THE STATE MEDICAL BOARD OF OHIO

In the Matter of:	:	
	:	**HEARING EXAMINER: Kimberly Lee.**
SHERRI J. TENPENNY, D.O.,	:	**Case No. 22-CRF-0168**

RESPONDENT'S OBJECTIONS TO REPORT AND RECOMMENDATION OF KIMBERLY A. LEE, ESQ, STATE MEDICAL BOARD OF OHIO

Respondent, Sherri J. Tenpenny, D.O. by and through undersigned counsel and pursuant to O.A.C. 124-15-02, hereby objects to the Report and Recommendation (R.R.) issued July 14, 2023, by Hearing Examiner Kimberly A. Lee, Esq. The Respondent's objections are based upon procedural, factual and legal errors, further explained in the following memorandum:

I. STATEMENT OF THE CASE

The State Medical Board of Ohio (the "Board") sent a Notice of Opportunity for Hearing (NOH) to Respondent Sherri Tenpenny, D.O. on September 14, 2022. The NOH stated the Board intended to determine whether or not to discipline Dr. Tenpenny for allegedly failing to cooperate in an investigation conducted by the Board pursuant to R.C. 4731.22(B)(34) in the following four specific instances: [1]

(1) It is alleged that on or about July 14, 2021, a Board investigator left his business card with Respondent's receptionist with the message that he needed to speak with her. The Board

[1] The Board first contacted Respondent via certified letter dated August 11, 2021, ordering her to submit to a psychiatric examination by September 22, 2021, for public comments she made before the Ohio House Health Committee concerning HB 248 and posts on www.dr.tenpenny.com. Respondent submitted written objections to this Order via counsel and the Board did not follow up on this Order or include it as part of the alleged violations in the NOH. See Tenpenny Affidavit and Tenpenny Brief pg. 6-9.

investigator subsequently sent an email requesting that she contact him at the earliest convenience to schedule an interview. (The preponderance of the evidence proves that Respondent received neither the business card nor the email.)

(2) On or about September 7, 2021, the Board sent its First Set of Interrogatories to Respondent with responses due no later than October 8, 2021. (Respondent timely filed legal objections to the interrogatories.)

(3) On or about October 12, 2021, the Board sent an Investigative Subpoena ordering her to appear at the Board's office on November 3, 2021. (Respondent timely filed legal objections to the subpoena.) And,

(4) On or about June 21, 2022, the Board sent Respondent a letter directing her to attend an investigative office conference on July 26, 2022. (The preponderance of the evidence proves that Respondent did not receive the June 21, 2022 letter.)

State's Exhibit 1, pg. 1-2.

The Board alleges that Respondent failed to cooperate with its investigation in each of these 4 instances. Respondent timely exercised her right to request a hearing and the hearing was held via video on April 7 and 19, 2023. On July 14, 2023, a R.R. was issued and delivered to Respondent via certified mail on July 20, 2023. Respondent's objections to the Findings of Fact, Conclusions of Law, and Proposed Order are detailed herein.

II. RESPONDENT OBJECTS TO THE R.R. FINDING THAT THE BOARD'S ENFORCEMENT OF "FAILURE TO COOPERATE IN AN INVESTIGATION CONDUTED BY THE BOARD" UNDER R.C. 4731.22 (F) 34 IS NOT UNCONSTITUTIONAL

Respondent submitted detailed arguments that the Board's interpretation and application of "failure to cooperate in an investigation conducted by the Board" as used in R.C.

4731.22(F)(34) is unconstitutional on its face due to vagueness and unconstitutional as applied. *See Respondent's Written Response and Reply, pg. 6 – 10.* A statute or ordinance may be ruled unconstitutional on grounds of vagueness. *State v. Bennett*, 150 Ohio App. 3d 450, 2002-Ohio-6651, 782 N.E.2d 101 (1st Dist.). The vagueness doctrine is premised on the due process clause of the Fourteenth Amendment and "bars enforcement of "'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."'" *Id.* at ¶ 17, quoting *United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997), quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). "When [a] resolution is challenged as unconstitutionally vague, the reviewing court must determine whether the statute provides sufficient notice of its proscriptions and contains reasonably clear guidelines to prevent official arbitrariness or discrimination in its enforcement." *State v. Brundage*, 7th Dist. No. 01 CA 07, 2002-Ohio-1541.

During the hearing, Ms. Marcie Pastrick, a Board Enforcement Attorney with 22 years of experience testified that there is no statutory or other guidance on the Board's interpretation or application of "failure to cooperate" and the enforcement of this rule varies on a case-by-case basis, thus specific conduct that is violative of this rule is not reasonably clear. Ms. Patrick testified to the following:

> <u>*Question*</u>: So are you aware of, just off the top of your head or in your experience how – what definition do you use for failure to cooperate? . . . *Tr. pg. 30, 1-4.*
>
> <u>*Ms. Pastrick*</u>: "[w]hen the Board is attempting to investigate a licensee we contact them several times through different methods, personal interview, email, phone

calls, depositions, interrogatories, and a failure to respond to any of those attempts would consider a failure to cooperate."[2] *Tr. pg. 30, 6-11.*

Question: Okay. So is it - - is it a failure to respond to any of those attempts or is it multiple? I thought you said it was multiple and then you said failure to respond to any one of these. *Tr. pg. 30, 12-15.*

Ms. Pastrick: The Board gives licensees several opportunities. Seldom does the Board act on one failure to respond. *Tr. pg. 30, 16-18.*

. . .

