

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals
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Board of Registration in Medicine,
Petitioner

Docket No: RM-20-0121

v.

William O'Connor, M.D.,
Respondent

Appearance for Petitioner:

Karen A. Robinson, Esq.
Board of Registration in Medicine
200 Harvard Mill Square, Suite 330
Wakefield, MA 01880

Appearance for Respondent:

Chad P. Brouillard, Esq.
Foster & Eldridge, L.L.P.
300 Trade Center, Suite 261
Woburn, MA 01801

Administrative Magistrate:

Edward B. McGrath, Esq.
Chief Administrative Magistrate

Summary of Recommended Decision

The Petitioner proved by a preponderance of the evidence that the Respondent violated the Board's regulations and I, therefore, recommend that the Board discipline the Respondent as it deems appropriate. But I was not convinced that the Respondent poses an immediate, serious threat to the health, safety, and welfare of the public and, therefore, I recommend that the Board deny the motion to suspend the Respondent's medical license.

Recommended Decision

I. Introduction

On February 7, 2020, the Board of Registration in Medicine (Board) issued a Statement of Allegations and an Order of Temporary Suspension concerning the Respondent's

medical license. The allegations arose following a complaint to the Board made by the husband of a former patient of Dr. O'Connor's. The Board charged in its Statement of Allegations that Dr.

O'Connor violated statutes and several of its regulations warranting his discipline. It also alleged that Dr. O'Connor committed misconduct in the practice of medicine violating 243 CMR

1.03(5)(a)18. Finally, it alleged that Dr. O'Connor should be disciplined, because he lacked good moral character and engaged in conduct that undermines the public confidence in the integrity of the medical profession. In addition, pursuant to the provisions of 243 CMR 1.03(11)(a), the Board suspended Dr. O'Connor's license. The Order of Temporary Suspension stated that: "The Board has determined that the health, safety and welfare of the public necessitate said suspension."

The Board referred the matter to the Division of Administrative Law Appeals (DALA) on February 11, 2020. DALA scheduled the hearing on the summary suspension for February 21, 2020. At Dr. O'Connor's request, the hearing on the summary suspension was continued until April 29, 2020. On March 23, 2020, the Respondent filed a pleading entitled: Respondent's Opposition to the Motion for Summary Suspension; Respondent's Motion to Dismiss. Dr. O'Connor asked that the Board's Motion for Summary Suspension be denied and that this matter be dismissed in its entirety. The Petitioner filed its opposition to the Respondent's motion on April 9, 2020 and I held an electronic conference to hear arguments concerning the motion on April 14, 2020. I denied the Respondent's Motion to Dismiss on April 20, 2020. The parties conducted written discovery.

On July 24, 2020, the parties filed a Joint Pre-hearing Memorandum, which I marked "A." The parties agreed to conduct a single evidentiary hearing to resolve both the summary suspension and the statement of allegations. The hearing was held on August 5, 2020 at the Board's office in

Wakefield.¹ The Board called its investigator Robert M. Bouton as a witness. In addition, the Board called Patient A's husband, John Doe, as a witness.² The Board also presented Dr. O'Connor as a witness and he testified on his own behalf. There is a transcript of the hearing which I will refer to in this decision by naming the witness and then the page and line number of the transcript.

I marked thirty exhibits offered by the Board (Pet. Exs. 1-30) and six offered by Dr. O'Connor (Res. Exs. 1-6). The parties submitted closing briefs. I marked the Board's "B" and Dr. O'Connor's "C." On September 24, 2020, Dr. O'Connor submitted an Objection and Motion to Strike Portions of the Petitioner's Closing Brief. I marked that "D." On October 1, 2020, the Board responded to the Motion to Strike. I marked the response "E" and I closed the administrative record.³

II. Findings of Fact

Based on the testimony, the exhibits in evidence, my assessment of the witnesses' credibility, and the reasonable inferences drawn for the evidence, I make the following findings of fact:

¹ In response to the COVID-19 Crisis, DALA closed its office to in-person hearings and the Board's larger hearing room was conducive to social distancing.

² Pursuant to the Order to Use Pseudonyms adopted by the Board on February 6, 2020, John Doe is a pseudonym used to prevent the identification of Patient A.

³ The Respondent's Motion to Strike Portions of the Petitioner's Closing Brief is Denied. The Respondent argues that he was denied due process, because the Petitioner surprised him with new allegations at the hearing. That statement is inaccurate. Paragraph 9 of the Statement of Allegations alleged that Dr. O'Connor dated Patient A and the next paragraph alleged that he provided her with medical care while they were dating. Moreover, I note that the Joint Pre-hearing Memorandum Section IIA refers to the Respondent's romantic relationship with Patient A and asserts that he provided medical care to her during that period. In addition, the list of exhibits contained in the Joint Pre-hearing Memorandum included the prescriptions at issue. Moreover, Res. Ex. 6 was the 2020 amendment to the Prescribing Policy and, therefore, it is apparent that Dr. O'Connor was aware that the prescribing policy was an issue. While I heard evidence concerning an alleged bogus donation to the National Rifle Association on the issue of John Doe's alleged bias, I did not consider that alleged conduct as a reason to discipline Dr. O'Connor as it was not raised in the Statement of Allegations.

