not necessarily depend on intent, knowledge, materiality, or reliance.” 490 Mass. at 727. It contrasted this regulatory language with the “fraudulent procurement” portion of the same regulation, which “expressly require[s] intent or knowledge.” *Id.*

Because fraudulent procurement of a license was not at issue in *Welter*, the Court did not expound on what would need to be shown to prove such a charge. If the elements of common law fraud applied, then it would seem that the Board would have to show that a medical license applicant made a false representation of a material fact in the application with knowledge of its falsity for the purpose of inducing the Board to act on it, and that the Board relied upon the representation as true and issued a license

accordingly. *See Welter*, 490 Mass. at 725. I have found no court decision describing whether this full panoply of common law elements must be proven. But at the very least, per *Welter*, there must be an intent on the part of an applicant to mislead the Board. Furthermore, the Board has acknowledged in an earlier decision that an inaccurate answer on a license application that was due to “oversight or carelessness” is insufficient to prove fraudulent intent to procure a license. *In the Matter of Charles M. Poser, M.D.*, No. 88-62-SU, Final Decision (Bd. of Reg. in Medicine, Dec. 20, 1989).¹⁹

Dr. Luna first faced the question about whether he had been charged with a criminal offense on a limited license application in 2012. Although the accident happened in 2011, he had not been charged by then, and thus his “no” answer was accurate. The same cannot be said for his “no” answer to the same question on his 2013 and 2014 renewal applications for a limited license as by then he had been charged in Florida with crimes connected to the accident and he knew he had been charged. Dr. Luna testified that he consulted Attorney Cohen about this question and was told that because the question did not seek charges related to traffic offenses and he had been charged only with traffic offenses, he could still validly answer “no.” Reliance on counsel would be sufficient to show lack of intent. *See Board of Registration in Medicine v. Bock*, Docket No. RM-19-0356, Decision at 6 (Div. of Admin. Law App.,

¹⁹ The Board cites to a decision in which a doctor was held to have fraudulently procured a license. In a license renewal application in Massachusetts, the doctor failed to fully explain discipline he had been subject to in Connecticut. Neither the DALA decision nor the Board decision describe or analyze the elements needed to prove fraudulent procurement of a license. *See Board of Registration in Medicine v. Moghul*, Docket No. RM-02-788 (Div. of Admin. Law App., May 1, 2003; Bd. of Reg. in Medicine, Sept. 17, 2003).

June 8, 2021). Attorney Cohen has confirmed in a letter that he advised the doctor about this question, but his letter discussed only the 2012 application, which was completed before charges were filed. The only evidence related to the later applications came from Dr. Luna who testified that he had consulted Attorney Cohen before answering the question about charges, and that, given that he and Attorney Cohen had parted on bad terms, the letter he got from Attorney Cohen was all he could get. I am inclined to believe that the doctor consulted Attorney Cohen after charges were filed because that is when the dilemma of how to answer the charges question most likely arose. Moreover, having seen a number of cases involving inaccurate answers to this question, I am struck by the ability of otherwise capable people to take a literal approach to their answers that is based more upon wishful thinking than anything else. A thoughtful approach to the traffic offense exclusion would recognize that the Board would have little interest in learning about a ticket for a lane violation, but would want to know about a drunk driving arrest. Dr. Luna would not be the first, however, to read the question literally and think that any traffic offense, no matter how serious, was excluded.

His "no" answer on the full license application is not simply wishful thinking but a misreading of this application because the charges question on the full application did not include a traffic offense exclusion. Still, having year after year seen a similar question that had such an exclusion, it is not altogether surprising that Dr. Luna read the question quickly and thought it was the same as before. I find no intent to mislead in his answer to the charges question in the limited license applications or the full license application. Thus, I conclude that the Board has not proven that Dr. Luna fraudulently procured his medical license.