Question: . . . [H]ow does the Board decide how many opportunities to give a physician before taking action for failure to cooperate? *Tr. pg. 31, 10-12.*

Ms. Pastrick: I believe that is part of the attorney-client privilege. *Tr. pg. 31, 13-14.*

The Board's chief and sole witness who was responsible for investigating Respondent was unable to articulate or cite to a reasonably clear interpretation that the Board applies for disciplining licensees for a failure to cooperate in an investigation. *Tr. pg. 30-31.* If such a standard does exist, the Board refuses to disclose it to the public and improperly shields the standard behind attorney-client privilege. The inevitable outcome is a licensee must guess at how the standard may be interpreted or applied as to her individual case. As a result, some licensees may be disciplined for failing to respond to a single phone call or email while others may be afforded numerous opportunities to cooperate before it is deemed a violation. This is an unconstitutional standard ripe for abuse of discretion and may lead to the disparate discipline of licensees who raise lawful objections to Board requests or have political or personal opinions

[2] Ms. Pastrick testified to the standard of "failure to respond" rather than the alleged violation of "failure to cooperate."

not shared by the Board.

The Board's standard procedure for enforcing alleged violation of Respondent's "**failure to cooperate**" is so vague and fluid that the standard is interchangeably applied and cited as "**failure to comply**" and/or "**failure to respond**". *Tr. Pg. 6,11 and 30, R.C.* 4731.22(B)(34). The R.R. also shifts the standard from "failure to respond" to "failure to cooperate" to "failure to comply". The very first paragraph of the Proposed Order in the R.R. cites the standard as "failure to respond":

> *The Board based its proposed action on allegations that Dr. Tenpenny failed to respond to an investigator's attempts to contact her, failed to respond to interrogatories from the Board, failed to appear at a deposition, and failed to appear at an investigative office conference.*
>
> *R.R. pg. 1, ¶1.*

However, R.R. later orders that that Respondent shall submit a written statement from the Board that she has "fully complied" with the Board's Orders as a condition or reinstatement.". *R.R. pg. 17, ¶ 3.* This Order strips her rights to due process and judicial review of legal objections to the Board's lawful and/or unlawful Orders.

Since the Board is unable to articulate and/or publicly disclose the meaning and application of a violation that constitutes a "failure to cooperate", "failure to respond" or "failure to comply" it is helpful to look at the plain meaning of the words for guidance.

The Revised Fourth Edition of Blacks Law Dictionary provides the following definitions:

> **(1) COOPERATE**: To act jointly or concurrently toward a common end. *Darnell v. Equity Life Ins. Co.'s Receivers,* 179 Ky. 465. 200 S.W. 967,970.
>
> **(2) RESPOND:** 1. To make or file an answer to a bill, libel, or appeal, in the character of a respondent, (q.v.).

(3) COMPLY: To yield, to accommodate, or to adapt oneself to, to act in accordance with. *Dragwa v. Federal Labor Union No. 23070*, 41 A.2d 32, 36, 136 N.J.Eq. 172.

It is clear that "failure to cooperate", "failure to respond" and "failure to comply" are three separate and distinct actions or violations. The fact that these three vastly different standards are cited and applied interchangeably by the Board, the Board's Counsel and the Hearing Examiner also demonstrates that R.C. 4731.22(B)(34) provides insufficient "notice of its proscriptions and contains reasonably clear guidelines to prevent official arbitrariness or discrimination in its enforcement." *State v. Brundage.*

The vagueness and various applications of R.C. 4731.22(B)(34) create an opportunity for disparate enforcement, which is further evidence that it is unconstitutionally vague. Thus, the Hearing Examiner erred by not declaring R.C. 4731.22(B)(34) and the "failure to cooperate" standard unconstitutional on its face and as applied.

III. *RESPONDENT OBJECTS TO THE R.R. FINDING THAT THE BOARD HAD EVIDENCE THAT APPEARED TO SHOW RESPONDENT VIOLATED ANY PROVISION OF R.C CHAPTER 4731 OR ANY RULE ADOPTED UNDER IT TO INITIATE AN INVESTIGATION AS REQUIRED BY R.C. 4731.22(F)(1)*

The Board does not cite to a single case such as this where the sole allegation against the licensee was a "failure to cooperate" under R.C.4731.22(B)(34) with no additional underlying alleged violation(s), and Respondent is unable to identify any such case. It appears the Board is applying a standard for "failure to cooperate" in a manner never before applied to any licensee where it is the sole alleged violation without an accompanying alleged violation of another statute or rule that was the basis for initiating the investigation. R.C. 4731.22(F)(1) requires that the Board must have "evidence that appears to show that a person violated any provision of this

chapter or rule adopted under it" to open an investigation. Here, the Board has submitted zero evidence that appears to show Respondent violated any specific provision of R.C. 4731.22 or other rule.