1. William O'Connor was born in 1948. He graduated from Faculte de Medecine, University de l'Etat a Liege in Belgium. Board certified in Otolaryngology; he has been licensed to practice medicine in Massachusetts under license number 56708 since 1980. He is affiliated with Truesdale Clinic in Fall River, MA. (Stip.)⁴
2. On January 27, 2001, Dr. O'Connor was arrested and charged with violating G.L. c. 90, § 24 by operating a motor vehicle under the influence of alcohol, negligent operation of a motor vehicle and marked lane violation. A criminal complaint concerning those charges was issued in the Taunton District Court on January 29, 2001. (Pet. Ex. 6 p.1.)
3. The Taunton District Court scheduled several events concerning the criminal matter and Dr. O'Connor was represented by counsel. On February 6, 2001, there was a conference scheduled. On February 13, 2001, the Commonwealth filed a motion to obtain Dr. O'Connor's witness list. On February 16, 2001, the Court heard and allowed Dr. O'Connor's motion to have his driver's license restored. On May 18, 2001, the Court heard Dr. O'Connor's motion to continue the trial and to gain access to the necessary state police records. (Pet. Ex. 6 pp. 2-3.)
4. Dr. O'Connor submitted his 2001 license renewal application on or about July 2, 2001. (Stip.)
5. Dr. O'Connor listed Old Harbor Rd., Westport MA 02790 as his residential address on his 2001 license renewal application. (Pet. Ex. 11.)
6. Dr. O'Connor signed the license renewal application under the penalties of perjury. (Petitioner Ex. 11 pp. 2 and 5.)

⁴ The stipulations of the parties are set forth in Part VI of the Joint Pre-hearing Memorandum (Pleading "A").

7. The directions set out in Part A of the Renewal Application stated that questions 14 through 22 referred to the last 2 years only. (Pet. Ex. 11 p. 2.)
8. When asked, in Question 17, on the license renewal application if he had been charged "with any criminal offence other than a minor traffic violation," Dr. O'Connor answered "No." (Pet. Ex. 7 p. 2.)
9. On February 8, 2002, Dr. O'Connor was found not guilty of Operating Under the Influence after a bench trial in Taunton District Court. He was found not responsible for marked lanes violation. Dr. O'Connor admitted to sufficient facts as to the negligent operation charge and that charge was dismissed on August 9, 2002. (Pet. Ex. 6 p. 1.)
10. He submitted his 2003 license renewal application on or about June 5, 2003. (Stip.)
11. The directions set out in Part A of the Renewal Application stated that questions 14 through 22 referred to the period since his last renewal application. (Pet. Ex. 7 p. 2, Stip.)
12. When asked on the license renewal application if he had been charged "with any criminal offence," Dr. O'Connor answered "No." (Pet. Ex. 7 p. 2.)
13. Dr. O'Connor dated Patient A from approximately 2008 to 2016. (Stip.)
14. Dr. O'Connor wrote Patient A a prescription for Lunesta on January 20, 2011. (Pet. Ex. 12 p. 8.)⁵
15. Lunesta's generic name is Zopiclone and it is a Schedule IV Controlled Substance.⁶
16. On February 28, 2011, Dr. O'Connor wrote an office note concerning Patient A, but it is illegible. (Pet. Ex. 12 p. 4.)
17. On July 28, 2012, Dr. O'Connor treated Patient A for hemorrhoids. (Pet. Ex 12 p.1.)

⁵ References to Pet. Ex. 12 are to the "Corrected Pet. Ex 12" provided at the hearing.

⁶ Drugs of Abuse, A DEA Resource Guide (2020 Edition) (getsmartaboutdrugs.gov).

18. A pathology report dated July 30, 2012 indicates that Dr. O'Connor provided samples of hemorrhoids and cervix tissue pertaining to Patient A for testing. (Pet. Ex. 12 p. 6.)
19. On May 28, 2013, Dr. O'Connor prescribed Flurazepam to Patient A. (Pet. Ex. 12 p. 21.)
20. Flurazepam is a Schedule IV Controlled Substance.⁷
21. On August 23, 2013, Dr. O'Connor removed 3 skin lesions from Patient A using a laser (Pet. Ex. 12 p. 4.)
22. On April 6, 2015, Dr. O'Connor treated Patient A for blocked ears by removing wax. (Pet. Ex. 12 p. 4.)
23. On July 14, 2015 and June 30, 2016, Dr. O'Connor prescribed Flurazepam to Patient A. (Pet. Ex. 12 pp. 23-24.)
24. On January 21, 2016, the Board reprimanded and fined Dr. O'Connor for failure to disclose a 2008 OUI conviction under Adjudicatory case No. 2015-020. (Stip.)
25. In the final Decision and Order pertaining to Adjudicatory Case No. 2015-020 the Board stated: "In its system of initial licensure and re-licensure, the Board depends on the accuracy and integrity of the information provided by physicians." (Pet. Ex. 5 p. 1.)
26. On July 7 and October 4, 2016, Dr. O'Connor prescribed Flurazepam 30 mg capsule to Patient A. (Pet. Ex. 4.)
27. In June of 2017, Patient A and John Doe began living together. (Doe p. 91 l. 14.)
28. They resided at houses in Woburn and Brewster, Massachusetts. (Doe p. 96 ll. 5-6.)
29. On August 6, 2017, John Doe and Patient A were at their home in Brewster. Patient A stated that she thought she saw Dr. O'Connor's car. (Doe p. 96 ll. 7-1.)

⁷ Drugs of Abuse, A DEA Resource Guide (2020 Edition) ([getsmartaboutdrugs.gov](https://www.getsmartaboutdrugs.gov)).

