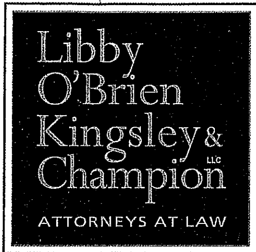

GENE R. LIBBY, ESQ.
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November 14, 2024

HAND DELIVERED

Tamara Rueda, Clerk
Kennebec County Superior Court
Capital Judicial Center
1 Court Street, Suite 101
Augusta, ME 04330

Re: *Meryl J. Nass, M.D. v. Maine Board of Licensure in Medicine*
Docket No. AUGSC-AP-23-45

Dear Ms. Rueda:

Enclosed for filing with this Court, please find Petitioner's Reply Brief in the above matter.

Thank you for your assistance. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Gene R. Libby
ME Bar No. 427

GRL/eb
Enclosure

c: Jennifer Willis, Esq., AAG (by email only)
Aaron M. Frey, AG (by email only)
Meryl J. Nass, M.D. (by email only)
Tyler J. Smith, Esq. (by email only)

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
LOCATION: Augusta
Docket No. AP-23-45

Meryl J. Nass, M.D.

Petitioner

v.

Maine Board of Licensure in Medicine

Respondent

Petitioner's Reply Brief

Petitioner, Dr. Meryl J. Nass, M.D., by and through counsel, responds to Respondent's Brief as follows.

INTRODUCTION

The Board, represented by the Attorney General's Office, continues to deny the obvious: Dr. Nass was targeted by the Board for her outspoken, public comments on COVID-19 and the vaccine it spawned. But denying the truth does not change the facts. The open hostility to Dr. Nass is evident. When the Board first considered Dr. Nass's alleged misconduct in executive session on January 11, 2022, Dr. Waddell advocated pursuing Dr. Nass for spreading misinformation. He characterized her public comments as "attention-seeking" and her medical beliefs as "harmful opinions." (A.R. 8722, *infra*, p. 8.) The executive session demonstrates the Board's hostility to Dr. Nass continued after the Board was forced to dismiss the "misinformation" allegations that are obviously protected core speech under the First Amendment. Much like poison, once contaminated, the hostility to Dr. Nass infected the entire proceeding. The bias against Dr. Nass is further discussed in Section II below.

As former Senator Daniel Patrick Moynihan famously said, "Everyone is entitled to their own opinions, but not their own facts." The Board's Brief is replete with misstatements and outright misrepresentations of alleged facts not contained in the record. A careful review of the

record reveals that the Board's findings contradict substantial evidence in the record that Dr. Nass's treatment of Patients 1, 2, and 3 was exemplary.

Indeed, the Board's own expert, Dr. Courtney, testified it was "perfectly permissible under the current standards of medical practice" for Dr. Nass to prescribe off-label use of Ivermectin to patients requesting the medication. (A.R. 000218.) There is simply no evidence in the record that Patients 1, 2, or 3 were harmed in any way by Dr. Nass's treatment or her selection of Ivermectin to be taken at the first sign of symptoms of COVID. All three patients testified Dr. Nass provided them exemplary care as discussed below.

I. The Board cannot pinpoint where it gave Dr. Nass notice that she was facing discipline for being incompetent in the practice of medicine by reason of her "treatment model."

Within the over 11,000 pages of the administrative record, the Board cannot cite to anything substantiating its position that Ground II of the Third Amended Notice of Hearing—alleging incompetence in the practice of medicine—was based on Dr. Nass's "treatment model." Nothing in pretrial submissions and motions, emails with the hearing officer, testimony before the Board, opening statements, closing arguments, or otherwise. All signs point to Ground II being about what the Board Staff said it was about: whether Dr. Nass relied on "inadequate science" to justify treatments with ivermectin and hydroxychloroquine, and whether Dr. Nass appreciated the severity or meaning of symptoms with respect to Patient 2. (A.R. 009805.)

