

**COMMONWEALTH OF MASSACHUSETTS**

Middlesex, ss.

**Division of Administrative Law Appeals**

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**Board of Registration in Medicine,**  
Petitioner

Docket No. RM-20-0452

v.

**Clark E. O'Brien, M.D.,**  
Respondent

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**Appearance for Petitioner:**

Lisa L. Fuccione, Esq.  
Board of Registration in Medicine  
178 Albion Street, Suite 330  
Wakefield, Massachusetts 01880

**Appearance for Respondent:**

Clark E. O'Brien, M.D.  
850 Oakwood Street  
The Villages, FL 32163

**Administrative Magistrate:**

Bonney Cashin

**Summary of Recommended Decision**

The petitioner's motion for summary decision is granted. No genuine issue of material fact exists as to whether the respondent failed to respond to the petitioner's repeated requests for information in violation of 243 CMR 1.03(5)(a)(16). His repeated failure to provide the petitioner with information needed for its investigation undermined the public's confidence in the medical profession.

**RECOMMENDED DECISION**

Pursuant to G.L. c. 112, §§ 5, 61, and 62 and 243 CMR 1.03(5), on November 5, 2020, the Petitioner, the Massachusetts Board of Registration in Medicine (Board), issued a Statement of Allegations ordering the Respondent, Clark E. O'Brien, M.D., to show cause why he should

not be disciplined for violations of Board regulations and relevant statutes, as a result of his failure to respond to a request for information from the Board and for engaging in conduct that undermines the public confidence in the integrity of the medical profession.

On November 5, 2020, the Board also referred *In the Matter of Clark E. O'Brien, M.D.* to the Division of Administrative Law Appeals (DALA) for recommended findings of fact and necessary conclusions of law. I held a prehearing conference by telephone on December 7, 2020. The Board subsequently filed a Motion for Summary Decision on March 15, 2021, after the parties' attempt to resolve the matter was unsuccessful.

I have marked and entered the following exhibits into evidence:

Exhibit 1: Statement of Allegations, dated November 5, 2020;

Exhibit 2: Voluntary Agreement not to Renew or Reinstate License between the Connecticut Department of Public Health and the Respondent, dated September 12, 2019;

Exhibit 3: Answer, dated December 14, 2020;

Exhibit 4: Email to Respondent from Board Investigator John Landers, dated October 17, 2019;

Exhibit 5: Email to Respondent from Board Investigator John Landers, dated November 4, 2019;

Exhibit 6: Board Complaint Committee Order to Respond, dated November 25, 2019;

Exhibit 7: Envelope Returned to the Petitioner with Respondent's Forwarding Address Associated with the First Order to Respond Sent by the Petitioner;

Exhibit 8: Second Order to Respond Sent to Respondent by Petitioner, dated December 5, 2019, and Associated United States Postal Service Tracking Information; and

Exhibit 9: Third Order to Respond Sent to Respondent by Petitioner, dated January 15, 2020, and Associated United States Postal Service Tracking Information.

### UNDISPUTED FACTS

The following facts are not in dispute.

1. Clark E. O'Brien, M.D. was licensed to practice medicine in Massachusetts under certificate number 242451 on September 8, 2010. (Exhibit 1.)
2. On September 12, 2019, Dr. O'Brien, who was also licensed to practice medicine in Connecticut under license number 025836, entered into a Voluntary Agreement not to Renew or Reinstate License (Voluntary Agreement) with the Connecticut Department of Public Health. (Exhibits 1 and 2.)
3. On October 11, 2019, the Federation of State Medical Boards (FSMB) informed the Board of Dr. O'Brien's Voluntary Agreement with the Connecticut Department of Public Health. (Exhibit 1.)
4. Dr. O'Brien entered into the Voluntary Agreement to resolve Connecticut Board Petition No. 2019-1028, which alleged an attempt to purchase cocaine in April 2019. (Exhibit 2.)
5. On October 16, 2019, Board Investigator John Landers spoke with Dr. O'Brien over the telephone and informed him that the Board had docketed Complaint No. 19-453 against him based on the FSMB report and required a written response from him regarding the allegations contained in Connecticut Board Petition No. 2019-1028. (Exhibits 1 and 4.)
6. During the October 16, 2019 telephone call between Investigator Landers and Dr. O'Brien, Dr. O'Brien confirmed that he had entered into the Voluntary Agreement after an incident approximately six months earlier and mentioned he was in the process of relocating to Florida. (Exhibits 1 and 4.)