2. *Conduct with the Capacity to Deceive or Defraud*

I turn then to the charge that Dr. Luna engaged in conduct that has the capacity to deceive or defraud. Both parties cite *Fisch v. Board of Registration in Medicine*, 437 Mass. 128 (2002) for its explanation of what needs to be proved to establish such conduct. The SJC stated in *Fisch* that:

fraudulent intent may be shown by proof that a party knowingly made a false statement and that the subject of that statement was susceptible of actual knowledge. *See Snyder v. Sperry & Hutchinson Co.*, 368 Mass. 433, 444, 333 N.E.2d 421 (1975). No further proof of actual intent to deceive is required. *Id.*

437 Mass. at 139. Although intent to deceive is not required, the SJC in *Snyder* did require that there be intent to induce action. 368 Mass. at 445. That can easily be seen in *Fisch*, in which a psychiatrist knowingly billed a health insurer for therapy sessions that did not take place with the intent that the insurer would pay him for these nonexistent sessions. 437 Mass. at 139.

The Statement of Allegations is not clear as to what conduct of Dr. Luna's the Board considered to be conduct that had the capacity to deceive or defraud. In her post-hearing brief, Board counsel's argument concerns the statements Dr. Luna made about the reasons he sought a leave of absence. While she asserts that he misled both the Board and his employer, she focuses on the benefit he gained from his employer by not revealing the all the reasons he needed the leave, and thus obtained sick pay and medical insurance in the two months away from his residency program that he might not otherwise have qualified for if BMC had known he needed to go to Florida to serve a jail sentence. Neither the original nor amended Statement of Allegations makes any mention of a financial or other benefit that the doctor may have gained from his employer by way

of deceit about the reason he sought a leave of absence. If this was the basis of the Board's charge, the doctor was entitled to notice of it.

What the Statement of Allegations implies is that Dr. Luna's deliberate vagueness about the reason he sought leave was to induce BMC to give him a leave that he could not otherwise obtain and for the Board to grant him a medical license. Dr. Luna testified that he failed to mention that he needed to go to Florida to serve a jail sentence because he was embarrassed. Embarrassment in this situation, while understandable, was not a valid reason to refrain from telling an employer or the Board information they were entitled to know. At best, his description of his reasons for seeking a leave – "personal/family matter" – was a half-truth. It is true that when he sought the leave, he had hoped to combine a work release program with assisting his mother to undergo radiation therapy in Florida. That he was unable to achieve this goal does not make his statement that this was one reason he sought leave untrue. But no one reading a leave request for personal or family reasons would have gathered that the doctor also sought leave to serve a jail sentence. Failure to reveal a pertinent matter can be the basis for a deceit action. In *Sperry*, for example, the buyer of a commercial property inquired whether the existing tenant had a lease. The seller let the buyer know part of the lease history, but failed to reveal the latest lease, thereby deceiving the buyer. 368 Mass. at 443-446.²⁰

²⁰ The facts of *Sperry* also help illustrate the intent needed to establish deceit. The seller's representatives were unaware of the latest lease and thus did not deliberately mislead the buyer. Still, claiming the leases they informed the buyer of were the only leases was false and the existence of the latest lease was susceptible of actual knowledge by the seller who had entered into that lease. The buyer, the Harvard Medical Building Associates evidently intended to turn the building into a medical building which was not

Here, Dr. Luna knowingly failed to reveal that he was to serve a jail sentence while on leave and the subject of that misstatement was obviously susceptible of his actual knowledge since he knew he was deliberately leaving out this information.²¹ It is less clear whether he intended to induce action by BMC or the Board. In some sense, he may merely have wanted to avoid having to go over embarrassing details in the process of seeking leave and then a medical license. Still, he should have known that BMC and the Board might think this information would be relevant to the decision each was to make. Whether it would ultimately have mattered to those decisions is less clear. Dr. Ramsey testified that it would be sheer speculations for her to say how BMC would have acted on Dr. Luna's leave application if it had known of the pending jail sentence. As for what the Board would have done, the evidence is mixed. The Board has issued a Statement of Allegations charging the doctor with acting to deceive it by failing to reveal the criminal case but, at the same time, following Dr. Luna's 2016 self-report of the accident and the criminal case, the Board three times issued him a medical license.