At the hearing, Respondent extensively questioned Ms. Pastrick about whether or not any of the approximately 350 alleged complaints provided the required threshold evidence that Respondent appeared to violate a Board rule that triggered the Board's authority to conduct an investigation pursuant to 4731.22(F)(1). See *Tr. pg.53 – 56.* Counsel for the Board initially responded that the complaints are confidential pursuant to R.C. 4731.22(F)(5). *Tr. pg. 44.* After much discussion, and a brief recess for the Board's counsel to confer with Ms. Pastick, she was permitted to respond to "a limited extent without waiving attorney-client, attorney work product or (F)(5)" of 4731.22. *Tr. pg. 55*. Ms. Pastrick responded:

> *The allegations – it would depend on what the investigation uncovered or what evidence showed through the investigations. Standard of care, basics possibility, perhaps other violations could be identified.*
> *Tr. pg. 56.*

Although 4731.22(F)(5) requires the Board conduct all investigations or inspections and proceedings in a manner that protects the confidentiality of patients and persons who file complaints with the board, there is no prohibition against disclosing the alleged violations to the Respondent while still protecting the confidentiality of patients and complaint filers. In fact, the Board routinely (if not always) discloses the violations alleged in the complaints when it issues a Notice of Opportunity for Hearing to a license. To the best of our knowledge this case is the first time the Board refused to disclose the evidence of a violation that triggers the Board's investigative authority under R.C. 4731.22(F)(1). In this case, the Board only alleged a violation that occurred after the investigation was initiated, which is legally insufficient. The Board is required to have complaint with evidence that appears to show evidence alleging a

violation of 4731.22 before initiating an investigation. Otherwise, the standard would be "show me the man and I'll show you the crime".[3]

Respondent has asserted, and the evidence supports, that the Board's investigation was initiated solely based upon statements she made that the Board deemed to be dissemination of *misinformation* or *disinformation* or unapproved information about the COVID-19 vaccines; and/or political speech disapproved of by the Board, which is unconstitutional.[4] Neither R.C. 4731.22 nor any other statute or Board rule grants the Board the authority to control, regulate, investigate, or discipline the public speech of licensees that has no bearing on their ability to practice medicine. *See Respondent's Written Response and Reply pg. 7-8 and Board's August 11, 2021 letter ordering psychiatric examination*. The Board's August 11, 2021 letter, the first one sent to Respondent, states only that the Board was concerned about public statements she made before the Ohio House Health Committee and four separate postings she made on her website. R.C. 4731.22(F)(1) does not grant the Board power to regulate or investigate a licensee's political and public freedoms of speech no matter how much the Board disagrees with such speech. Just like in California, an Ohio licensee should free to express her personal and political opinions and even ask questions about "the science" without fear that the Board will Order her to submit to a psychiatric examination or have her license suspended. *See Respondent Response and Reply, pg. 5-8.*

The Board has no lawful or reasonable grounds for refusing to disclose the alleged "evidence that appears to show that a person [Respondent] violated any provision of this chapter [4731.22] or rule adopted under it". R.C. 4731.22(F)(1) requires that the Board must have such

[3] The saying is commonly attributed to the Stalinist-era Soviet jurist Andrey Vyshinsky or the Soviet secret police chief Lavrentiy Beria.

[4] See *Høeg v. Newsom*, No. 2:22-cv-01980 WBS AC, 2023 U.S. Dist. LEXIS 13131, at *1 (E.D. Cal. Jan. 25, 2023) and stated that a federal district court found a specific California law regarding dissemination of COVID-19 misinformation by physicians to be unconstitutional and granted a preliminary injunction.

evidence before initiating an investigation. The Board had multiple opportunities to disclose the alleged evidence but refused to do so. "During the COVID-19 pandemic, a period perhaps best characterized by widespread doubt and uncertainty, the United States Government seems to have assumed a role similar to an Orwellian "Ministry of Truth."" See *State of Missouri, et al. v. Joseph R. Biden Jr., et al., Case No. 3:22-cv-01213-Tad-Kdm, US W. Dist. LA, Monroe Div.* 7. The preponderance of the evidence demonstrates the Board initiated the investigation of her without the requisite evidence and was therefore unlawful.

IV. THE RESPONDENT OBJECTS TO THE FINDING THAT SHE FAILED TO COOPERATE BECAUSE THE EVIDENCE SUPPORTS THAT SHE DID COOPERATE WITH EVERY SUCCESSFUL ATTEMPT THE BOARD MADE TO CONTACT HER

1. Respondent objects to the R.R. finding that she received a business card left at her office by a Board Investigator on July 14, 2021, and the email sent subsequently.