7. On October 17, 2019, Investigator Landers followed up on his October 16, 2019 phone call with Dr. O'Brien by email and reiterated the Board's request for a written response regarding the Connecticut Board Petition No. 2019-1028 allegations. (Exhibits 1 and 4.)

8. On October 25, 2019, Dr. O'Brien allowed his Massachusetts license to lapse by failing to renew it. (Exhibits 1 and 3.)

9. On November 4, 2019, after receiving no response to his October 17, 2019 email, Investigator Landers called, left a voicemail, and emailed Dr. O'Brien concerning the Board's docketed complaint against him and request for a written response. (Exhibits 1 and 5.)

10. On November 7, 2019, the Board Complaint Committee issued an Order to Respond (Order) within 10 days in response to Dr. O'Brien's failure to respond to Investigator Lander's October 17, 2019 email and November 4, 2019 call, voicemail, and email. (Exhibits 1 and 6.)

11. On November 25, 2019, a copy of the Order was sent, via certified mail to Dr. O'Brien's Connecticut address. (Exhibits 1 and 6.)

12. The Order mailed to Dr. O'Brien on November 25, 2019 was returned by the United States Postal Service (USPS) with a forwarding address in Florida. (Exhibits 1 and 7.)

13. On December 5, 2019, the Board sent a second copy of the Order via certified mail to Dr. O'Brien's Florida address. (Exhibits 1 and 8.)

14. The December 5, 2019 copy of the Order that was mailed to Dr. O'Brien's Florida address never arrived. (Exhibit 8.)

15. On January 15, 2020, the Board sent a third copy of the Order via certified mail to Dr. O'Brien's Florida address. (Exhibits 1 and 9.)

16. On January 17, 2020, the third copy of the Order was delivered to Dr. O'Brien's Florida address. (Exhibits 1 and 9.)

17. On November 6, 2020, after receiving no response from Dr. O'Brien, the Board referred this matter to DALA. It sent Dr. O'Brien a copy of the referral and Statement of Allegations to his Connecticut and Florida addresses. (Exhibit 1.)

18. The Statement of Allegations sought authorization to take disciplinary action against Dr. O'Brien for "[failure] to respond to a subpoena or to furnish the Board, its investigators or representatives, documents, information or testimony to which the Board is legally entitled" and for "lack[ing] good moral character and [engaging] in conduct that undermines the public confidence in the integrity of the medical profession." (Exhibit 1.)

19. On December 12, 2020, Dr. O'Brien filed an answer to the Board's Statement of Allegations, which addressed the drug use alleged in Connecticut Board Petition No. 2019-1028, but which did not address his failure to respond to the Board's communications and requests for information. (Exhibit 3.)

20. Dr. O'Brien is not actively practicing medicine. (Exhibits 1 and 3.)

### DISCUSSION

When a party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues.

801 CMR 1.01(7)(h).

A motion for summary decision may be granted when there is no genuine issue of material fact regarding the claims presented and a party is entitled to prevail as a matter of law.

*Kobrin v. Bd. of Reg. in Med.*, 444 Mass. 837, 846 (2005). The moving party may show the

absence of a genuine issue of material fact by submitting affirmative evidence that invalidates a central element of the opposing party's claim. *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 715 (1991). If the motion for summary decision is adequately made and supported, a party opposing it must respond with specific facts showing that there is a genuine, triable issue. Mass. R. Civ. P. 56(e); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976).

The Board is authorized to discipline physicians in the Commonwealth of Massachusetts by G. L. c. 112, § 5. *Levy v. Bd. of Reg. in Med.*, 378 Mass. 519 (1979); *Sugarman v. Bd. of Reg. in Med.*, 422 Mass. 338, 342-344 (1996). 243 CMR 1.03(5)(a)(16) specifically provides that the Board can discipline a physician for "failure to respond to a subpoena or furnish the board, its investigators or representatives, documents, information or testimony to which the Board is legally entitled." 243 CMR 1.03(5)(a)(16). Additionally, in an effort to protect the image of the medical profession and to maintain the public's confidence in a physician's professional judgment, the Board may discipline a physician if he has engaged in conduct that undermines public confidence in the medical profession. *Raymond v. Bd. of Reg. in Med.*, 387 Mass. 708, 713 (1982) (disciplining physicians for lack of good moral character and for conduct that undermines public confidence in integrity of profession is reasonably related to promotion of public health, welfare, and safety).

