

approximately five years.” (Order, September 18, 2009.)¹

Petitioner graduated from the University of Pittsburgh School of Dental Medicine in 1997 and received a D.M.D. Petitioner failed multiple portions of the North East Regional Board of Dental Examiners, Inc. (NERB) in 1997, 1998, and 1999.

On January 11, 2008, the Board adopted a Consent Agreement with Petitioner under her married name, Jinan Dahar. (See Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs v. Jinan Dahar, File No. 07-46-09810; Docket No. 2428-46-07, (Consent Agreement), R.R. at 1a – 6a.) In the Consent Agreement, Petitioner admitted that she practiced dentistry without a dental license from 2002 through November 2007. (Consent Agreement ¶¶ 2, 4(e), R.R. at 1a-2a.) During this time, Petitioner’s unlicensed practice of dentistry included prescribing antibiotics, performing root canals, placing fillings and crowns, and fittings for partial dentures to approximately 400-500 patients. (Consent Agreement ¶ 4(e)–(j), R.R. at 2a.) Petitioner admitted to violating Section 10(a) of The Dental Law (Act)² by engaging in the practice of unlicensed dentistry, and she agreed to cease and desist from practicing dentistry and from holding herself out as being entitled to practice dentistry and pay a civil penalty of \$1,000. (Consent Agreement ¶¶ 5-6, R.R. 3a.)

¹ On March 1, 2010, this Court granted Petitioner’s unopposed Motion Requesting Oral Argument.

² Act of May 1, 1933, P.L. 216, as amended, 63 P.S. § 129(a).

In May 2008, Petitioner successfully completed the dental examination administered by NERB. As such, on June 15, 2008, Petitioner submitted her Application to the Board. In the Application, Petitioner left blank the sections requesting information on “Current or Previous Licensure History” and “Practice Activity.” (Application at 1-2, R.R. at 7a-8a.) Specifically, under the heading “Practice Activity,” there is a statement directing Petitioner to:

List in chronological order your practice activities since graduation from dental school. All time periods should be documented. If you did not practice during a specific time period, the timeframe should be documented as “no practice in dentistry.” If additional space is needed, please attach on a separate 8½ x 11 sheet of paper.

(Application at 2, R.R. at 8a.)

On July 29, 2008, the Board sent a discrepancy letter to Petitioner notifying her that: she failed to sign her application check; she needed to forward a report of her NERB written grades; and she failed to provide information pertaining to her “Licensure History” and “Practice Activity” on the Application. (Letter from Board to Petitioner (July 29, 2008), R.R. at 113a.) The Board requested that Petitioner provide her answers to the Board, including a written explanation for her failure to include this information on the Application. On August 11, 2008, the Board sent a second discrepancy letter to Petitioner informing her that it needed a report of her NERB written grades and directing her to refer to the July 29, 2008 discrepancy letter in which the Board directed Petitioner to provide a written explanation for her failure to include her “Practice Activity” and “Licensure History” on the Application. (Letter from Board to Petitioner (August 11, 2008), R.R. at 115a.) On September 2, 2008, Petitioner returned the August 11, 2008 discrepancy letter to the Board with a handwritten notation stating, “I do apologize. I was not shore [sic] what exactly you

needed about a licsence [sic]. I am not liscensed [sic] [and] never had one so I thought I did not have to answer question.” (Board Order, Finding of Fact (FOF) ¶ 12 (quoting Letter from Petitioner to Board (September 2, 2008)).) Along with her September 2, 2008 response to the Board, Petitioner included a typed letter indicating that: she graduated from the University of Pittsburgh School of Dental Medicine in May 1997; from August 1997-1998, Petitioner was a graduate resident at the University of Florida; and from 1998 to the date the response was sent, Petitioner “did not practice licensed dentistry in Pennsylvania or any other state.” (FOF ¶ 13 (quoting Letter from Petitioner to Board (September 2, 2008)).)

On September 4, 2008, the Board sent a third discrepancy letter to Petitioner again requesting that Petitioner forward her NERB written grades to the Board’s office. (Letter from Board to Petitioner (September 4, 2008), R.R. at 116a.) On October 6, 2008, the Board sent a fourth discrepancy letter to Petitioner requesting that Petitioner “provide your employment history since your graduation from an accredited dental school. If there are any specific periods when you were unemployed, please state.” (Letter from Board to Petitioner (October 6, 2008), R.R. at 117a.) On October 7, 2008, Petitioner faxed an employment history to the Board’s office, which did not indicate that she ever practiced dentistry after graduating from the University of Pittsburgh School of Dental Medicine in 1997. (Faxed Employment History, R.R. at 119a.)