The Report and Recommendation cites an email that was allegedly sent to Respondent by Jason Alameda, a Board Enforcement Investigator, on July 21, 2021. The email states:

> *Dr. Tenpenny, please contact me at your earliest convenience, as I would like to schedule a date and time to speak with you in regards to a matter that has been referred to the State Medical Board. I dropped a business card [off] for you at your practice last week (714/21) and* ***wanted to ensure that you had received it****. Feel free to contact me via email or telephone to arrange a time. . . Emphasis added.*

R.R. pg. 4, ¶7.

Mr. Alameda's email is clear that he was uncertain whether or not Respondent received the business card he left with a receptionist at her office. The sworn affidavit of the Respondent

states she first became aware the State Medical Board was trying to contact her was when she received the Board's letter dated August 11, 2021. *Tenpenny affidavit.* Thus, there is no evidence or even an allegation in the record that Respondent received Mr. Alameda's business card. Yet, despite Respondent's sworn affidavit stating she did not receive Mr. Alameda's business card, the Hearing Examiner found otherwise and that her lack or response was a failure to cooperate with the Board's investigation. This is a factually and legally incorrect.

Similarly, The Hearing Examiner stated "Dr. tenpenny did not respond to the investigator, and there is no evidence that the email was not delivered." *R.R. pg. 10, ¶ 1.* Ms. Pastrick provided hearsay testimony that "to the best of her recollection" Mr. Alameda informed her that he had a receipt showing his July 21, 2021 email had been received. However, she also admitted it was possible the email went into Dr. Tenpenny's junk folder or was never received. *(Tr. at 33-34).* Again, Respondent's sworn affidavit states the first time she was aware the Board was trying to contact her was when she received the Board's letter dated August 11, 2021. After weighing the equivocal hearsay testimony that the email may have been received against the unequivocal and sworn affidavit that it was not received, the Hearing Examiner erred by concluding that Respondent failed to cooperate with the Board's investigation by failing to follow-up on a business card and an email that were never received by Respondent.[5]

R.C. Chapter 119 does not explicitly define the burden of proof required for administrative hearings, but the Supreme Court of Ohio has held that the standard for administrative cases is a preponderance of the evidence. *VFW Post 8586 v. Ohio Liquor Control Comm.,* 83 Ohio St.3d 79, 81 (1998). Preponderance of evidence means that the agency has the

[5] Whether or not the business card and email were received is the crux of the issue. The Board could have produced a copy of the email receipt that Mr. Alameda may have possessed or had him testify at the hearing, but it did not.

burden to show that it is more likely than not that the events charged occurred. *Pang v. Minch*, 53 Ohio St.3d 186, 197 (1990). Here, the preponderance of the evidence supports that Respondent did not receive Mr. Alameda's business card or his email.

2. Respondent objects to the R.R. finding that filing legal objections to the Board's First Set of Interrogatories to Respondent was a failure to cooperate in an investigation conducted by the Board pursuant to R.C. 4731.22(B)(34).

It is uncontested that Respondent received the Board's September 7, 2021 interrogatories and that she timely responded by filing objections pursuant to the express written instructions accompanying them. The instructions included with the interrogatories state:

> *If you enter an objection and refuse to answer any interrogatory in whole or in part, describe the basis for the lack of a response in sufficient detail so as to permit a court to determine the validity of said refusal.*

State's Exhibit 2, pg. 4.

Respondent filed lawful objections in sufficient detail pursuant to the written instructions included with the interrogatories. *State's Exhibit 3.* The Hearing Examiner's interpretation of failure to cooperate under R.C. 4731.22(B)(34) would require Respondent and all other licensees surrender their due process rights and the ability to object to interrogatories in accordance with the written instructions and the law.

The instructions for the interrogatories further state:

> *Failure to answer as instructed without substantial justification may render you subject to an Order compelling the information sought by these interrogatories and may render you or your attorney liable for the expenses of a motion. Id.*

It is clear that the appropriate action for the Board was to seek a court Order compelling

her to answer the objectionable interrogatories if the Board found her objections to be without merit. The Board did not request an Order to compel her compliance and did not provide any response to Respondent concerning her objections. *Tr. pg. 39-41*. Ms. Pastrick, the Board Enforcement Attorney in charge of Respondent's case, said she was not familiar with the instructions to the interrogatories that she sent to Respondent; and that she did not know the Board could seek a court Order to evaluate the validity of the objections or compel Respondent to answer the interrogatories. *Tr. pg. 41, 5-6.* If she had been aware of the Board's instructions this issue would have been properly decided by a Common Pleas Court judge rather than in this hearing.

Thus, the R.R finding that Respondent's filing of lawful, detailed and timely objections to the Board's interrogatories warrants discipline for a failure to cooperate with the investigation violates the Board's own instructions on the interrogatories and due process. It was the Board who failed to comply with the requirements of the interrogatories by initiating discipline prior to permitting a Common Pleas Judge to rule on the merits of her objections.[6]

3. Respondent objects to the R.R. finding that filing legal objections to the investigative subpoena sent on or about October 12, 2021 constituted a failure to cooperate with a Board investigation.