The fact that the Third Amended Notice of Hearing generally discussed Dr. Nass's interactions with Patients 1, 2, and 3 changes nothing. Those general allegations pertained to different grounds for discipline, brought under different statutes and different rules. For example, the Third Amended Notice of Hearing alleged that Dr. Nass violated discrete telemedicine rules in her telephonic visits with Patients 1, 2, and 3. (A.R. 000757-58 (Grounds IV, V, VI, VII, IX,

XI, XII, XIII).) This dichotomy is again apparent from Board Staff's own arguments below. Ground V was about the failure to track and monitor symptoms, and gathering an adequate medical history; Ground VI about whether Dr. Nass provided adequate risk-benefit information to enable informed consent; Ground VIII about whether Dr. Nass escalated Patient 2's care; and Ground IX about prescribing on a phone interaction "without medical history or adequate exam," and allegedly failing to uphold patient safety or meeting the standard of care; Ground XI for not recording sufficient notes; Ground XIII about not having required telemedicine protocol. (A.R. 9795-9802, 9805; *see also* A.R. 000014 (describing Ground IV as a telemedicine rule violation for failing to obtain an appropriate medical history).) So, although Dr. Nass had notice that the Board was considering whether her treatment practices for Patients 1, 2, and 3 violated discrete telemedicine rules; she did not have notice the Board would be scrutinizing whether those practices showed a larger problem of "incompetence by engaging in conduct that evidences a lack of knowledge or inability to apply the principles and skills to carry out the practice of medicine for which the licensee is licensed in providing care for Patients 1, 2, and 3" under 32 M.R.S. § 3282-A(2)(E)(2). (A.R. 000757.)

Moving on, the Board has much to say about the evidence supporting its findings that Dr. Nass violated telemedicine rules. (*See*, *e.g.*, Resp't Br. 5-11, 21-24.) The petitioner's brief does not challenge the Board's findings about violations of telemedicine rules, so those pages are wasted. The discipline on Ground II, in contrast, primarily focuses on the Board's belief that Dr. Nass somehow delegated her medical judgment to Patients 1, 2, and 3, simply handling out prescriptions because the patients asked for them. (A.R. 000013-14.) And to that, the Board offers nothing in the record to say that Dr. Nass failed to apply her own medical judgment. Indeed, the Board complains about things like Dr. Nass failing to contact the patients' primary

care doctors, despite there being no statutory or regulatory requirement that she do so. The Board also misapprehends the petitioner's brief by saying in footnote 8 that "Dr. Nass highlights that patients have a 'right' to refuse medications or treatment to support the converse—that patients have a right to receive medications or treatment." (Resp't Br. at 21, n.9 (citing Pet'r Br. at 13).) Dr. Nass argued no such thing. The entire discussion in Petitioner's Brief was about how Dr. Nass applied her own medical judgment to prescribe the medications, that the Board Staff's own medical expert agreed that Dr. Nass had sufficient information to support those prescriptions, and that the record establishes that Dr. Nass did *not* prescribe the medications requested by Patient 2 or Patient 3. Dr. Nass did not argue that the patients had a right to receive whatever treatment they wanted.

A. The Board Ignored the Testimony of Patients 1, 2, and 3 and Its Own Expert, Dr. Courtney

The Board's primary role is to protect the health and welfare of the people of Maine. Remarkably, the complaints involving Patients 1, 2, and 3 did not originate with the patients who Dr. Nass treated. In fact, the record reveals the Board did not even interview Patients 1, 2, and 3 about Dr. Nass's treatment. Clearly, the Board used Patients 1, 2, and 3 in an attempt to discipline Dr. Nass for her speech. Each patient testified and complimented Dr. Nass on the quality of her care. Patient 1 testified "I found her to be knowledgeable and professional, and she certainly answered any questions or concerns I had at the time." (A.R. 527.)

The Board's argument on Dr. Nass failing to escalate Patient care defies common sense. The Board appears to take issue that Dr. Nass told Patient 2 to get a chest x-ray, but not to go to the hospital, even though getting a chest x-ray required going to the hospital. And not to mention the undisputed testimony from Patient 2's spouse that Dr. Nass "advised that we go to the

emergency room to get that done[.]" (A.R. 000559-60; *see also* A.R. 000097 (Dr. Nass testimony).)