On December 1, 2008, the Board received a letter from Petitioner stating that she had, in fact, practiced dentistry without a license. The letter provides, in pertinent part:

I am preparing this letter to explain my current need for licensure to practice dentistry in Pennsylvania. My intention was never to violate state law and practice dentistry without a license. In 2001, I found myself pregnant for the second time, and my husband was unable to work since he had to leave for his residency in Missouri. That same year we had a tremendous blow to our family and a painful death of a loved one. In addition, the person who I employed to work as a dentist left me without notice and abandoned all of her patients. At that time I was only managing Dentique, I tried desperately to find a replacement with continued failures. As a result, I felt I had no other option but to practice without a license.

(Letter from Petitioner to Board (December 1, 2008), R.R. at 121a.)

On December 12, 2008, the Board met to review Petitioner's Application and related documents. The Board voted to provisionally deny the Application for "attempt[ing] to hide her employment history from the Board in trying to obtain a license to practice dentistry." (Board Op. at 11.) The Board provided the following explanation to Petitioner in a letter dated December 24, 2008:

Section 4.1 of the [Act], 63 P.S. § 123.1,³ authorizes the Board to refuse to issue a license to practice dentistry for any or all of the following reasons:

(2) Making misleading, deceptive, untrue or fraudulent representations.

(3) Practicing fraud or deceit in obtaining a license to practice dentistry or dental hygiene or certificate for expanded function dental assisting or making a false or deceptive biennial renewal with the board.

(6) Violating any of the provisions of this act or of a lawful regulation promulgated by the board or violating a lawful order of the board previously entered by the board in a disciplinary proceeding.

63 P.S. § 123.1.

³ Added by Section 5 of the Act of December 20, 1985, P.L. 513, as amended.

In a letter received September 2, 2008, you stated that from 1999 to the present day you, “did not practice licensed dentistry in Pennsylvania or any other state.” The materials you submitted on October 7, 2008, in support of your application for a license to practice dentistry similarly indicated that . . . from January, 2000, to the present day, you did not practice dentistry in Pennsylvania or any other state. However, a supplemental letter submitted on December 1, 2008, indicates that you did, in fact, practice dentistry for a significant period of time. Section 2 of the Dental Law, 63 P.S. § 121, states:

A person engages in the “Practice of Dentistry,” within the meaning of this act, who diagnoses, treats, operates on, or prescribes for any disease, pain or injury, or regulates any deformity or physical condition, of the human teeth, jaws, or associated structures, or conducts a physical evaluation, or administers anesthetic agents, or uses ionizing radiation in the course of dental practice, or who fits, constructs, and inserts any artificial appliance, plate, or denture for the human teeth or jaws, or **who holds himself or herself out as being able or legally authorized to do so.**

63 P.S. § 121.

(Provisional Denial, December 24, 2008, R.R. at 9a-10a (emphasis in original).) Through counsel, Petitioner timely appealed the Board’s Provisional Denial and requested a hearing. (Notice of Appeal, January 16, 2009, R.R. at 124a-25a.) In her appeal, Petitioner referred to the Consent Agreement and indicated that she had submitted a copy of the Consent Agreement to the Board in September 2008, a copy to a Bureau Inspector, Benjamin Bogus, in October 2008, and Petitioner attached another copy of the Consent Agreement to her appeal. (Notice of Appeal, R.R. at 125a.)

A formal hearing was held on March 25, 2009, at which Petitioner appeared with counsel and testified. Petitioner testified that she thought that the Board was aware of the Consent Agreement because, although she entered into it under her married name, her social security number and birth date were the same as on her

Application. (Hr’g Tr. at 34, R.R. at 47a.) Petitioner stated that she used her maiden name on her Application because it was the name on her diploma from dental school. (Hr’g Tr. at 9, 13-14, R.R. at 22a, 26a-27a.) Petitioner stated that, in September, she had mailed her Consent Agreement along with a cover letter to the Board and never intended to deceive the Board. (Hr’g Tr. at 20-21, R.R. at 33a-34a.) Petitioner also testified that, when she discovered that the Board was not aware of the prior discipline, her attorney faxed a copy of the Consent Agreement to Board investigator Benjamin Bogus. (Hr’g Tr. at 27-30, R.R. at 40a-43a.)