30. At that time, John Doe and Patient A walked to the front end of their driveway.⁸ John Doe saw Dr. O'Connor stop his vehicle and look at Patient A and John Doe for 10 to 15 seconds. (Doe p. 91 ll. 4-15.)
31. On August 11, 2017, Patient A and John Doe traveled from their house in Woburn to their house in Brewster and found their outdoor shower running. (Doe p. 99 ll. 8-14.)
32. On August 26, 2017, John Doe had a No Trespass Order from the Brewster Police Department served upon Dr. O'Connor by the Westport Police Department. The Officer who served the Order noted that Dr. O'Connor refused to sign that he had received the notice. (Pet. Ex. 3.)
33. On about October 16, 2017, Patient A received a credit card statement reflecting that unauthorized charitable donations amounting to \$5,000 were made on her credit card. (Doe p. 100 ll. 13-20.)
34. On February 21, 2018, Patient A told John Doe that she had received a telephone message which she played for John Doe. (Doe p. 104 ll. 14-16.)
35. Patient A's phone listed the phone number that the call was made from and John Doe called that number and reached Roger Williams Hospital. (Doe p. 108 ll. 12-16.)
36. Dr. O'Connor performed surgeries at Roger Williams Hospital. (Doe p. 108 l. 16; O'Connor p. 195 l. 20.)
37. John Doe copied the telephone message onto his computer and then provided the copy of the recording to the Board's investigator. The copy of the message he provided the Board was a fair and accurate copy of the message Patient A received. (Doe p. 109 ll. 2-23.)

⁸ Patient A's statement was not admitted as to the fact it was Dr. O'Connor's car that she saw, but the testimony was probative and admitted to explain why John Doe and Patient A walked to the front end of the driveway.

38. Pet. Ex. 25 is a fair and accurate copy of the message. (Doe p. 109 l. 24-p. 110 l.15, Ex. 25.)
39. The person who left the message referenced the fact that John Doe was a member of the National Rifle Association and I, therefore, infer the person who left the message was acquainted with John Doe. (Pet. Ex. 25.)
40. John Doe and Patient A noticed that mail they were expecting was not arriving. For example, on April 25, 2018 John Doe did not receive a prescription he was expecting. In addition, they did not receive utility bills and tax bills. (Doe p. 111 l. 20-p. 112 l. 24.)
41. On about April 30, 2018, John Doe did not receive new bank checks that he was expecting. He called the bank and was told that they had been delivered. (Doe p. 114 ll. 5-19.)
42. One of the missing checks was used to make a \$4,000 donation to the National Rifle Association in John Doe's name. (Doe p. 115 ll. 2-23.)
43. On May 24, 2018, Doe had a motion activated camera installed on the garage at Patient A and Doe's Woburn house. Doe had it installed, because some of their mail was missing and they wanted to try to catch someone stealing it. (Doe p. 92 l. 22 – p. 93 l. 6.)
44. Pet. Ex. 26 is a fair and accurate representation of a video the security system took on May 24, 2018. (Doe p. 122 l. 11 and p. 126 l. 4.)
45. Based upon my observations of Dr. O'Connor at the hearing and Pet. Ex. 26, Dr. O'Connor is the person depicted in the video taking mail out of John Doe and Patient A's mailbox. (Pet. Ex. 26.)

46. Based upon my observations of Dr. O'Connor at the hearing and the photograph, he is the person depicted in the photograph. (Pet. Ex. 27.)
47. On or about May 25, 2018, Patient A reported to the Woburn Police complaining that Dr. O'Connor was stalking her. She was advised to apply for an Abuse and Prevention Order. (Pet. Ex. 2 p. 2)
48. On the same day, Patient A obtained an Abuse Prevention Order from the Woburn District Court requiring, among other things, that Dr. O'Connor stay at least 100 yards away from Patient A. (Stip.)
49. The Order also mandated that Dr. O'Connor leave and stay away from Patient A's residence. (Pet. Ex. 1 p. 1)
50. Pet. Ex. 27 is a fair and accurate representation of a photograph the security system took on May 26, 2018. (Doe p. 128 l. 11)
51. On June 5, 2018, the Abuse and Prevention Order was extended to June 19, 2018, so Dr. O'Connor could be served. The Order was served on Dr. O'Connor when it was left at 130 Old Harbor Rd. Westport, MA 02790. On June 18, 2018, the Order was extended to June 18, 2019 by the Court. (Pet. Ex. 1 p. 2.)
52. John Doe married Patient A on September 2, 2018. (Doe p. 91 l. 7.)
53. The Abuse Prevention Order was extended again for one year on June 18, 2019 and again service was made by leaving a copy of the Order when Westport Police left a copy of it at Dr. O'Connor's "last & usual." (Pet. Ex. 1 p. 3.)
54. On September 14, 2019, the security system at the Brewster House notified John Doe that there was movement at the Brewster house. (Doe p. 137 l. 22-p.138 l. 1.).