As Patient 2 explained, he was hesitant to go to the hospital, fearing administration of Remdesivir. (A.R. 000544, 545.) He testified regarding the allegation Dr. Nass's prescription of Hydroxychloroquine and Ivermectin delayed his admission to the hospital. Patient 2 testified:

> Q. Now, one of the allegations the Board has made against Dr. Nass is – is that because she prescribed you Ivermectin and/or Hydroxychloroquine that you didn't take, it delayed your admission to the hospital and created risk for you. Is that your feeling?
>
> A. **Not at all; not at all. My hesitance to go to the hospital had nothing to do with Dr. Nass or any recommendation from her at that point. As a matter of fact, to go get the x-ray was her suggestion, you know, so going to the hospital ended up being something that was really motivated from her perspective.**

With respect to Dr. Nass's medical records for the care of Patient 2, Dr. Courtney testified Dr. Nass "did the right thing" in referring Patient 2 to the emergency room. (A.R. 232.) Dr. Courtney further testified that Dr. Nass's medical records provide the reader with a "reasonably good picture of what's happening" with his illness and that Patient 2's medical records were not missing information. (A.R. 000230-231.)

Finally, with respect to Patient 3, a woman 6 months pregnant, Dr. Courtney testified it was appropriate to treat her via telehealth and the Hydroxychloroquine was safe for pregnancy. (A.R. 000234, 237.) Likewise, Dr. Courtney conceded the medical records for Patient 3 were sufficient, although questioning the efficacy of Hydroxychloroquine. *Id.*

The Board's findings regarding the treatment of Patients 1, 2, and 3 is diametrically opposed to their actual testimony. The Board ignored both the testimony of the patients and its

own expert, clearly and unquestionably demonstrating a bias to "find" evidence to support discipline.

II. The Board and its chair were biased against Dr. Nass for her exercise of her free speech rights.

The Board repeatedly asserts that various arguments about the Board's bias were waived. Not so. In the opening brief, Dr. Nass argued that the Board targeted Dr. Nass for publicly expressing viewpoints with which she disagreed—in other words, that this was a pretextual prosecution to punish Dr. Nass and "mak[e] a public example of a doctor who failed to toe the line on COVID-19 treatments." (Pet'r Br. at 17-20.) The brief also explained that Chair Gleaton, herself, was biased because of her affiliation with the FSMB and her unprofessional behavior throughout the hearing, suggesting a "deep seated favoritism or antagonism" rendering a fair judgment impossible. (*Id.* at 20-22.) Although the factual theory advanced in the Petitioner's brief focuses on the Board's retaliation against Dr. Nass for exercising her First Amendment rights, this Court need not evaluate the case in the specific context of a First Amendment retaliation claim because bias, whatever its cause, is grounds for reversal. 5 M.R.S. § 1107(4)(C)(4). The discussion in the opening brief raises that the Board had the appearance of bias, was in fact biased, and that the bias was factually predicated on the Board's effort to retaliate against Dr. Nass's speech.

The Board then walks through each factor discussed in the opening memo in a divide-and-conquer method. But "[i]n retaliation cases, the whole is sometimes greater than the sum of the parts[,]" and pieces of evidence may, when taken collectively, "have significant probative value." *Harrington v. Aggregate Indus.-Ne. Region, Inc.*, 668 F.3d 25, 34 (1st Cir. 2012) (discussing evidence in employment retaliation cases). Even if this Court concludes that none of the points establish bias in isolation, the collective force of the Board's focus on Dr. Nass's

speech and the irregularity of the proceedings provides sufficient grounds to conclude that, at a minimum, the Board's impartiality "might reasonably be questioned." *State v. Bard*, 2018 ME 38 ¶ 41, 181 A.3d 187.

