

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In re: William A. O'Rourke, Jr., M.D.

Docket No. MPN 19-0302

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**STATE'S ANSWER TO PROPOSED
FINDINGS AND CONCLUSIONS OF LAW OF
RESPONDENT WILLIAM A. O'ROURKE, JR., M.D.**

NOW COMES the State of Vermont, by and through Attorney General William H. Sorrell and undersigned Assistant Attorney General, James S. Arisman, and submits the following answer to Respondents proposed findings of fact and conclusions of law.

1. The State has received on March 14, 2006 a copy of Respondent's O'Rourke's proposed findings of fact and conclusions of law in this matter. Respondent's proposed findings are frequently inaccurate or confusing and are largely without merit.

2. Respondent's proposed findings are often no more than counsel's arguments labeled as "facts" that are wholly unsupported by the record in this matter. Moreover, Respondent's proposed findings are inconsistent with the prehearing agreement of the parties and the presiding officer that (a) evidence presented as relevant to the merits of the State's charges would be identified as such and heard separately from other evidence; and (b) all evidence presented solely regarding the sanction in this matter would be clearly identified as such and would not be conflated with other evidence. See State's Motion in Limine of October 19, 2006. And see Tr. at 94-96.¹ For these and other reasons set forth below, the State urges that the Board disregard Respondent's submission of proposed findings and

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1. Transcript of Hearing of October 30, 2006 (referred to hereinafter as "Tr.").

conclusions of law. The hyperbole of Respondent's Proposed Findings is not matched by an accurate rendering of the facts in the record.

A. The "Introduction".

3. Respondent's "Introduction" is simply argument and mischaracterizes the record. One witness regarding the sanction, Mary Fregosi, referred to Respondent as "probably a doctor's doctor" but the other remarks attributed to her within the "Introduction" are not supported by the record of the proceedings.

4. The "Introduction" also includes the following statement, "Dr. O'Rourke acknowledges that he should have completed the Case Western Reserve University course sooner than he did. For that he apologizes." Conspicuous by its absence anywhere in the record, however, is any word of apology, regret, or sorrow personally expressed by Respondent regarding his own conduct.

5. Finally, the "Introduction" refers to the State's charges against Respondent as "a persecution" and asserts that the State seeks "to punish Dr. O'Rourke beyond what he has endured over the past four years". However, this is simply more argument. Neither claim is supported by facts in the record.

B. Proposed Finding Number 4.

6. Proposed Finding Number 4 is further argument and is wholly unsupported by the record. The State made no such concession, as claimed, regarding Respondent's care of Patient A and had no need to do so. Respondent in the November 5, 2003 Stipulation and Consent Order had already admitted that (a) he prescribed narcotics for Patient A on November 9, 2001 without examining her or taking a medical history; (b) prescribed narcotics for Patient A on May 15, 2002; and (c) that his medical records for both dates

included no entry to indicate that he had taken a detailed medical history or examined her. See November 5, 2003 Stipulation and Consent Order at Paragraph 15; see also Paragraph 14 (Respondent agrees that Board may adopt and enter paragraphs 5 through 15 of agreement as uncontested findings of fact and/or conclusions). In Paragraph 17, Respondent agreed "appropriate disciplinary action in this matter shall consist of imposition of conditions upon Respondent's license to practice medicine."

C. Proposed Finding Number 5.

7. Proposed Finding Number 5 is largely argument, at variance with the record, and of questionable relevance. Respondent could not "renew" a narcotics prescription for Patient A because prior to November 9, 2001 Respondent had not prescribed for the patient, as reflected by the contents of the office "record". See November 5, 2003 Stipulation and Consent Order at Paragraphs 8 and 9.

8. In Proposed Finding Number 5, Respondent states, "As the Hearing Panel now understands, there was *nothing* medically unorthodox, harmful, or inappropriate in Patient A receiving the medication at issue." The State respectfully submits that Respondent has no basis to propose a finding regarding the hearing panel's understanding on this point. Respondent had already made numerous admissions as noted above regarding his prescribing for and care of Patient A, and no expert testimony was presented by either party regarding the medical appropriateness of such prescribing, possible patient harm, or "orthodoxy". In sum, there is no factual basis in the record for any such finding.

9. Proposed Finding Number 5 includes the following sentence, "[I]t was only Investigator Philip Ciotti who felt that there was a 'suspicious circumstance' surrounding the prescription, and who on March 4, 2002, "opened" a complaint against Dr. O'Rourke." The

testimony at hearing does not support the proposed finding that "it was only Investigator Ciotti who felt there was a 'suspicious circumstance'". (Emphasis added.) Investigator Ciotti testified that this matter was opened for investigation following receipt of information from a Rutland pharmacist "expressing some concerns" regarding prescribing by area physicians, including a prescription that had been "picked up" by Respondent and that involved Patient A. Tr. at 66-67. Neither Investigator Ciotti nor any other witness used the phrase "suspicious circumstance". The Investigator testified that he proceeded with his investigation by obtaining a subpoena from the Office of the Attorney General. And see 26 V.S.A. §1355(a). The hearing panel may also rely on its own experience and understanding of the Board's investigative process, including the involvement of the Board's three investigative committees.