55. The security system at that time allowed John Doe to view what was going on at the Brewster house from other locations. (Doe p. 138 ll. 15-18.)
56. Pet. Exs. 28, 29 and 30 are fair and accurate representations of the videos taken by the security system on September 14, 2019. (Doe p. 145 l. 22- p. 148 l. 11)
57. Based upon my observations of the videos in evidence and Dr. O'Connor at the hearing, I find that Dr. O'Connor is depicted in Pet.'s Exs. 28, 29 and 30.
58. On September 14, 2019, Dr. O'Connor was in Patient A and John Doe's backyard. He entered the outdoor shower and tried to turn the water on. He tried to open the back door, when the outside light came on Dr. O'Connor scurried from the door. (Exs. 28, 29, 30.)
59. Because Dr. O'Connor was acquainted with John Doe, performed surgeries at Roger Williams Hospital, visited and tried to enter the home of John Doe and Patient A at night when he did not believe that they were home, and took their mail I infer that Dr. O'Connor left the voicemail message marked Pet. Ex. 25.
60. On September 16, 2019, Dr. O'Connor was charged in Orleans District Court with violating the No Trespass Order (G.L. c. 266, § 120), violating an Abuse Prevention Order (G.L. c. 209A, § 7) and Attempting to Commit a Crime to wit Breaking & Entering during the Nighttime (G.L. c. 274, § 6). (Pet. Ex. 8 p. 2.)
61. On January 14, 2020, John Doe filed a complaint with the Board accusing Dr. O'Connor of harassing and stalking John Doe and Patient A. (Pet. Ex. 13 p. 3, Doe p. 88 l. 3.)
62. Robert Bouton was assigned to investigate John Doe's complaint and learned that Dr. O'Connor had been charged with the 2001 criminal charges. (Bouton p. 53 ll. 6-8).

63. On March 13, 2020 in Orleans District Court, Dr. O'Connor admitted to sufficient facts to the charge of trespass. He was placed on administrative supervision and was ordered to have "n/c (no contact) with the victim." The other charges were dismissed at Dr. O'Connor's request. (Resp. Ex 2 pp. 3 and 4.)

III. Analysis

a. Board's authority and adjudicatory process

The Board has statutory authority to regulate the practice of medicine "in order to promote the public health, welfare, and safety." G.L. c. 112, § 5. The issuance of a statement of allegations initiates the formal adjudicatory process, provides a physician with notice of the conduct with which he is charged, and informs him of the discipline that might be imposed if the allegations are found to be true. 243 CMR 1.01(2) (statement of allegations is paper served by board upon licensee ordering licensee to appear before board for adjudicatory proceeding and show cause why licensee should not be disciplined). In the Statement of Allegations in this case, the Board alleged that Dr. O'Connor should be disciplined for failing to disclose that he had been the subject of criminal charges when he filed applications to renew his medical license; practicing medicine in violation of law, regulations or good and accepted medical practice; treating Patient A while dating her; and violating an Abuse Prevention Order obtained by Patient A.

In this proceeding, the Board must prove the allegations set forth in the Statement of Allegations by a preponderance of the evidence. A fact is proven by a preponderance of the evidence if the tribunal has "a firm and abiding conviction in the truth of the proposition advanced" by the Board. *Stepakoff v. Kantar*, 393 Mass. 836, 843, 473 N.E.2d 1131, 1136 (1985). A fact may be proven by the evidence and the reasonable inferences from the evidence. *See Commonwealth v.*

Beckett, 373 Mass. 329, 341, 366 N.E.2d 1252 (1977) (inference must be reasonable and possible not necessary or probable); Mass. Guide to Evid. 304(b).

b. Marital disqualification

Dr. O'Connor raised the marital disqualification to prevent John Doe from testifying about private conversations that he had with Patient A. It is true that the Legislature mandated, and the courts enforce the disqualification of a spouse from testifying as to the private conversations with the other spouse. G.L. c. 233, §20 First; *Gallagher v. Goldstein*, 402 Mass. 457, 524 N.E.2d 53, 55 (1988); see G.L. c. 30A, § 11 (agency adjudicatory proceedings shall preserve privileges). But John Doe and Patient A were not married until September 2, 2018. Testimony concerning private conversations they had before that date is not barred by the marital disqualification. Mass. Guide to Evid. § 504 (b)(1).

c. Admissibility of photograph, videos and recording of phone message

I was persuaded by a preponderance of the evidence that the photographs, security videos and the phone message offered by the Petitioner were what the Petitioner claimed they were. See *Commonwealth v. Purdy*, 459 Mass. 442, 447, 945 N.E.2d 372, 379 (2011), quoting M.S. Brodin & M. Avery, *Massachusetts Evidence* § 9.2, at 580 (8th ed. 2007) (evidence supporting finding that matter in question is what its proponent claims sufficient to support authentication). I found John Doe's testimony concerning the authentication of each item credible. In addition, to the extent John Doe testified as to his opinion of who was depicted in the videos his testimony was probative. Dr. O'Connor argued that John Doe's testimony was infected with bias. The videos and John Doe's testimony as to whom he believed was depicted in the videos addressed the issue of bias raised by Dr. O'Connor. Moreover, because there was no jury in this administrative proceeding, I, as the finder of fact, was able to ensure that such testimony did not infringe on my role as fact finder. See

Commonwealth v. Pina, 481 Mass. 413, 429-30, 116 N.E.3d 575, 592 (2019) (witness may provide opinion testimony as to identity of person in video or photograph unless it would infringe on province of jury); *Commonwealth v. Matos*, 95 Mass. App. Ct. 343, 348-49, 126 N.E.3d 106, 114 (2019).

d. Motion to Amend the Statement of Allegations

The Statement of Allegations which was served on Dr. O'Connor in this matter incorrectly asserted, in Factual Allegation 2, that Dr. O'Connor was arrested for Operating Under the Influence and other infractions on September 29, 2001. The Statement of Allegations further alleged that Dr. O'Connor submitted his 2001 license renewal application on or about July 2, 2001 and his 2003 license renewal application on June 5, 2003. In factual allegations 5-7 of the Statement of Allegations, the Petitioner focused on the specifics of the 2003 license renewal application and alleged that they were untrue.