Respondent received the investigative subpoena from the Board and sent detailed written objections in response on October 31, 2021, which gave the Board several days evaluate their merits before she was ordered to appear. *State's Exhibit 5.* Respondent further informed the Board, "[p]lease be advised that any further attempts to enforce the subpoena, the Board's prior August 11th Order or obtain responses to the September 7th interrogatories will be met with an immediate filing for declaratory and injunctive relief, in addition to all other available remedies."

[6] The Board had not evaluated the merits of Respondent's objections as of the date of the hearing. Tr. pg. 40, 19-23.

Id. Clearly, Respondent believed she was cooperating with the Board's investigation, exercising her legal rights and expected the Board to seek judicial review of her objections and legal rights if the Board found them to be without merit.

Respondent's objections to the investigative subpoena were proper pursuant to and in compliance with R.C. 4731.22(F)(3)(b), which states:

> *On failure to comply with any subpoena issued by the board and after reasonable notice to the person being subpoenaed, the board may move for an order compelling the production of persons or records pursuant to the Rules of Civil Procedure.*

Unfortunately, the Board was unaware of Respondent's right to file objections and immediately deemed her exercising her rights to object to the subpoena as a failure to cooperate with the investigation. *Tr. pg. 42.*

The Board made no effort whatsoever to contact Respondent or evaluate the merits of her objections. *Tr. pg. 40, 19-23.* Further, it made no attempt to follow R.C. 4731.22(F)(3)(b) and seek a court order. *Tr. pg. 44.* At the hearing, Ms. Pastrick testified that she was unaware the Board could seek an Order compelling Respondent to comply with the subpoena and she was not familiar with R.C. 4731.22(F)(3)(B). *Tr. pg. 42*. If the Board truly desired that Respondent appear as ordered by the subpoena (rather than cooperate by filing lawful objections), and if it had been aware the applicable law or taken the time to look it up, the Board would have sought a court Order for Respondent to appear overruling her objections. At a minimum, the Board could have contacted Respondent to let her know her objections would not be considered. Instead, the Board did nothing. *Tr. pg. 44.*

Similar to the interrogatories, a finding that Respondent's filing of lawful, detailed and

timely objections to the Board's subpoena supports a finding that she failed to cooperate with the investigation is violative of the law and due process. It is uncontested that the Board was unaware of Respondent's right to file legal objections to a subpoena that she believed to be unlawful. *Tr. pg. 42.* Thus, deeming her objections to the subpoena as failure to cooperate without evaluating their merits or seeking a court Order to comply denied her right to judicial review of her objections.

4. RESPONDENT OBJECTS TO THE R.R FINDING THAT SHE FAILED TO COOPERATE WITH THE JUNE 21, 2022 LETTER DIRECTING HER TO ATTEND AN INVESTIGATIVE CONFERENCE BECAUSE THE PREOPONDERANCE OF EVIDENCE SHOWS THE LETTER WAS NOT RECEIVED BY RESPONDENT.

After nearly 9 months without receiving a response to any of the objections she filed with the Board, Respondent received a letter from the Board dated June 9, 2022. The letter directed her to attend an "investigative office conference" at the James A. Rhodes State office Tower. However, the letter was defective and failed to provide a date or time for her to appear. The letter erroneously instructed her to appear on **"<DATE> at <TIME>".** *Tenpenny Exhibit C.* On July 5, 2022, Respondent sent a written response to the Board's June 9, 2022 letter stating, "the letter provides neither a date nor a time for said interrogation.[7] Given the Board's failure to provide a proper notice we decline your invitation." *State's Exhibit 5.*

Ms. Pastrick testified that upon realizing her mistake she sent a second letter dated June 21, 2022. *Tr. pg. 46.* The second letter made no reference to the defective letter and requested Respondent to appear for an investigative interview on July 26, 2022 at 1:15 p.m. However, the June 21, 2021 letter was never received by Respondent or her counsel. Respondent and her

[7] Ms. Patrick testified that she although she received the July 5, 2022 letter from Respondent's counsel she did not respond to him to inform him a corrected notice was mailed. Tr. 49.

counsel have both submitted sworn affidavits that this second letter was never received. *See Tenpenny and Renz affidavits.* The Hearing Examiner relied solely upon a USPS tracking form as proof the second letter was received by respondent. *State's Exhibit 7.* However, this USPS tracking form, unlike the USPS tracking forms for the Board's prior correspondence, did not include the recipient's name, signature or address. It merely states it was "Delivered, Left with Individual". *State's Exhibit 7, pg. 2*. Thus, there is no evidence showing to whom or where the letter was actually delivered. [8]

When an item is sent by certified mail, return receipt requested and thereafter a **signed receipt** is returned to the sender, a rebuttable presumption of delivery to the addressee is established. *Tripodi v. Liquor Control Comm*., 21 Ohio App.2d 110, 111-12 (7th Dist.1970). Here, there is no signed receipt, no recipient's name, and no address specifying where the June 21, 2022 letter was delivered. The best that can be surmised is that it was delivered to someone who was somewhere in Fremont, Ohio. Without the signed receipt a rebuttable presumption of delivery is not established. On the other hand, an affidavit, by itself, stating that appellant did not receive service, with other evidence of failure of service may be sufficient to rebut the presumption of service. *New Co-Operative Co. v. Liquor Control Comm*., 10th Dist. Franklin No. 01AP-1124, 2002-Ohio-2244, ¶ 9.