The Board's individual criticisms are also misplaced. For example, citing *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898, 902 (Me. 1993), the Board distances itself from statements by its investigative secretary about the basis for the Board's jurisdiction being Dr. Nass's allegedly inaccurate or misleading statements to the public. In *Gorham*, the appellant sought to impute bias to a zoning board of appeals through a statement by the code enforcement officer, and the Law Court held that the statement did not demonstrate bias because the CEO was not a Board member. *Id.* at 902. But a zoning board of appeals is just that—a board that hears appeals. 30-A M.R.S. § 2691. It has no authority over town employees, or the CEO who made the statements at issue. *Id.* In contrast, the Board has plenary power over its employees; it employs the Board's personnel, proscribes their duties, and controls the executive director. 32 M.R.S. § 3269(6), (16), and (17). Moreover, the relevance of the investigative secretary's statement is to corroborate that speech, not medicine, was the driving factor behind the investigation. Even if her statement does not *alone* prove bias, it corroborates the many other indicators that the Board aggressively pursued Dr. Nass for reasons other than what was alleged in the Third Amended Notice of Hearing.

The same principles apply to the Board's retort to the fact that assistant attorneys general aiding administrative agencies were building the "complaint file" against Dr. Nass using statements before the Maine Board of Pharmacy. (Pet'r Br. at 17; Resp't Br. at 34; A.R. 5177.[1]) Why would an assistant attorney general, monitoring proceedings for another Board, send his

[1] A more legible copy of the exhibit admitted as Exhibit 13D at the administrative hearing is attached to Petitioner's Motion to Take Evidence as Exhibit 1.

notes to another assistant attorney general representing the Maine Board of Licensure? The obvious answer is that he was asked to do so, as corroborated by the fact that AAG Miller (representing the Board of Licensure in Medicine) forwarded the email to the investigative secretary and asked her to add the information to the "complaint file."

The Board also claims that Dr. Nass takes Board Member Dr. Waddell's comment that Dr. Nass's "harmful opinions" are a "gigantic problem" out of context. (A.R. 8722). These comments, however, were made in the context of Dr. Waddell's position that the Board *should* pursue Dr. Nass for allegedly spreading misinformation:

> Well I just want to be clear. I by no means am I implying that we should drop the misinformation complaints. Um, I had the same kind of concerns, um, that Dr. Nesin just speaker. Um, I think that's, but that's just obviously a more controversial topic. If that's all we had, this would be a different conversation. I'm not suggesting we drop it, uh, or dismiss those complaints. It's all tied together to me. My point was that it one of the ways to negate some of the disagreement about that thing is that we've just simply got bad medical care in front of us. And that's a good starting point, but but all the other things and I go back I mean misinformation I just I hate the work um but it doesn't but that doesn't mean that I don't you know have concerns that it's happening. Um I I think it's just because it's so um it's so wiggly it's so hard to kinda nail down, but you know so is the word professionalism. So is the word ethics. I mean those are things that we collectively define. So I have no heartburn with the notion that we can collectively in our profession define what qualifies as unsubstantiated misinformation or bad information. Especially when it's willful and that's a key thing. You know mistakes um honest mistakes misspeaks um you know um things like that um are one thing, but willfully and actively going out um and seeking the attention that's why again I think the um it's it's the attention-seeking nature of it that bothers me so much um you know the attention-seeking for something that is generally accepted in our professional community to be harmful um you know no benign differing opinions, but harmful opinions. Um to actively be promoting opinions that are collectively felt to be harmful that to me is a gigantic problem.

(A.R. 8722.) Moreover, the two "CR" complaints the Board was considering, according to the Board chair herself, focused on misinformation and Dr. Nass allegedly disparaging organizations that the Board typically respects:

> The reason for these complaints really focus around unprofessional conduct due to the spreading of misinformation about COVID-19, primarily on social media. So, so these complaints revolved around a interview. We all had the ability to listen to that interview, as well as some, social media posts from this licensee really talking about, you know, many of the, prevention and and treatment of COVID-19 that is very much outside of the mainstream medicine belief of prevention and treatment of COVID-19. There is also a lot of mentions of, you know, organizations that we usually respect and use to guide our clinical decision-making. Some--conspiracy theory kind of language around those organizations, um, in in the posts, as wells as in the, um, in the interview itself. So we all had an interview to listen to, we all had a--written--a write out of of the interview, as well. So, so that's what those two cases sort of, revolve around.