On the day of the evidentiary hearing, the Petitioner moved to amend the Statement of Allegations so that it would state the correct date of Dr. O'Connor's arrest for Operating Under the Influence as January 29, 2001 and change the reference to 2003 in factual allegations 5-7 to 2001. Dr. O'Connor opposed the motion to amend the Statement of Allegations. He argued that he would be unfairly prejudiced because his defense was prepared to address the allegation that his 2003 license renewal application contained the inaccurate information. Dr. O'Connor's argument was that, since the renewal applications cover the two-year period since the last application and since the arrest in question occurred before the 2001 application, his 2003 application was accurate.

After hearing from the parties on the record, I allowed the amendments of the Statement of Allegations because Dr. O'Connor was not unfairly prejudiced by the correction of the dates on the day of the hearing. *See* G.L. c. 30A, § 11(1) (Parties must have sufficient notice of issues involved

to afford them reasonable opportunity to prepare and present evidence and argument); 801 CMR 1.01(6)(f) ("Presiding Officer may allow the amendment of any pleading previously filed by party upon conditions just to all parties").

The Statement of Allegations was sufficient to put Dr. O'Connor on notice that the Board alleged that he was charged with operating under the influence and that he failed to disclose that fact on his license renewal application. *See LaPointe v. Licensing Board of Worcester*, 389 Mass 454, 458, 451 N.E.2d 112, 116 (1983) (due process requires notice reasonably calculated to apprise interested party of proceeding and afford him opportunity to present his case); *Emerald Home Care, Inc. v. Department of Unemployment Assistance*, 99 Mass. App. Ct. 151, 154, 164 N.E.3d 916, 920 (2021); *Cf. Knight v. Board of Registration in Medicine*, 2021 WL 1991270 at * 5 SJC-12994 (May 19, 2021)(physician could not show prejudice where he had notice of substantive misconduct he allegedly committed). Moreover, Dr. O'Connor stipulated to the incorrect date of his arrest set forth in the Statement of Allegations when he filed his response to the Statement of Allegations and again in the Joint Pre-hearing Memorandum. Had he denied the allegation setting forth the incorrect date in the Statement of Allegations when he filed his response to the Statement of Allegations or in the Joint Pre-hearing Memorandum, the errors would have been corrected prior to the day of the hearing. The fact that Dr. O'Connor went through another disciplinary proceeding based upon similar allegations before he received the Statement of Allegations in this case is yet another factor to consider in deciding whether he was unfairly prejudiced by the amendments to the Statement of Allegations.

e. Fraudulently procuring license renewal

In Massachusetts, a physician must renew his certificate of registration every two years. *See* G.L. c. 112, § 2. The Board may discipline a physician who fraudulently obtains his license or its

renewal. G.L. c. 112, § 5, eighth par. (a); 243 CMR 1.03(5)(a)(1). "[F]raudulent 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. No further proof of actual intent to deceive is required." *Fisch v. Board of Registration in Medicine*, 437 Mass. 128, 139, 769 N.E.2d 1221, 1230 (2002).

On January 27, 2001, Dr. O'Connor was charged with violating G.L. c. 90, § 24 for operating a motor vehicle under the influence of alcohol, negligent operation of a motor vehicle and marked lane violations. On June 29, 2001, Dr. O'Connor signed the renewal application for his license. When asked in Question 17 of the application if he had been charged "with any criminal offence other than a minor traffic violation," Dr. O'Connor answered "No." Dr. O'Connor testified at the hearing that he answered Question 17 in the negative, because he considered the charges to be minor traffic violations.

After observing Dr. O'Connor testify, I did not find Dr. O'Connor's testimony on that point credible. The criminal charges included operating a motor vehicle under the influence of alcohol and Dr. O'Connor was represented by an attorney. Between the time of his arrest and when he answered Question 17 there were several court proceedings and I am convinced that, when Dr. O'Connor answered Question 17 "no," he knew that the criminal charges pending against him were not minor traffic violations. Dr. O'Connor's answer to Question 17 on his 2001 renewal application was false and Dr. O'Connor knew it was false. Dr. O'Connor violated G.L. c. 112, § 5, eighth par. (a); 243 CMR 1.03(5)(a)1 and he is, therefore, subject to discipline by the Board. *See Kellogg v. Board of Registration in Medicine*, 2011 WL 13224166 * 10, SJ-2010-0382 (Spina, J. Feb. 4, 2011) *aff'd* 461 Mass. 1001 (2011).

f. Committing misconduct in the practice of medicine

In Massachusetts, physicians may be disciplined for “misconduct in the practice of medicine.” 243 CMR 1.03(5)(a)18. The Supreme Judicial Court has defined the term “misconduct” as:

improper conduct or wrong behavior, but as used in speech and in law it implies that the conduct complained of was willed and intentional. It is more than that conduct which comes about by reason of error of judgment or lack of diligence. It involves intentional wrongdoing or lack of concern for one’s conduct. Whether or not an act constitutes misconduct must be determined from the facts surrounding the act, the nature of the act, and the intention of the actor.