Here, there are two sworn affidavits in the record stating the June 21, 2022 letter was not received by Dr. Tenpenny or her counsel. *See Tenpenny and Renz Affidavits.* These affidavits would successfully rebut a presumption of delivery that may exist - - if there had been a signed receipt of delivery. See *Menon v. State Med. Bd. of Ohio, Franklin C.P*. No. 06CVF01-404 (Aug. 11, 2006). See, also, *Sandhu v. State Med. Bd. of Ohio, Franklin C.P*. No. 07CVF-12-17446

[8] The USPS tracking form for the NOH lists Sherri J. Tenpenny, D.O. as the recipient's name, includes a handwritten signature of receipt, and a handwritten confirmation of the address where it was delivered. *State's Exhibit 1*.

(Dec. 3, 2008). Therefore, the Hearing Examiner failed to give proper weight and consideration to the sworn affidavits and erred relying on a faulty or defective USPS tracking form as proof Respondent or her counsel received the Board's June 21, 2022.

Respondent provides written and detailed responses to each and every successful attempt the Board made to contact her. Respondent submitted (1) written objections to the August, 11, 2021 Order for a psychiatric examination, (2) written objections to the September 7, 2021 Board interrogatories in accordance with the Board's own written instructions, (3) written objections to the October 21, 2021 investigative subpoena as permitted by R.C. 4731.22, and (4) a written response to the Board's June 9, 2022 letter advising the Board that it failed to include the date and time she was ordered to appear.

In spite of Respondent's numerous written responses exercising her legal and due process rights, the Hearing Examiner relies upon a patently false statement by Ms. Pastrick, the Board Attorney who in charge of investigating Respondent: The R.R. states:

> **Ms. Pastrick testified that, as of the date of the hearing, the Board has not received any information from Dr. Tenpenny in response to its investigation.** R.R. pg. 10. ¶ 28, Tr. pg. 27, 7-11.

In reality, the Board did receive written responses along with objections to the four attempts to contact her that were successful.

The new standard created by the R.R. is that a licensee who exercises her legal right to file written objections to Board Orders will be risk having her license to practice suspended for failure to respond (or cooperate or comply depending on the standard being used for 4731.22(B)(34) in that particular case.)[9] This is an unprecedented and unconstitutional standard. It abolishes all licenses' rights and grants the Board unlimited power unrestricted by the

[9] The proper standard in this case is "failure to cooperate" pursuant to R.C. 4731.22(B)(34).

legislature, judicial system, and the constitution. If standard adopted in the R.R. is upheld it will strip every Ohio licensee of constitutional and due process protections including freedom of speech, freedom of association, freedom to protest, the right against self-incrimination, and the rights against unreasonable search and seizure. Licensee's will need to promptly obey every request of the Board, not dare challenge the Board's authority, disagree, or exercise their rights to file objections to improper or unlawful Board requests and Orders. The Board will have the unbridled power to suspend their license, destroy their livelihood, and publicly humiliate them.

Based on the foregoing, there is insufficient evidence to establish that Respondent failed to cooperate with the Board's investigation in every alleged instance. (1) There is insufficient evidence to establish that Respondent received the business card or email from Mr. Alameda. The weight of the evidence supports that neither were received. (2) Respondent cooperated by timely filing legal objections to the Board's interrogatories. The Board's unfamiliarity of Respondent's right to file objections to the interrogatories and its ability to seek an Order to compel may not be used as evidence of failure to cooperate. (3) Respondent cooperated by timely filing legal objections to the Board's subpoena. The Board's failure to respond to Respondent's objections and ignorance of R.C. 4731.22(F)(3)(b) does not establish a failure to cooperate. (4) Respondent received the Board's June 9, 2022 letter that was erroneously sent without a date or time for her to appear and she cooperated by filing a written response dated July 5, 2022. (5) Respondent has successfully rebutted any possible presumption that the subsequent June 21, 2022 letter was received as there is no signed mail receipt and two sworn affidavits prove it was no received. Therefore, the Hearing Examiner erred in finding Respondent failed to cooperate with the Board's investigation.

V. RESPONDENT OBJECTS TO DENIAL OF ADMITTING THE AUGUST 11, 2021 LETTER FROM THE BOARD ORDERING RESPONDENT TO SUBMIT TO A PSYCHIATRIC EVALUATION INTO EVIDENCE.

The Hearing Examiner erred in declining to admit the August 11, 2021 letter from the Board ordering Respondent to submit to a psychiatric exam into evidence. The R.R. states:

> *In her written defense and in Mr. Renz's September 20, 2021 letter, Dr. Tenpenny made arguments regarding a letter she received from the Board dated August 11, 2021. This letter is not in evidence, and it is not part of the allegations contained in the Notice. Neither the hearing examiner nor the Board can consider documents that are not part of the record. Dr. Tenpenny could have asked to have this document admitted but did not do so.*

R.R. Pg. 14.