10. The final three complete sentences of Proposed Finding Number 5 (appearing toward the top of Page 3) are irrelevant and misleading and are no more than an argument. No testimony used the term "cops and robbers" in describing any aspect of this case. Nor did evidence establish or even suggest that Investigator Ciotti employed a "cops and robbers approach" during his investigation. The accusation exists solely within counsel's and is unsupported by the record. Moreover, there was no testimony to establish or suggest that the investigator had any legal or procedural obligation that would have required him to begin his investigation by talking first to Respondent (notwithstanding Respondent's purported stature as a "a respected, long-standing member of the Vermont medical community").

D. Proposed Finding Number 6.

11. Proposed Finding Number 6 addresses State's Exhibit Number 1, the November 5, 2003 Stipulation and Consent Order. This simply a weak legal argument and

is wholly without merit. Respondent attaches great weight to the claim that the agreement as introduced is blank at the lines for date and entry. He cites no authority for his argument. Moreover, Respondent failed to raise these claims at hearing or prior to the entry into evidence of the agreement as signed by him. Respondent has not contested the accuracy of the Stipulation and Consent Order as entered into evidence. Nor has he ever sought to have the agreement set aside based on the claim he makes here. Finally, it is well settled that administrative agencies as a necessary adjunct to their quasi-judicial duties have the authority to take notice of judicially cognizable facts whether requested or not and may do so at any stage of the administrative proceeding. In re Handy, 144 Vt. 610, 612-613 (1984). Here, the Board may draw upon its own internal records in taking notice that Respondent has been disciplined by the Board pursuant to the November 5, 2003 agreement signed by Respondent. The hearing committee may note that the properly dated and entered agreement is contained in the Board's permanent files.

E. Proposed Finding Number 7.

12. Proposed Finding Number 7 is, again, legal argument masquerading as facts. Whether Respondent's *ex parte* written communication with a Board member is "dishonorable and/or unprofessional conduct" is a legal conclusion that must be drawn from the facts in the record. Respondent admitted writing and sending the letter in question (admitted as Exhibit Number 3) directly to the Board member. Tr. at 34, 37. He admitted that he did not ask his attorney to communicate with the Board or the Board member about substituting a different course for the one required by his agreement with the Board. Tr. at 38. He admitted that he sent the letter to the Board member at the Board member's hospital address and to the Board of Medical Practice. Tr. at 37-38. Finally, Respondent admitted

that he did not send a copy of his letter to either his own attorney or the undersigned Assistant Attorney General. Tr. at 38.

13. Respondent's unilateral action in writing to the Board member is minimized in the Proposed Findings as an "obviously sincere effort to communicate 'physician-to-physician'". Without regard to any claimed sincerity, the letter nonetheless is an *ex parte* communication by Respondent with a Board member regarding a pending matter. The letter was sent by Respondent to no other Board member, the letter was not addressed to the Board of Medical Practice or its administrative staff, and no copies of the letter were sent to anyone else. Tr. at 37-38. Whether such communication was "dishonorable and/or unprofessional conduct" is a matter for the Board to conclude from the facts adduced at hearing. The circumstances suggest that Respondent unilaterally chose to attempt to resolve a pending concern without involving others with an interest in the matter. The facts fully support a finding that Respondent engaged in *ex parte* communication, as charged by the State.

14. The State will not respond here to the non-factual, hyperbolic comment that makes up the final sentence of Proposed Finding Number 7.

F. Proposed Finding Number 8.

15. Proposed Finding Number 8 begins with self-serving argument and proceeds on to mischaracterize the record in this matter. The claim that "[t]here is no evidence that Dr. O'Rourke failed to produce any requested records or documents on a timely basis" is simply wrong and factually unsupported. On or about March 16, 2006, Investigator Ciotti went to Respondent's office to review prescribing files that Respondent was required to maintain under the November 5, 2003 Stipulation and Consent Order. Tr. at 75. At the office, Respondent's bookkeeper, Linda Lewis, was present. Tr. at 76. Investigator Ciotti

told the bookkeeper what records he was seeking, and she replied that there was no such file in the office that she was aware of. Tr. at 76-77.