Hellman v. Board of Registration in Medicine, 404 Mass. 800, 804, 537 N.E.2d 150, 152 (1989); see *Weinberg v. Board of Registration in Medicine*, 443 Mass. 679, 686-87, 824 N.E.2d 38, 44 (2005) (discussing amendments to G.L. c. 112, § 5(c) and 243 CMR 1.03(5)(a)(3) clarifying that misconduct in practice of medicine is independent and sufficient ground to warrant discipline). A physician may be disciplined for misconduct during diagnosis or treatment of a patient or for misconduct “in carrying out his professional activities.” *Forziati v. Board of Registration in Medicine*, 333 Mass. 125, 130, 128 N.E.2d 789, 792-93 (1955). Lying on his license renewal application, Dr. O’Connor violated 243 CMR 1.03(5)(a)18 and is subject to the Board’s discipline.

I was not convinced that Dr. O’Connor committed misconduct in the practice of medicine by prescribing Lunesta or Flurazepam to Patient A. These are Schedule IV controlled substances. They have a low potential for abuse relative to the drugs or other substances in Schedule III. Drugs of Abuse, A DEA Resource Guide (2020 Edition) ([getsmartaboutdrugs.gov](https://www.getsmartaboutdrugs.gov)). While Board regulations prohibit a physician from prescribing Schedule II Controlled Substances to members of his family, they are silent concerning Schedule IV drugs. See 243 CMR 2.07(19). In addition, Board Policy 15-05 prohibits physicians, “[e]xcept in an emergency, . . . from prescribing Schedule II controlled substances to a member of his immediate family, including a spouse (or equivalent)…” Board

Policy 15-05 par. 2 p. 5. Later the policy states, "Accordingly, the Board *suggests* that physicians *consider* refraining from prescribing all controlled substances for family members and significant others in non-emergency situations." *Id.* (emphasis added). Dr. O'Connor testified that he prescribed the medications, because Patient A was having difficulty sleeping and there was no evidence contradicting him or indicating that the medication was inappropriate for that purpose. Dr. O'Connor did not commit misconduct by prescribing Lunesta or Flurazepam to Patient A.

The Petitioner argues that Dr. O'Connor failed to adequately document the prescriptions or treatment he provided Patient A. 243 CMR 2.07(13)(a), requires that:

A licensee shall maintain a medical record for each patient that is complete, timely, legible, and adequate to enable the licensee or any other health care provider to provide proper diagnosis and treatment.

The evidence is that Dr. O'Connor prescribed Lunesta on January 20, 2011. There is no documentation in evidence dated prior to his writing that prescription. I find that he violated 243 CMR 2.07(13)(a) and is, therefore, subject to discipline by the Board. In addition, I find that he failed to properly document the reasons for the Flurazepam prescriptions. I was not persuaded that he violated any Board regulation when he treated Patient A's hemorrhoids, skin lesions, or ear trouble. There are medical records in evidence for those actions and I was not persuaded that they were not adequate.

g. Undermining the public's confidence in the medical profession and lack of good moral character

The Board may impose discipline if a physician lacks "good moral character" or engages in conduct that undermines public confidence in the integrity of the medical profession. Good moral character includes "the elements of simple honesty, fairness, respect for the rights of others and for the laws of State and Nation." *See In the Matter of Sherwin H. Raymond, M.D., Board of*

Registration in Medicine, Adj. Case #243, 15 (Memorandum of Decision, July 29, 1981) (quoting *State ex rel. McAvoy v. Louisiana State Board of Medical Examiners*, 238 La. 502, 516 at n.2 (1959). In *Levy v. Board of Registration Discipline in Medicine*, 378 Mass. 519, 392 N.E.2d 1036 (1979), the Board revoked a physician's license to practice medicine following multiple convictions for grand larceny. The Supreme Judicial Court held that the Board's action was proper and concluded that the Board's responsibility extends not only to the public but also to other physicians whose reputations could be tarnished by the bad acts of members of their profession. *Id.* at 528, 392 N.E.2d at 1042. The Court observed that the practice of medicine requires that physicians be possessed of good moral character, and those doctors who act with integrity "ought not to have public esteem for their honorable and learned profession eroded by a few who do not live up to the solemn nature of their public trust." *Id.*

Likewise, it was proper for the Board to revoke a physician's license after he was convicted of possessing unregistered automatic submachine guns. *Raymond v. Board of Registration in Medicine*, 387 Mass. 708, 713, 443 N.E.2d 391, 395 (1982). In upholding the Board's decision, the SJC wrote: "Disciplining physicians for lack of good moral character, and for conduct that undermines public confidence in the integrity of the profession, is reasonably related to promotion of the public health, welfare, and safety." *Id.*; See also *Sugarman v. Board of Registration in Medicine*, 422 Mass. 338 (1996) (intentional public disclosure of confidential information); *Aronoff v. Board of Registration in Medicine*, 420 Mass. 830 (1995) (deceitful practice of medicine, commercial transactions with patient contrary to interests of patient).

Dr. O'Connor committed several acts that showed a lack of good moral character and that were likely to undermine the public's confidence in the medical profession. He was creeping around outside the home of Patient A and John Doe at night. He took their mail out of their mailbox. He

tried to enter John Doe and Patient A's house when he believed that they were not home and, when the outdoor light came on, he scurried away from the door. He committed a trespass and he ignored court orders. His testimony that he visited the property belonging to John Doe and Patient A at night, because he wanted to see the property, was not credible. His reaction when the outdoor light came on, depicted in the video, and my observations of him testifying convinced me that he was not telling the truth when he testified on that point.