The R.R. supports that Respondent's defense, in part, rested on the content of the August 11, 2021 Board letter. *Id.* At the Hearing, Respondent put forth evidence that the Board's investigation was initiated without evidence of a violation of R.C. 4731. The investigation was based upon public statements she made that that the Board deemed to be dissemination of *misinformation* or *disinformation* or unapproved information about the COVID-19 vaccines; and/or political speech disapproved of by the Board. *Respondent's Written Response and Reply to the NOH, pg. 4-10.* The Board's August 11, 2021 supports her defense. It reveals the underlying motive and intent for the Board initiating the investigation and demonstrates there were no allegations of any other Medical Practices Act violations when the investigation as initiated. "An agency may not charge a licensee with a violation of a standard neither promulgated by the rule nor adopted pursuant to a procedure authorized by statute." *Farina v. ohio State Racing Comm.,* Franklin C.P. 17CV-4343 (dec. 26, 2017). The NOH only alleges that Dr. Tenpenny failed to cooperate with

the Board's investigation. The NOH fails to allege an underlying basis or rule upon which the investigation was initiated as required, rather the only evidence of a possible violation occurred after the investigation was initiated. *State's Exhibit 1*. The Board's August 11, 2021 letter supports Respondent's defense to the allegations in the NOH and excluding it from evidence is prejudicial.

The Hearing Examiner erred in finding that Respondent failed to request this document be admitted into evidence. *Respondent's Objections to May 15, 2023 Entry & Order Regarding Respondent's Motion to Reopen, Motion to Strike and Arguments Regarding Redactions* filed on May 26, 2023 unequivocally moved for its admission into evidence and objected to any redactions to respondent's exhibits. Respondent's motion states:

> *At the outset of the hearing Respondent's counsel contemplated agreeing to a redaction narrowly limited to the Board's August 11, 2021 Order that Respondent was ordered to submit to a psychiatric examination and the words "psychiatric examination", "examination", "UH Cleveland Medical Center", "Stephen Noffsinger, M.D", "Sarah Spurbeck", and "University Hospitals Cleveland Medical Center" were under consideration to be redacted. These references were all concerning potential medical records of Respondent that may violate Respondent's right, and only her right, to medical privacy. However, the Respondent never received a psychiatric examination or treatment from any of these providers. Respondent fully waives any privacy to which she may be entitled contained in evidence in the record that would support redaction.*
>
> *Respondent believes the Board's order for her to submit to a psychiatric examination and all references to such order is direct evidence supporting defenses she has raised in this matter concerning the Board's attempt to censor her political and public speech and regulate her First Amendment right to freedom of speech. Likewise, Respondent objects to any and all redactions of information contained in briefs, affidavits and exhibits she has introduced as evidence in this matter and* ***moves that all exhibits submitted in her defense be admitted unredacted.*** *Emphasis added.*

Respondent's Objections Filed May 26, 2023.

Thus, the refusal to admit the August 11, 2021 letter from the Board ordering Respondent to Submit to a psychiatric examination due to her public and political statements was an error and it must be admitted into evidence.

VI. RESPONDENT OBJECTS TO THE R.R. FINDING THAT THERE WAS PROPER NOTICE OF THE APRIL 19, 2023 HEARING AND THE FAILURE TO CONSIDER THE NOTICE REQUIREMTNS UNDER O.A.C. 4731-13-11.

Respondent's *Objections to May 15, 2023 Entry & Order Regarding Respondent's Motion to Reopen, Motion to Strike and Arguments Regarding Redactions* filed May 26,23 contained nearly 5 pages of legal analysis arguing that Respondent did not receive the legally required notice of the April 19, 2023 hearing as required by O.A.C. 4731-13-11. *See Respondent's Objections filed May 26, 2023, pg. 1-5.*

The R.R. fails to address these arguments and does not even make a reference to the requirements of O.A.C. 4731-13-11.

O.A.C. 4731-13-11 is unambiguous and states:

> *Notice specifying the date, time and place set for hearing shall be mailed by certified mail to the representatives of record,* ***except*** *that notice to changes to the date, time or place set f*or hearing ***shall be mailed by regular mail, e-mail or facsimile*** *if a representative of each party participated in the selection of the new date, time or place. Emphasis added.*

The Hearing Examiner sent an e-mail to Respondent's counsel and the Board's counsel on April 24, 2023, responding to counsel's concern about not receiving written of notice of hearing on

April 19, 2023. The Hearing Examiner's response stated in an email sent April 24, 2023:

> *I did draft an entry regarding the second day of hearing. After looking into the issue this morning, it appears that entry was not circulated to the parties. I have attached it here. While it was my mistake, you were still on notice of this second day of hearing. The date was selected during the conference call on April 5, 2023 and agreed to by all parties. (Emphasis added).*
>
> *Exhibit A to Respondent's Objections Filed May 26, 2023.*

The Entry with notice of the April 19, 2023 hearing was properly sent to the Board and was stamped as received by the Board on April 5, 2023, which was 9 days prior to the hearing. The notice the Board received further contained the additional specific notice requirements of R.C. 119.07. *(See attached Exhibit B).* However, it is undisputed that a copy of the April 19, 2023 hearing notice was not sent to Respondent by regular mail, email, or facsimile as required. Respondent was not afforded her right to proper of the notice of hearing until April 24, 2025 – 19 days after it was sent to the Board and 5 days after the hearing occurred.