Physicians who have failed to respond to a Board request for information in violation of 243 CMR 1.03(5)(a)(16) have been found to have engaged in conduct that undermines the public's confidence in the integrity of the medical profession and been disciplined accordingly. See, e.g., *In the Matter of Joshua P. Golden, M.D.*, No. 89-10-SU (Final Decision and Order, August 1, 1990) ("A physician who obstructs the Board's efficient investigation of a complaint, and who does so repeatedly, directly threatens the public health and safety by draining the scarce

resources of the Board and, in turn, undermines public confidence in the integrity of the medical profession by flouting the rules and regulations of the agency which granted his license.”)

After the FSMB notified the Board that Dr. O’Brien had entered into the Voluntary Agreement with the Connecticut Department of Public Health, the Board requested information concerning the allegations underlying the Voluntary Agreement multiple times by phone, email, and certified mail. Dr. O’Brien knew of the Board’s docketed complaint against him and request for a written response concerning the Voluntary Agreement after his October 16, 2019 call with Investigator Landers. Nonetheless, he failed to acknowledge or respond to Board Investigator Landers’ October 17, 2019 email and November 4, 2019 phone call, voicemail, and email. The Board issued and mailed a 10-day Order to Respond to Dr. O’Brien on November 25, 2019 only to discover that the Connecticut address it had on file for Dr. O’Brien was no longer his current address. The Board subsequently mailed a copy of the 10-day Order to Respond to Dr. O’Brien at his Florida address on January 15, 2020 and received confirmation of its delivery on January 17, 2020. Dr. O’Brien, however, never responded. In fact, Dr. O’Brien failed to respond to the Board’s request until after the Board referred this matter to DALA and issued the Statement of Allegations on November 6, 2020.

When Dr. O’Brien ultimately filed an Answer (Exhibit 3) to the Board’s Statement of Allegations on December 12, 2020, he acknowledged that “[t]he allegations are basically correct,” although he vigorously denied the Board’s recitation of his alleged arrest for attempting to purchase cocaine in April 2019, an allegation taken from Connecticut Board Petition No. 2019-1028. He did not, however, contest the Board’s allegations that he had failed to respond to the Board’s repeated requests and orders for information concerning the circumstances leading to the Voluntary Agreement. His silence is an admission of Allegations 1-4 (b), (c), 5-14. *See* 801

CMR 1.01(6)(d)2 and Mass. R. Civ. P. 8(d). Dr. O'Brien failed to show the existence of a genuine, triable issue of fact.

Dr. O'Brien violated 243 CMR 1.03(5)(a)16 when he failed to provide the Board with information to which it is legally entitled. Dr. O'Brien engaged in conduct that undermines the public confidence in the integrity of the medical profession.

It appears that Dr. O'Brien believed that his decision not to renew his license was sufficient. (Exhibit 3.) G.L. c. 112, § 2, however, states that after a physician's license has lapsed, the license "shall be revived upon completion of the renewal process." While the Board has the discretion to wait until a physician applies for renewal of his or her license before initiating disciplinary proceedings, it is not required to do so. *See Wang v. Bd. of Reg. in Med.*, 405 Mass. 15, 19 (1989) (physician who allows license to lapse retains, at a minimum, inchoate right to renew license.) As long as Dr. O'Brien retains this inchoate right to renew his medical license in Massachusetts, the Board is authorized to pursue disciplinary proceedings against him.

### CONCLUSION

No genuine issue of material fact exists as to whether Dr. O'Brien failed to respond to the Board's repeated requests for information in violation of 243 CMR 1.03(5)(a)(16). His repeated failure to provide the Board with information needed for its investigation undermined the public's confidence in the medical profession. As such, the Petitioner is entitled to prevail as a



matter of law. I recommend that the Motion for Summary Decision be allowed and that the Board impose appropriate discipline on Dr. O'Brien.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Bonney Cashin  
Bonney Cashin  
Administrative Magistrate

DATED: July 22, 2021