16. Ms. Lewis never produced the requested records on March 16, 2005, and Investigator Ciotti left the office empty-handed. Tr. at 77-78. The investigator subsequently requested from Attorney Berger production of the records² that were required to be maintained under the November 5, 2003 agreement (and that had not been produced on March 16, 2006). Tr. at 79-80, 156-157. The requested records were not made available to the Board until June 13, 2005, almost three months after first being requested. Tr. at 133-134. In sum, there is evidence aplenty that Respondent failed to timely produce the required records on March 16, 2005 and during the three months that followed.

17. Proposed Finding Number 8 also asserts that when Investigator Ciotti sought the required records on March 16, 2005, "he did so when he knew or should have known that Dr. O'Rourke and his nurse (who happens to be his wife) were in Florida." To the extent that this specious claim can be understood, there is nothing in the record in this matter that would support the notion that the investigator "knew or should have known" Respondent's whereabouts in Vermont or elsewhere on any given day.

18. Proposed Finding Number 8 also claims, "Mr. Ciotti barged into Dr. O'Rourke's office, intimidated the bookkeeper, Linda Lewis, leaving her in tears." (Emphasis added.) This bare assertion is both incorrect and irrelevant. The evidentiary record is wholly devoid of factual support for this self-serving accusation (that has been advanced solely by counsel for Respondent). Investigator Ciotti denied that any such improper conduct by him took place during his visit to Respondent's office. Tr. at 147-149. The bookkeeper, Ms.

2. Neither side introduced evidence during the hearing as to the date(s) when Investigator Ciotti contacted Mr. Berger and requested production of the required records.

Lewis, in her testimony failed to corroborate any of Mr. Berger's allegations. Tr. at 147, 160-165.

19. Finally, Proposed Finding Number 8 offers a series of unsupported and vague allegations of "questionable behavior" by Investigator Ciotti, "grave concerns" regarding an affidavit prepared by him, and overzealousness on his part in the case of David S. Chase. Respondent produced no factual evidence to back up his innuendo and allegations. Tr. 140-143. Respondent inaccurately claims that the investigator "conceded that the Board reinstated a physician's license because of grave concerns about an affidavit prepared by Mr. Ciotti." Tr. 140-143. Counsel for Respondent repeatedly directed compound questions to the investigator that would have required the investigator to respond with legal conclusions rather than factual statements. The investigator agreed in his testimony only that the emergency suspension had been reversed and added that he had no knowledge of what weight had been attached to his affidavit by the Board. Tr. at 142.

20. The Board may properly take notice of its three-page written decision of March 31, 2004 in the David S. Chase matter. In re Handy, supra. The decision makes no findings regarding the accuracy or truthfulness of investigator's affidavit in that matter. The decision does not express "grave concerns" regarding the affidavit. The decision states, "The Board does not believe the questionable portions of the affidavit or the summary suspension order has in any way tainted the Superceding Specification of Charges."³

21. The essence of Proposed Finding Number 9 has largely been addressed above. With regard to Dr. O'Rourke's non-attendance (and sorely belated attendance) of the

3. The Board's decision did not explain its use of the term "questionable affidavit" or make any findings in this regard. (The context of the decision indicates that the term "questioned affidavit" might have been a better and more accurate usage.) The decision summarized allegations made by Dr. Chase's attorneys but made no attempt to resolve these or enter findings.

required Case Western Reserve University coursework, it is far from clear that Respondent's conduct was not "dishonorable" or the result of "false and fraudulent representations" by him. Respondent's explanations for his failure to attend the coursework and to do so in a timely manner are both vague and unconvincing.

22. Contrary to Proposed Finding Number 9, no witness characterized Respondent as "a man of the highest integrity and honor". While Respondent's witnesses spoke highly of him, none offered the above-exaggerated testimony as claimed in the proposed finding.

23. Respondent's claim that he failed to attend the required coursework in a timely manner in May 2004 due to his brother's injuries in an automobile accident are also unsupported and unconvincing. Respondent chose to provide almost no detail on this point when questioned by his own attorney. Tr. at 54. Respondent chose not to present his brother as a witness on this point, although his brother was present at the hearing. Respondent failed to establish that he had ever attempted to explain these claimed circumstances to the Board and ask the Board to grant him more time to complete the coursework. Finally, Respondent simply did not bother to attend the required coursework at Case Western Reserve University for a full two years even after his brother had been discharged from the hospital.

24. The remainder of Proposed Finding Number 9 is largely argument unsupported by facts. No evidence in the record supports the claim that Respondent's pleas regarding the required coursework "fell on deaf ears" when he sought to attend other coursework that he preferred. The final sentence of Proposed Finding Number 9 is further argument and appears to be an attempt to explain away Respondent's failure to attend the

required coursework in a timely manner as fault of the State for having charged him with unprofessional conduct.