The Board issued its Order making the Provisional Denial final on September 18, 2009. The Board determined that Petitioner’s actions in failing to accurately provide the Board her employment history since graduating from dental school, coupled with her failure to complete the “Practice Activity” section of the Application, were deceptive and that she only disclosed her “extensive unlicensed practice history” in December, after she found out that the Board would be reviewing her Application at an upcoming meeting. (Board Op. at 12.) Therefore, the Board denied her appeal pursuant to Section 4.1(a) of the Dental Law, 63 P.S. § 123.1(a). The Board explained that it was through the Notice of Appeal of the Provisional Denial that “the Board learned that [Petitioner] has previously been disciplined for the unlicensed practice of dentistry under the name ‘Jinan Dahar.’” (FOF ¶ 25.) With regard to Petitioner’s argument that she had sent the Consent Agreement to the Board in September, the Board explained:

The disputed documents are Exhibits R-3 and R-4 - a short letter briefly stating [Petitioner’s] work history, which was allegedly sent in September, 2008, and a cover sheet from a subsequent fax to Benjamin Bogus on October 29, 2008.

The letter (admitted as Exhibit R-3) states that from November, 2002, to October 2007, [Petitioner], “did not practice licensed dentistry

in PA - I was not licensed and owned/practiced dentistry under Detique [sic] Dental.” [Petitioner] claims that the letter was sent shortly after Exhibit R-2, which was received by the Board on September 2, 2008 (N.T. 22, Exhibit B-1 at [Petitioner] correspondence of September 2, 200[8])[.] The Board has no record of receiving Exhibit R-3, to which [Petitioner] allegedly attached [to] the January 11, 2008, Consent Agreement.

With respect to the fax cover sheet (Exhibit B-4), [Petitioner] misunderstands the structure of the Department of State and the Bureau of Professional and Occupational Affairs. [Petitioner] contends that she faxed, through the office of her attorney, the Consent Agreement to Benjamin Bogus. Mr. Bogus is an employee of the Bureau of Enforcement and Investigation (BEI) in the Bureau’s Pittsburgh regional office. Information gathered in the course of an investigation is not shared with the Board or its counsel until a Notice and Order To Show Cause is filed, due to the “walls of division” described in the Supreme Court of Pennsylvania’s decision in Lyness v. Pa. State Board of Medicine, 529 Pa. 535, [546,] 605 A.2d 1204[, 1209] (1992). As such, the Board had no knowledge of Mr. Bogus’ interactions with [Petitioner], or any documents allegedly sent to him, until receiving the transcript of the March 25, 2009, hearing in this matter. . . . [E]ven if the Board *had* received Exhibit R-3, it contained an admission that [Petitioner] practiced dentistry without a license in this Commonwealth, which would have been grounds for the provisional denial of her application under 63 P.S. § 123.1(a)(6) (violating any of the provisions of this act or of a lawful regulation promulgated by the board or violating a lawful order of the board previously entered by the board at a disciplinary proceeding). The same principle applies to the January, 2008, Consent Agreement. If the Board had knowledge of the Consent Agreement at the time it considered the application for licensure, it could have provisionally denied the application due to having disciplined [Petitioner] less than 12 months earlier for numerous years of unlicensed practice.

(Board Op. at 12-13 (emphasis in original).) Petitioner now petitions this Court for review.⁴

⁴ This Court’s review in appeals from orders of the Board is limited “to determining if the board has committed an error of law, violated constitutional rights, or failed to support any necessary finding of fact with substantial evidence.” Oppenheim v. State Dental Council and Examining Board, 459 A.2d 1308, 1311 (Pa. Cmwlth. 1983). Substantial evidence is defined as
(Continued...)

On appeal, Petitioner argues⁵ that the Board erred: (1) in determining that there was substantial evidence to support its denial of the Application; and (2) in referencing Petitioner’s prior disciplinary action under her former, married name in the Order.

Petitioner first argues that the Board erred in concluding that Petitioner was deceitful and misleading in her Application because “[c]onfusion occurred between Petitioner and the [Board] . . . during Petitioner’s application process but this was due

“such relevant evidence as a reasonable person would accept as adequate to support a conclusion.” Wittco Fashions v. Workmen’s Compensation Appeal Board (O’Neil), 544 A.2d 559, 561 (Pa. Cmwlth. 1988).

