

IN AND BEFORE THE OKLAHOMA STATE BOARD  
OF MEDICAL LICENSURE AND SUPERVISION  
STATE OF OKLAHOMA

**FILED**

AUG 13 2012

OKLAHOMA STATE BOARD OF  
MEDICAL LICENSURE & SUPERVISION

STATE OF OKLAHOMA )  
EX. REL. THE OKLAHOMA BOARD )  
OF MEDICAL LICENSURE )  
AND SUPERVISION, )

Plaintiff, )

Case No. 10-06-4011

v. )

WILLIAM BROWNING O'BRIEN, M.D. )  
LICENSE NO. 20338, )

Defendant. )

**PLAINTIFF STATE OF OKLAHOMA ex rel. THE OKLAHOMA  
BOARD OF MEDICAL LICENSURE AND SUPERVISION'S  
RESPONSE TO MOTION TO DISMISS**

COMES NOW the Plaintiff, the State of Oklahoma ex rel. the Oklahoma State Board of  
Medical Licensure and Supervision (the "Board"), by and through its attorney, E. Marissa Lane,  
Assistant Attorney General, and responds to Defendant's Motion to Dismiss as follows:

**INTRODUCTION**

A Complaint was filed against Defendant on April 5, 2011 alleging he is guilty of the  
following unprofessional conduct:

A. Habitually uses habit-forming drugs in violation 59 O.S.  
407 §509(4) and OAC 435:10-7-4(3).

B. Engaged in practice or other behavior that demonstrates an  
incapacity or incompetence to practice medicine and surgery in  
violation of OAC 435:10-7-4(18).

C. Violated any provision of the medical practice act or the  
rules and regulations of the Board or of an action, stipulation, or

agreement of the Board in violation of 59 O.S. §509(13) and OAC 435:10-7-4(39).

D. Is unable to practice medicine with reasonable skill and safety to patients by reason of age, illness, drunkenness, excessive use of drugs, narcotics, chemicals or any other type of material or as a result of any mental or physical condition in violation of 59 O.S. §509(15) and OAC 435:10-7-4(40).

E. Engaged in fraud or misrepresentation in applying for or procuring a medical license or in connection with applying for or procuring periodic reregistration of a medical license in violation of OAC 435:10-7-4(8).

F. Failed to furnish the Board, its investigators or representatives, information lawfully requested by the Board in violation of OAC 435:10-7-4(37).

G. Failed to cooperate with a lawful investigation conducted by the Board in violation of OAC 435:10-7-4(38).

### **STANDARD OF REVIEW**

The purpose of a dismissal motion is to test the law's support for a claim, not the sufficiency of the underlying facts. *Patel v. OMH Medical Center, Inc.*, (987 P.2d 1185, 1192 (Okla. 1999)). *See also Miller v. Miller*, 956 P.2d 887 (Okla. 1998). In the instant matter, Defendant is urging dismissal not based on whether there is a *legal* basis for the claims against Defendant, but rather the factual allegations do not support the Board's claims against Defendant. This is not proper for a motion to dismiss.

### **ARGUMENT AND AUTHORITIES**

The Defendant claims that paragraphs A,B, C, D, F, & G of the Complaint should be dismissed or stricken from the Complaint asserting that they are invalid as a matter of law because the Board failed to follow proper prerequisite procedures and "because the Board has no

competent evidence to support each of the claims.” Defendant also by footnote asserts that Count “E” was to be dismissed based on a prior agreement of Prosecutor for the Board and counsel for Defendant. Count “E” has not been dismissed and the State of Oklahoma, the Board, intends to proceed against Defendant on all allegations set forth in the Complaint.

Following *Patel* and *Miller, supra*, a Motion to Dismiss is solely to test the *legal* basis for a claim; it is not to test the underlying *facts* supporting a claim. The thrust of Defendant’s argument is simply that the facts recited in the Board’s Complaint do not support the alleged violations. Although the facts set forth in the Board’s Complaint are more than ample to support the cited violations, this is not relevant to a Motion to Dismiss.