(A.R. 008715 (cleaned up by removing filled pauses).) The Board is also wrong in claiming that Dr. Waddell's statement is irrelevant to bias under *Liteky v. United States*, 510 U.S. 540, 551 (1994). The cited proposition in *Liteky* simply meant that a judge who hears evidence is not automatically biased because the judge has formed an opinion from that evidence. *Id.* The issues here are very different: whether the Board's hostility toward Dr. Nass and her speech made a fair judgment impossible, *id.* at 555, and whether the Board's impartiality might reasonably be questioned, *Bard*, 2018 ME 38 ¶ 41.

Next, the Board asserts that sending the 25-questions letter does not reflect bias. (Pet'r Br. at 17; Resp't Br. at 35.) The Board offers nothing in support of that position, other than saying it is "simply inaccurate," making uncited representations about how this is a regular and routine practice, and that the Board's investigative authority includes asking questions. To be sure, the Board has the *power* to ask licensees questions. But the questions here speak for themselves: pressing Dr. Nass on perceived weaknesses in her opinions, much like an attorney taking a deposition would press the other side. Again, the entire point is that Board was pursuing

Dr. Nass not for any legitimate purpose, but because the Board was hostile to Dr. Nass's exercise of her free speech rights. And finally, the Court should disregard the Board's representations about this being a "usual" investigative practice of the Board. Considering that the Board successfully opposed Dr. Nass's motion to take evidence, it would be fundamentally unfair for the Court to rely on the Board perception of what that evidence might show.

The Board offers no legitimate defense of its subpoenas issued to Dr. Nass, other than the idea that the Board had concerns about Dr. Nass's medical treatment of patients. (Pet'r Br. at 18; Resp't Br. at 36-37.) In doing so, the Board chooses to gloss over the scope of the subpoenas: Dr. Nass's *entire patient appointment calendar* from July 21, 2021 to January 12, 2022, a list of *all patients* seen, in person or via telehealth, from July 21, 2021 to present, and the full medical record for two patients who were not at issue. (A.R. 3370-72.) Absent some showing that it is customary for the Board to issue subpoenas such as these in like circumstances, the natural inference from the subpoenas overbreadth, paired with all the other evidence in the record showing the Board's fixation on Dr. Nass, is that the Board was trying to harass Dr. Nass or find more violations to tack on to the pending complaints.

The Board's defense of its evaluation order is similarly unavailing. (Pet'r Br. 18, 25-29, Resp'T Br. 37.) The Board relies on post-hoc rationalizations by its counsel about how the evaluation in order, in theory, might have been supportable by the record. What matters here, however, is the reason the Board issued the order. The evaluation order findings dealt almost entirely with Dr. Nass's statements about COVID-19 and make only a brief reference to Dr. Nass mistakes when attempting to cooperate with the Board's request for patient records. (A.R. 9910-14.) And even then, a person's difficulty with technology and allegedly poor recordkeeping is hardly a basis for a finding that someone is mentally ill or suffering from a mental condition, as

is required by statute. 32 M.R.S. § 3286. As with the many other indicators referenced herein, the evaluation order similar supports that the Board was targeting Dr. Nass because it was biased against her for her speech.

The Board further responds that the swiftness with which the Board issued the immediate suspension order and evaluation order is reflected in the record, showing that Board staff prepared those orders "anticipating" what may happen. (A.R. 8725.) The discussion in the executive session, however, highlights the concern among the Board room about Dr. Nass's statements to the public reflects discussion about adding Dr. Nass's speech to the final order. (A.R. 8725-27.) So even if the cited portion of the records shows that Board staff "anticipated" that the Board might pursue an evaluation, it nonetheless corroborates the earlier point that the purpose of the evaluation had nothing to do with patient care and everything to do with Dr. Nass's speech.