The evidence could be better as to the significance of the jail sentence to the decisions that were to be made by BMC and the Board, but I ultimately conclude that Dr.

the existing tenant's use. Given the importance the buyer placed on knowing the length of the existing tenant's lease, the seller's representations about the lease were made with the intent to induce action, namely the purchase of the property, which indeed took place. 368 Mass. at 435 and 443-446.

²¹ Board counsel, in her closing brief, suggests the present case is similar to one in which a resident who missed the last train took a taxi voucher meant to be used only by patients and then lied about doing so when confronted. *See In the Matter of Sahil Patel, M.D.*, Docket No. RM-13-528, Final Decision and Order (Bd. of Reg. in Medicine, Aug. 4, 2016). The decision does not contain an analysis of what was found to be deceitful, but it would appear to be the lie the resident told. The present case involves failure to reveal information rather than lying about it when confronted.

Luna's failure to reveal the jail sentence had the capacity to deceive in the sense that the existence of the jail sentence was likely relevant to both BMC's and the Board's decision and the doctor should have known this. However, in mitigation, the evidence suggests that the doctor acted in the good faith belief that his description of his reason for needing a leave was adequate. Moreover, once he learned otherwise during the hiring process at UMass Medical, he self-reported the criminal charge to the Board.

C. *Lack of Good Moral Character*

An applicant for a medical license in Massachusetts must possess good moral character.²² 243 CMR 2.02(1)(b). The commission of a crime may show that a doctor lacks good moral character. *See Matter of Harold Altwater*, Docket No. RM-19-0351, Final Decision (Bd. of Reg. in Medicine, July 14, 2022) (conviction of felony securities fraud shows lack of good moral character). What having good character means has been spelled out in decisions addressing the same requirement for members of the bar, who must also have good moral character. When assessing a disbarred lawyer's moral fitness to be reinstated to the bar, courts consider: "(1) the nature of the original offense; (2) the petitioner's age, maturity, and experience at the time of disbarment; (3) the petitioner's conduct and occupation since disbarment; [and] (4) the amount of time that has elapsed since disbarment."²³ *Matter of Cappiello*, 416 Mass. 340, 343 (1993).

²² The Board had also charged the doctor with engaging in conduct that undermines the public confidence in the integrity of the medical profession. Board counsel did not mention this charge in her closing brief. As I understand it, this charge and the charge of lack of moral character cover the same ground in this instance. Thus, I address only the lack of moral character charge.

²³ The courts also consider whether the disbarred attorney is "currently competent in his legal skills." 416 Mass. at 343. While this would seem relevant when

Here, the original offense was a car accident that left a motorcyclist with a broken leg. The accident was Dr. Luna's fault and he was subsequently charged criminally. Although he was charged with a felony for leaving the scene of an accident causing injury, the prosecution acknowledged as part of a plea deal that his actions were negligent, not deliberate, and dropped this charge. I have found that, in his sleep-deprived state, the doctor did not realize that he had injured someone. What moral fault that can be found in connection with the accident was the doctor's failure to recognize that his lack of sleep made it unsafe for him to drive. He subsequently took responsibility for his actions by pleading guilty to the two misdemeanor charges against him, paying substantial restitution to the hospital where Mr. Pugh was treated, and performing community service at a VA hospital in Massachusetts, where he continued to volunteer after his community service obligation was completed. He acknowledged in his self-report to the Board that it was his fault for driving while sleep-deprived.