Defendant’s argument that Count “D”, “F” and “G” of the Complaint must be dismissed because the Board failed to follow certain procedures outlined in 59 O.S. §509 (15) and OAC 435:10-7-4(40), is misplaced. The sections cited by Defendant provide in pertinent part as follows:

**59 O.S. § 509 (15)** The inability to practice medicine with reasonable skill and safety to patients by reason of age, illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition. In enforcing this subsection the State Board of Medical Licensure and Supervision *may*, upon probable cause, request a physician to submit to a mental or physical examination by physicians designated by it. If the physician refuses to submit to the examination, the Board shall issue an order requiring the physician to show cause why the physician will not submit to the examination and shall schedule a hearing on the order within thirty (30) days after notice is served on the physician. The physician shall be notified by either personal service or by certified mail with return receipt requested. At the hearing, the physician and the physician's attorney are entitled to present any testimony and other evidence to show why the physician should not be required to submit to the examination. After a complete hearing, the Board shall issue an order either requiring the physician to submit to the examination or withdrawing the request for examination. The medical license of a physician ordered to submit for examination may be suspended until the results of the examination are received and reviewed by the Board; (emphasis added)

**OAC 435:10-7-4 (40)** The inability to practice medicine and surgery with reasonable skill and safety to patients by reason of age, illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical

condition. To enforce this paragraph, *the Board may*, upon probable cause, request a physician to submit to a mental or physical examination by physicians designated by it. If the physician refuses to submit to the examination, the Board shall issue an order requiring the physician to show cause why he will not submit to the examination and shall schedule a hearing on the order within thirty (30) days after notice is served on the physician. The physician shall be notified by either personal service or by certified mail with return receipt requested. At the hearing, the physician and his attorney are entitled to present any testimony and other evidence to show why the physician should not be required to submit to the examination. After a complete hearing, the Board shall issue an order either requiring the physician to submit to the examination or withdrawing the request for examination. The medical license of a physician ordered to submit for examination may be suspended until the results of such examination are received and reviewed by the Board. (emphasis added)

The Board is not proceeding against Defendant based on a violation of the above cited statute and rule and these provisions are irrelevant to a determination of whether Defendant has violated the relevant sections that have been cited in the Board Complaint.

Rather, the Board is proceeding against Defendant for the following reasons; (1) the habitual and chronic use of habit forming drugs, opiates, affecting Defendant's ability to practice medicine with skill and safety, (2) failing to cooperate with a lawful investigation conducted by the Board and to provide information lawfully requested, and (3) for not truthfully responding to questions regarding substance abuse and treatment in procuring reregistration of a medical license. The Board has not cited and is not relying on 59 O.S. §509 (15) and OAC 435:10-7-4(40) as cited by Defendant, and this argument has no application or relevance to the instant Board matter.

Accordingly, the State of Oklahoma ex rel. The Oklahoma Board of Medical Licensure and Supervision, respectfully requests that Defendant's Motion to Dismiss be denied and for such other and for such other and further relief as this Court deems just and equitable.

WHEREFORE, the State respectfully requests that the Court deny the Defendant's motion to dismiss or motion to strike, and for such other and further relief as this Court deems just and equitable.

Respectfully submitted,

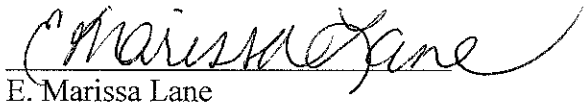


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Attorney for the Plaintiff

**CERTIFICATE OF MAILING**

I certify that on the 13 day of August, 2012, I sent via email to mbarkett@barkettlaw.net and by U.S. mail postage prepaid, a true and correct copy of the Plaintiff's response to motion to dismiss to Michael L. Barkett, 1408 S. Harvard Avenue, Tulsa, Oklahoma, 74112, attorney for the Defendant.



E. Marissa Lane