As discussed above, he lied when he filled out his 2001 license renewal application answering "no" when asked if he had been charged with a criminal offense other than a minor traffic offense. He telephoned a former patient's home and left a voicemail message disguising his voice and taunting Patient A and John Doe. Such conduct is the type of conduct that demonstrates a lack of respect for the rights of others. It shows an absence of simple honesty and fairness. When committed by a physician, this conduct undermines the public's confidence in the medical profession. Dr. O'Connor violated 243 CMR 1.03(5)(a)18 and, therefore, the Board may discipline him as it deems appropriate.

h. Res judicata and laches

Dr. O'Connor argued that the matter before me should be dismissed because the criminal case against him was dismissed and that dismissal should operate as res judicata. I am not persuaded. First, it should be noted that the standard of proof in a criminal case is beyond a reasonable doubt. The dismissal of the criminal case does not foreclose this administrative matter, in which the burden of proof is a preponderance of the evidence. *See Town of Natick v. Sostilio*, 358 Mass. 342, 344, 264 N.E.2d 664, 666 (1970) (acquittal ordinarily given no binding effect in subsequent civil proceeding). There are several other reasons why I rule that the doctrine of res judicata does not bar the Petitioner's action to discipline Dr. O'Connor.

The term “res judicata” includes both claim preclusion and issue preclusion. *See Heacock v. Heacock*, 402 Mass. 21, 23 n. 2, 520 N.E.2d 151, 152 (1988). “Claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action.” *Town of Brookline v. Alston*, 2021 WL 1619958 SJC 1619958 at *11 (Kafker, J. Apr. 27, 2021). The invocation of claim preclusion requires three elements: “(1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits.” *DaLuz v. Department of Correction*, 434 Mass. 40, 45, 746 N.E.2d 501 (2001), quoting *Franklin v. North Weymouth Coop. Bank*, 283 Mass. 275, 280, 186 N.E. 641 (1933). Similarly, issue preclusion “prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies.” *Heacock v. Heacock*, *supra* at 23 n.2, 520 N.E.2d at 152.

The Supreme Judicial Court has noted that “Privity is an elusive concept, and no single definition of that term applies to all cases.” *DeGiacomo v. Quincy*, 476 Mass. 38, 43, 63 N.E.3d 365, 370 (2016). The Court went on to instruct that to determine if parties are in privity we should examine “the nature of the nonparty’s interest, whether that interest was adequately represented by a party to the prior litigation, and whether binding the nonparty to the judgment is consistent with due process and common-law principles of fairness.” *Id.* at 43-44, 63 N.E.2d at 370. The issue in this administrative case is different from the issue in the criminal case. *See Feldstein v. Board of Registration in Medicine*, 387 Mass. 339, 341, 439 N.E.2d 824, 826 (1982). (discipline of physician not criminal or penal and purpose of disciplinary proceedings is protection of public). In the matter presently before me, the issue is whether Dr. O’Connor violated the Board’s regulations and should be disciplined. Those issues were not litigated in the criminal case and, therefore, issue

preclusion does not apply. *See Kobrin v. Board of Registration of Medicine*, 444 Mass. 837, 844, 832 N.E.2d 628, 634 (issue preclusion only prevents relitigation of issues actually litigated in prior action). In the instant case, the Board seeks to enforce its regulations and discipline Dr. O'Connor, a role given it by the Legislature. *See G.L. c. 112, § 5*. The Board is entitled to a hearing on its allegations. *See Sostilio, supra* at 344, 264 N.E.2d at 666.

Dr. O'Connor's laches argument is no more persuasive. First, I note that in Massachusetts "[l]aches is not generally a bar where a public right is being enforced." *Wang v. Board of Registration in Medicine*, 405 Mass. 15, 20, 537 N.E.2d 1216 (1989) (four-year delay by board before initiating investigation of physician did not trigger doctrine of laches). Moreover, on the merits, Dr. O'Connor's laches argument lacks merit.

"A defense of laches exists upon a factual finding that there has been unjustified, unreasonable, and prejudicial delay in raising a claim" and the burden of proving laches rests upon Dr. O'Connor. *See Santagate v. Tower*, 64 Mass. App. Ct. 324, 333, 833 N.E.2d 171, 178-79 (2005). In this matter, I did not find an unreasonable delay by the Board. Any delay in pursuing the statement of allegations against Dr. O'Connor for lying on his license renewal application was caused by Dr. O'Connor not notifying the Board of the criminal charges.

Even if the Board had been responsible for an unreasonable delay, Dr. O'Connor failed to show that he was unfairly prejudiced by it. While in his closing brief, Dr. O'Connor asserted that he was unfairly prejudiced by the delay as his memory suffered during the delay, I did not find that to be true. When Dr. O'Connor testified during the hearing, he did not convince me that he suffered from a lack of recall of the events surrounding his arrest or the criminal charges. He testified that he did not provide the information concerning the criminal charges on the license renewal application, because he thought they were minor motor vehicle charges. While I did not find his testimony

credible, it was not because of a lack of recall. *Cf. Weiner v. Board of Registration of Psychologists*, 416 Mass. 675, 682, 624 N.E.2d 955 (1993) (record incomplete because of twenty-year delay of board prosecution, prejudicing petitioner).