The Hearing Examiner erroneously relies on the fact that the representatives participated in a call selecting the new date and time of April 19, 2023 hearing. However, O.A.C. 4731-13-11 is unequivocal and requires "that notice to changes to the date, time or place set for hearing shall be mailed by regular mail, e-mail or facsimile" when the representatives participate in a call selecting the hearing date as occurred in this case. There are no exceptions and there is no dispute that the legally required notice of the April 19, 2023 hearing was not sent to Respondent by regular mail, e-mail or facsimile, which was severely prejudicial to Respondent.

Moreover, the failure of the Hearing Examiner to provide notice of the April 19, 2023 hearing to Respondent and/or her counsel by regular mail, e-mail or facsimile as required by O.A.C. 4731-13-11 resulted in prejudicial ex parte communication between the Hearing Examiner and the Board's counsel, without Respondent or her counsel present. Although there is no express

prohibition against ex parte communications in R.C. Chapter 119, O.A.C. 4731-13-34 (C) states:

> *The hearing examiner and members of the board shall disclose on the public record the source of any ex parte or attempted ex parte communications pertaining to a substantive issue. If the recipient of the ex parte communication determines that he or she can no longer render an impartial decision, the recipient shall recuse himself or herself from further participation in consideration of the matter.*

Thus, the Hearing Examiner erred by not striking the testimony and evidence submitted at the April 19, 2023 hearing; erred by failing to disclose the ex parte communication on the public record; and erred by failing to consider if she can render an impartial decision and whether she should recuse herself from further participation in the hearing.

VI. RESPONDENT OBJECTS TO MULTIPLE PROCEDURAL ERRORS THAT WERE SEVERLY PREJUDICIAL AND THE R.R. SHOULD BE REJECTED BY THE BOARD

The evidence demonstrates that Respondent was severely prejudiced due to procedural errors. First, the refusal to admit the August 11, 2021 letter from the Board ordering her to submit to a psychiatric examination was prejudicial as the content of that letter were included some of the foundation of her defense and she moved to have it admitted. Second, Respondent was prejudiced when the Hearing Examiner sent the legally required notice of the April 19, 2023 hearing to the Board but failed to send such notice to her or her counsel until 5 days after the scheduled hearing date. Third, although Respondent was not sent proper notice of the April 19, 2023 hearing the hearing went forward without her or her counsel present and it is prejudicial to not have stricken all testimony and evidence from the record. Fourth, extensive ex parte communication occurred at the April 19, 2023 hearing and it was prejudicial for it not have been publicly disclosed as required by

O.A.C. 4731-13-34 (C). Finally, since the Hearing Examiner was the recipient of extensive ex parte communication at the April 19, 2023 hearing it was prejudicial to not consider if she could no longer render an impartial decision, and if she should recuse herself from participation in the matter.

VII. RESPONDENT OBJECTS TO R.R.'S SUSPENSION OF HER LICENSE, FINE, CONDITIONS FOR REINSTATEMENT, AND REQUIRED REPORTING TO THIRD PARTIES AND VERIFICATION SET FORTH IN THE R.R

The Board has failed to prove by the preponderance of the evidence that Respondent failed to cooperate with an investigation of the Board or violated any other rule under the Medical Practices Act. The evidence demonstrates that Respondent sent written responses to the Board raising legal objections to the Board's Orders and requests on every occasion the Board successfully contacted her.

The Board Enforcement Attorney's testimony and the evidence contained on the record and herein establishes that there are multiple interpretations and applications concerning the degree of action or inaction would be considered a "failure to cooperate" as the standard is vague, fluid and disparately applied on a case-by-case basis rendering it unconstitutional. Even so, there is no interpretation that would equate responding to Board requests or Orders with lawful objections subject to judicial review to be deemed a failure to cooperate. Therefore, Respondent objects to the suspension of her license, fine, conditions for reinstatement, and required reporting to third parties and verification set forth in the R.R.

Respondent has set forth numerous objections to findings of fact, legal conclusions, prejudicial procedural errors, and the proposed order of discipline contained in the R.R. Each of these objections is supported by the preponderance and supported by facts and laws cited to and

contained in the record. As such, Respondent respectfully requests that the Board sustain each of her objections and reject the findings and recommendations in the R.R.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Respondent's Objections to Report and Recommendation of Kimberly A. Lee, State Medical Board of Ohio* was sent via e-mail on July 24, 2023 to the following:

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