In response to the fact that the Board expressly tried to punish Dr. Nass for her speech, the Board points out that some of the withdrawn counts have nothing to do with her speech. The fact that some of the withdrawn counts dealt with topics other than her speech does not change that the Board, in fact, tried to discipline Dr. Nass for her speech. And nothing that has been offered in the thousands of pages of documents in this case, including Respondent's Brief, reasonably explains how the Board could, consistent with the First Amendment, punish Dr. Nass for her speech about COVID-19. The most that's offered is a disclaimer statement that "Board Staff does not agree with the 'viewpoint discrimination' argument that is the main thrust of the Motion [to Dismiss]." (Resp't Br. at 40 (quoting A.R. 10394).)

The conclusion that the Board tried to discipline Dr. Nass because of her viewpoints is corroborated by the Board's policy statement warning physicians not to spread misinformation.

The proposition that "[a] preconceived position on law, policy or legislative facts is not a ground for disqualification," *New England Tel & Tel. Co. v. Pub. Utils. Com.*, 448 A.2d 272, 280 (Me. 1982) focused on a hearing examiner was biased because the hearing examiner had, in the past, acted in an advocacy capacity. *Id.* This case deals with a threat of specific action against doctors who exercise a constitutional right to free speech and spread ideas that the Board disfavors. (A.R. 5526 ("Physicians who generate and spread COVID-19 vaccine misinformation or disinformation are risking disciplinary action by state medical boards, including the suspension or revocation of their medical license").) The position statement therefore corroborates that the Board's effort to sanction Dr. Nass was motivated by the Board animus against doctors who spread what the Board perceives as misinformation.

Just as the Board staff below "[did] not agree" that the Board was committing viewpoint discrimination, the Board here "does not concede" that it misrepresented Dr. Faust's compensation to the Maine Department of Procurement Services when submitting the blanket contract justification form. (Pet'r Br. at 5-7, 19; Resp't Br. at 42). But one cannot avoid a waiver simply by announcing that they do not concede a fact. *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 (failure to supply argument or support a rationale in support of a position amounts to waiver). Thus, for purposes of this proceeding, the Board misrepresented Dr. Faust's compensation to another state agency. And again, the Board cannot distance itself from that misrepresentation by blaming its employees (Resp't Br. at 42 (asserting that a "staff person" signed the document), because the Board's employees operate at the direction of the Board. 32 M.R.S. § 3269(6), (16), and (17).

Finally, the Board's defense of Dr. Gleaton oversimplifies the facts and overstates the holding of *New England Tel. & Tel. Co.*, 448 A.2d at 280. Dr. Gleaton's position with the

Federation of State Medical Boards may not alone establish bias, but it contributes to an inference of bias when considering the totality of the circumstances. Dr. Gleaton's pledge to "work hard on behalf of the FSMB" and "develop strategic goals for the FSMB" are important when considering that, in her role as Board chair, she announced that the Board was supporting the FSMB's position statement that threatened doctors with discipline for expressing viewpoints about COVID-19 with which the FSMB disagreed. And then, couple this with other indicators of bias reflected throughout the proceeding, and Dr. Gleaton's animated behavior throughout the hearing.

To that conduct, the Board asserts that Dr. Gleaton's "fleeting" facial expressions and unmuted comment were unimportant and that any inference is speculative. In a case where a doctor's ability to practice medicine is at stake, an adjudicator should not treat her responsibility to support both the fact and appearance of impartiality with such disregard. The Board now complains that it is uncertain whether Dr. Nass contends that Dr. Gleaton *actually* fell asleep or *pretended* to fall asleep (Resp't Br. at 48), but either one significantly undermined the appearance of impartiality. As to Dr. Gleaton's interjection in which she mocked counsel, and then stood idly by while Dr. Nass was admonished for Dr. Gleaton's comment, the Board's reliance on *Logue v. Dore*, 103 F.3d 1040, 1046 (1st Cir. 1997), is misplaced. That case was a jury trial, so the judge was not the factfinder as Dr. Gleaton was here. *Id.*

Finally, the Board argues that no findings on the motion to disqualify were necessary. But the Board fails to cite a single case for that proposition and instead relies on textual distinctions between 5 M.R.S. §§ 9061 and 9063. The Law Court's reasons for requiring adequate findings is not grounded in statute, but in the need for an adequate record that supports meaningful judicial review. *Harrington v. Kennebunk*, 459 A.2d 557, 561 (Me. 1983). Even though Section 9063's

plain language may not require "findings," Law Court precedent supports that Dr. Gleaton articulate some findings supporting her denial of the motion to disqualify.