Moreover, Dr. O'Connor, having lied when he filled out the license renewal application in 2001 and having failed to bring his deception to the Board's attention even after he was disciplined for not reporting a subsequent conviction for Operating Under the Influence in 2016, cannot now obtain the equitable remedy of laches. "[H]e who comes into equity must come with clean hands'.... [T]hus 'the doors of equity' are closed 'to one tainted with inequity or bad faith relative to the matter in which [h]e seeks relief, however improper may have been the behavior of the' other party.'" *Fidelity Mgt. & Res. Co. v. Ostrander*, 40 Mass. App. Ct. 195, 200, 662 N.E.2d 699, 704 (1996).

i. Summary suspension

In certain situations, the Board may suspend a physician's medical license prior to an evidentiary hearing and the Board's regulations provide two procedures for doing so, 243 CMR 1.03 (11)(a) and (b). If the Board believes that a physician may be an immediate and serious threat to the public health or safety, it may proceed to suspend the physician's license immediately based upon the written materials before it. 243 CMR 1.03 (11)(a). If, however, the Board does not believe that the threat is immediate, the Board may ask the physician to respond to the documentary evidence presented in support of the suspension and then consider the question. 243 CMR 1.03 (11)(b). In either situation, the Board must provide an evidentiary hearing on the question of the suspension within a week.

Dr. O'Connor asserts that his due process rights were violated because the Board failed to give him notice of the reasons for his suspension or give him an opportunity to respond to the

allegations before it suspended him. I do not agree with his argument. In this matter, after considering the documents submitted with the motion to suspend his license, the Board proceeded to suspend Dr. O'Connor's license pursuant to 243 CMR 1.03(11)(a). That regulation provides:

If, based upon affidavits or other documentary evidence, the Board determines that a licensee is an immediate and serious threat to the public health, safety, or welfare, the Board may suspend or refuse to renew a license, pending a final hearing on the merits of the Statement of Allegations.

The Board provided Dr. O'Connor with the materials it had when it determined that his license should be suspended, and he was given the opportunity for a quick hearing on the summary suspension. The hearing was continued at Dr. O'Connor's request and he filed a motion for summary decision. Dr. O'Connor's due process rights were protected.

I turn now to the substance of the Board's argument in support of the summary suspension. To suspend Dr. O'Connor's license, the Board had the burden to prove by a preponderance of the evidence that Dr. O'Connor is an immediate and serious threat to the public. *See Randall v. Board of Registration in Medicine*, SJ-2014-0475 Memorandum of Decision (Cordy, J. Jun. 9, 2015) (Board has burden of preponderance of evidence). The definition of serious threat to the public health, safety, and welfare is not limited to patient care or clinical judgment. *See Raymond v. Board of Registration in Medicine*, *supra* at 712, 443 N.E.2d at 394 (physician's unlicensed possession of machine guns and silencers serious threat to public health, safety, and welfare).

Serious means "having important or dangerous possible consequences." *Board of Registration in Medicine v. Harold Altvater, M.D.*, RM-19-0351 at *5 (Recommended Dec. Oct. 15, 2019, *aff'd* and remanded for hearing on Statement of Allegations Adj. No 2019-039 May 7, 2020) citing <https://www.merriam-webster.com/dictionary/serious>. The phrase "public welfare" has been defined as "[a] society's well-being in matters of health, safety, order, morality economics, and

politics.” *Lisa McGonagle v. Home Depot, USA, Inc.*, 22 Mass. L. Rptr. 708 at * 7 quoting Black’s Law Dictionary 1588 (7th ed.1999) (Henry, J. Middlesex Sup Ct. Jul. 17, 2008) *aff’d* 75 Mass. App. Ct. 593, 915 N.E.2d 1083 (2009). As repugnant as Dr. O’Connor’s conduct was in the way he behaved regarding Patient A and John Doe, that conduct was focused on Patient A and John Doe. It was apparently motivated by Dr. O’Connor’s relationship with Patient A. I do not find that conduct motivated by his relationship with Patient A, was such as to demonstrate that Dr. O’Connor poses an immediate and serious risk to the public health, safety, or welfare, because it was motivated by his relationship with Patient A.

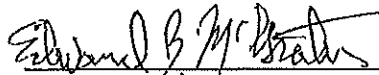
I have considered Dr. O’Connor’s decision not to provide truthful answers on his applications to renew his license, but that conduct does not demonstrate that he poses an immediate and serious threat to the public health either. Dr. O’Connor has been practicing in Massachusetts for decades. There is no evidence that his practice has been infected with untruthfulness like that on his license application. *See Board of Registration in Medicine v. Gabriel Luna, M.D.*, RM-19-0151*8 (Recommended Dec. Mar. 6, 2020, *aff’d and remanded for hearing on Statement of Allegations* Adj. No. 2020-10, Mar. 19, 2020) (failing to disclose criminal matters on application not sufficient support for summary suspension when evidence failed to show that doctor lied during practice of medicine in three years since falsehood on license application,). Nor was I convinced that Dr. O’Connor’s failure to properly document the Lunesta and Flurazepam prescriptions was such as to support the summary suspension of his license to practice medicine.

Conclusion

I was persuaded by the preponderance of the evidence that Dr. O’Connor violated the Board’s regulations and, therefore, he is subject to the discipline the Board deems appropriate. I was

not convinced that Dr. O'Connor poses an immediate and serious threat to the public health and safety and, therefore, I recommend the Board deny the summary suspension.

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A handwritten signature in dark ink, appearing to read "Edward B. McGrath", is written over a horizontal line.

Edward B. McGrath
Chief Administrative Magistrate

Dated: May 26, 2021