Secondarily, the doctor failed to inform the Board on various licensing applications of the criminal charges and failed to tell BMC and the Board that one of his reasons for seeking leave from his residency program was to serve a jail sentence connected to his guilty plea. I have found that he did not intentionally lie on his license applications. When first faced with a licensing application question regarding criminal charges, he took the step of inquiring of his attorney at the time whether he needed to inform the Board of the criminal charges that arose out of the traffic accident. In good faith, he followed the attorney's advice on the limited medical license applications and

reinstatement is under consideration, it does not strike me as involving moral fitness.

failed to read the full application license question carefully enough to recognize that it was seeking charges related to car accidents. With respect to the leave application, he chose not to tell BMC or the Board that one reason for his leave was to serve a jail sentence. His motive was not to mislead, but simply to avoid the embarrassment the criminal case caused him. The moral fault in these actions is that the doctor engaged, at best, in wishful thinking as to what the Board and BMC needed to know about the criminal case and his jail sentence. It was not long thereafter when he went through the credentialing process at UMass Memorial Hospital that he recognized that he should have been forthcoming to the Board about the criminal charges and responded by self-reporting them to the Board.

His self-report shows that Dr. Luna has matured since the accident that occurred when he was 30 years old, that he recognized the need for full disclosure, and acted on this realization. Eleven years have elapsed since the accident and seven since the doctor last filled out a license application without revealing the criminal charges. Since then, Dr. Luna has been employed as an ophthalmologist at UMass Memorial Hospital. The chair of the hospital's Department of Ophthalmology testified on his behalf at the hearing and noted that Dr. Luna has been made the chief quality officer in the Department of Ophthalmology and was nominated by the hospital for a national award for compassionate physicians. (Finding 26.) The eleven letters of support he received from people he worked with at UMass Memorial Hospital and the Bascom Palmer Eye Institute reflect the high regard in which he is held by his colleagues, who see him as honest and a person of integrity.

Moreover, Dr. Luna's behavior closer in time to the accident hardly shows a lack of good moral character. While in medical school in Mexico, he "provided regular free medical consultation in some of Mexico's poorest rural areas." (Finding 2.) The hospital he worked at in Orlando thought well enough of him that even after he left his residency in internal medicine after one year that he was kept on while awaiting a visa approving his move to Miami. (Finding 5.) And the faculty of the Bascom Palmer Eye Institute where he worked shortly after the accident thought that "[f]rom the outset [he] possessed the dedication, professionalism, and empathy of a physician, as he devoted himself completely to our patients and the study of Ophthalmology." (Finding 13.)

Considering the totality of the evidence, I find that the criminal charges against Dr. Luna and his failure to fully inform the BMC and the Board of the reasons he wished to take a leave from his residency do not demonstrate that he is lacking in moral character overall or in reference to these specific charges.

D. *Mitigation*

Many factors have been recognized as mitigating in discipline cases involving professional licenses. Among them are admission of guilt in a criminal proceeding, acceptance of responsibility, remorse, contrition, performance of community service, *In re John F. Doyle*, 429 Mass. 1013, 1014 (1999), the high regard in which the subject of discipline is held by his colleagues, the lapse of time since the offense, *Fisch*, 437 Mass. at 140, and the lack of patient complaints during that time, *Herridge v. Board of Registration in Medicine*, 420 Mass. 154, 166 n. 13.

In this instance, Dr. Luna expressed remorse as soon as the police informed him that he had injured a motorcyclist. He pled guilty to the misdemeanor charges arising out

of the car accident, served his jail sentence and paid the substantial restitution although it was financially hard for him to do so. He completed his community service and still volunteers at the VA hospital where he performed community service. In his self-report to the Board he expressed remorse for driving while sleep-deprived and took full responsibility for his actions. It has been a number of years since the events that are the subject of the Statement of Allegations. In that time, he has worked for UMass Memorial Hospital. He has not been the subject of patient or staff complaints during that time. He has received letters of support from doctors, nurses and other hospital staff that vouch for his honesty and integrity. He was also rated superior in integrity when he worked at Florida Hospital. (Finding 14.)

Conclusion

Dr. Luna is subject to discipline because he was charged criminally in connection with a 2011 traffic accident and because his failure to reveal that was one of the reasons he sought a leave from his BMC residency was to serve a jail sentence had the capacity to deceive BMC and the Board. The doctor has also submitted substantial mitigating evidence for the Board's consideration when imposing a sanction.

DIVISION OF ADMINISTRATIVE LAW APPEALS



James P. Rooney
First Administrative Magistrate

Dated:

DEC 15 2022