III. The Evaluation Order deprived Dr. Nass of due process, and was arbitrary and capricious.

A due process claim requires consideration of three factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and administrative burdens that the additional or substitute procedural requirement would entail." *Balian v. Bd. of Licensure in Med.*, 1999 ME 8, ¶ 10, 722 A.2d 364 (quoting *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976)). The Board offers no argument on the second or third factors, implicitly conceding both the risk of erroneous deprivation and the lack of any governmental interest against affording licensees additional procedural safeguards.

The Board's only argument is that a person's interest against being ordered to undergo a neuropsychological examination is undeserving of due process protection. This is simply wrong, considering that an evaluation is a medical examination that intrudes on a person's bodily autonomy. The Board also ignores the consequences of its actions in directing a licensee attend a neuropsychological examination, regardless of whether the order is enforced, because the Board finding that the licensee may suffer from a mental illness carries forward on the Board's website and the National Practitioner Databank. Although the Law Court stated in *Hamilton v. Bd. of Licensure in Med.*, 2024 ME 43, ¶ 11, 315 A.3d 762, "that a disciplinary proceeding was commenced, whether that proceeding had merit or not, is a matter of fact that cannot be undone[,]" this language dealt with mootness, not whether an evaluation order implicates a private interest. *Id.* Moreover, *Hamilton* goes on to say that, "Hamilton's avenue for redress was

to proceed through the complaint process and, if dissatisfied with that result, to appeal from the Board's final ruling." *Id.* That is precisely what Dr. Nass did here. And finally, although a physician may have been deemed to have consented to an evaluation order, 32 M.R.S. § 3282, that does not undermine the significance of a physician's private interest in being (or not being) medically evaluated, or in avoiding a publicly posted order from the Board asserting that the physician may be mentally ill.

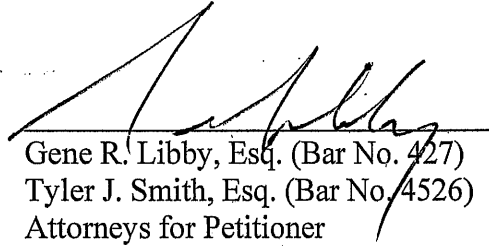
The order is also arbitrary and capricious. As explained above, the Board's findings are devoid of anything suggesting that Dr. Nass was suffering from mental illness or any physical or mental conditions. And while the Board's brief can recite minutes of various criticisms about Dr. Nass, what it cannot do is point to any specific indicators of mental illness or any physical or mental condition, as required by Section 3282.

IV. The Board reads *Narowetz* too narrowly.

The Board argues that, because the AAG advising the Board did not herself advocate at the hearing, there can be no *Narowetz* violation. *Narowetz v. Bd. of Dental Prac.*, 2012 ME 46, 259 A.3d 771, 781. The problem here, however, is that the AAG advising the Board was part of the prosecutorial team when considering her role in identifying the exhibits that the expert should review. (A.R. 5177.) Deciding what exhibits a prosecution expert should review, and coordinating in the selection of the expert, is a prosecutorial function. As discussed in *Narowetz*, "[a] licensee coming before a board to face potentially severe discipline might question the legitimacy of an adjudicatory proceeding where the lawyer presenting the prosecution's case is the same lawyer who acted in an advisory capacity to the board in the same matter." *Id.* ¶ 30. The same question arises when the lawyer acting in an advisory capacity to the board, with ex parte access to the board members, works behind the scenes to help the prosecution build its case.

Respectfully submitted,

Dated: November 14, 2024



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