25. Proposed Finding Number 10 states, "The State conceded in its closing argument that Dr. O'Rourke is a competent, compassionate physician providing the highest quality of care to his patients." Unfortunately, the State did not and was unable to offer any such concession in its closing argument regarding Respondent's competence, skill, or quality of care. Thus, there is no basis for this proposed finding regarding the State's position. In fact, the State's closing observations regarding Respondent were premised on the notion that it is not enough to be just a good person or a good doctor, if such be the case. Rather, one must also be a person whose word is good, a person of honor, and that "sometimes [this] involves doing things you don't want to do because it's the right thing or because others in the community expect it of you, and that didn't happen here."⁴ Tr. at 173.

26. Proposed Finding Number 10 concludes, "Dr. O'Rourke has endured punishment far disproportionate to his purported 'crime' and this prosecution has long since turned into an irrational pursuit of punishment for the sake of punishment." Again, there is no factual basis in the record for this claim. It is simply argument made for effect. Respondent has not been accused by the State of a crime. Rather, he has been charged with unprofessional conduct as a physician for failing to honor his obligations to the Board and to the profession of medicine. The proposed finding refers to "punishment" endured by Respondent but the record is wholly bare of any evidence that Respondent has been punished at all or punished for the sake of punishment or irrationally pursued by the State.

4. "The universality of a law which says that anyone believing himself to be in difficulty could promise whatever he pleases with the intention of not keeping it would make [the act] of promising . . . quite impossible." A man dishonoring a promise "intends to make use of another man merely as a means to an end". Kant, Immanuel, *Grounding for the Metaphysics of Morals* 31, 37 (J.W. Ellington, trans., Hackett, 1993).

27. The State summarized in closing that Respondent formally agreed to accept expressly stated obligations to the Board of Medical Practice, to patients, and to the public and then willfully chose not to fulfill these. Whether Respondent acted dishonorably and/or unprofessionally, as the State has alleged, are ultimately conclusions that the Board itself must draw from the facts in the record. The State submits that the factual record in this matter fully supports such findings regarding Respondent's conduct and submits that a lengthy suspension of Respondent's medical license is warranted in light of his indifference and willful disregard of the obligations that he agreed to in the November 5, 2003 Stipulation and Consent Order.

WHEREFORE, the State of Vermont moves the Board of Medical Practice hearing committee to consider and rely on the above answer by the State, as well as the State's Proposed Findings of Fact, and to disregard, in whole or in part, the flawed and unreliable findings submitted by Respondent.

Dated at Montpelier, Vermont, this 13th day of November, 2006.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by:


JAMES S. ARISMAN
Assistant Attorney General

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In re: William A. O'Rourke, Jr., M.D.)
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AFFIDAVIT OF GAIL PHIPPS

COMES NOW Affiant, Gail Phipps, Financial Administrator, CASE/UHHS CME Program, School of Medicine, Case Western Reserve University, and, under penalties of perjury, deposes and states as follows:

1. I am the Financial Administrator for the Continuing Medical Education (CME) Program of the School of Medicine, Case Western Reserve University. I am responsible for certain administrative and managerial duties for the Program, including maintenance and/or retrieval of information and files related to the Program and its current and prior schedules for individual courses.

2. I have reviewed the records of the Case Western CME Program with regard to the past and current scheduling of the Intensive Course in Controlled Substance Management. The information in the Program's files regarding the past and current scheduling of CME courses is recorded at or near the time that each course is offered to attendees and to interested organizations.

3. The Intensive Course in Controlled Substance Management is offered by the Case Western CME Program twice each year, in May and December. I have determined from the records of the Program that the Intensive Course in Controlled Substance Management was held on the following dates in recent years:

- 1999 - May 19-22; December 1-4
- 2000 - May 17-20; December 6-9
- 2001 - May 16-19; December 5-8
- 2002 - May 15-18; December 4-7

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2003 - May 14-17; December 10-13

2004 - May 19-22; December 15-18

2005 - May 11-14; December 7-10

2006 - May 10-13

The Intensive Course in Controlled Substance Management will be offered again on December 6-9, 2006.

4. The information set forth above is found in the files and records of the Continuing Medical Education (CME) Program of the School of Medicine, Case Western Reserve University. This information is kept in the course of regularly conducted business. It is the regular practice of the Program to compile and retain such information and records in its files. The information set forth above is based on my review of the records in question and my personal knowledge.

Dated at Cleveland, Ohio this ____ day of October 2006.

GAIL PHIPPS

Financial Administrator, CASE/UHHS
Continuing Medical Education Program
School of Medicine, Case Western Reserve University

SUBSCRIBED AND SWORN TO BEFORE ME:

NOTARY PUBLIC

My Commission Expires _____

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