⁵ Petitioner lists six Statements of Questions on appeal to this Court. However, for the sake of clarity, we have consolidated Petitioner’s Statement of Questions into two issues. For reference, Petitioner set forth the following six issues in her brief:

1. Whether the evidence presented by the Bureau of Professional and Occupational Affairs and the State Board of Dentistry (the “Boards”) was sufficient to show a wanton or willful disregard of the Boards’ policies?
2. Whether the Denial of Petitioner’s License to Practice Dentistry was supported by substantial evidence?
3. Whether the evidence presented by the Boards was sufficient to show a willful disregard of the application procedures for a license to practice dentistry in Pennsylvania?
4. Whether the Board’s consideration of the Petitioner’s prior practice of dentistry in Pennsylvania, without a license, was improper in that the Petitioner had previously been disciplined for that infraction and had complied with all sanctions?
5. Whether the Board’s consideration of the Petitioner’s prior practice of dentistry in Pennsylvania, without a license, was improper in that the Provisional Denial letter did not reference the unlicensed practice period as a reason for the Provisional Denial?
6. Whether the final conclusion of law relied upon by the Boards in support of [the] Final Order were [sic] erroneous?

(Petitioner’s Br. at 4.)

to misunderstandings, not the Petitioner's attempt to deceive the Board or make fraudulent submissions in support of Petitioner's [A]pplication." (Petitioner's Br. at 8.) Petitioner asserts that she did not provide information about her unlicensed practice because her understanding was that the Board was asking for her "licensed" practice and, since she was never licensed, she did not think this question was applicable. (Petitioner's Br. at 8.) Petitioner also assumed that when the Board reviewed her Application, it was already aware of her previous unlicensed practice because it was the same Board that had cited her for the previous infraction and the same entity that entered into the Consent Agreement. Further, Petitioner contends that her "recollection" is that, in September 2008, she forwarded the Consent Agreement to the Board in an effort to advise that she had practiced unlicensed dentistry in the Commonwealth. (Petitioner's Br. at 10.) She also contends that she faxed Investigator Benjamin Bogus a copy of the Consent Agreement on October 29, 2008.

In so arguing, Petitioner is essentially asking this Court to reweigh the evidence, believe her testimony and, thus, make credibility determinations contrary to those made by the Board. However, "[w]eight and credibility of the evidence are solely within the province of the [Board as] factfinder." Oppenheim v. State Dental Council and Examining Board, 459 A.2d 1308, 1311-12 (Pa. Cmwlth. 1983). Here, the Board made factual findings inconsistent with those facts proffered by Petitioner in her appeal and, in making contrary findings, implicitly found Petitioner not credible. Specifically, the Board found that Petitioner initially concealed the fact that she had practiced dentistry without a license in the Commonwealth from 2002 to November 2007. (See FOF ¶¶ 6, 8; Board Op. at 11.) The Board found that Petitioner failed to note her practice of dentistry on her Application, or in any of the

responses which the Board received to the four discrepancy letters sent asking for her practice activity. (FOF ¶¶ 8-17; Board Op. at 8-9.) Notably, the question regarding “Practice Activity” on the Application did not refer to only *licensed* practice of dentistry. (Application at 2, R.R. at 8a; Board Op. at 11.) Rather, the question asked applicants to “[l]ist in chronological order your practice activities since graduation from dental school,” and also instructed that “[a]ll time periods should be documented. If you did not practice during a specific time period, the timeframe should be documented as ‘no practice in dentistry.’” (Application at 2, R.R. at 8a.) Even in Petitioner’s October 7, 2008 faxed response to a discrepancy letter requesting her employment history, Petitioner did not indicate *any* employment in dentistry from the time she graduated from dental school in 1997 until October 7, 2008,⁶ even though she worked, practiced, and held herself out as a dentist for approximately 6 years from 2002 through November 2007. (Faxed Letter from Petitioner to Board (October 7, 2008), R.R. at 119a; see also Letter from Petitioner to Board (December 1, 2008), R.R. at 121a.) Although Petitioner had several opportunities to reveal that she had practiced dentistry from 2002 through November 2007, the Board found that

⁶ Petitioner provided the following information in her October 7th, 2008 letter to the Board:

- | | |
|---------------------|---|
| June 1997 | - Graduation dental school from University of Pitt |
| Aug 1997 – Apr 1998 | - GPR University of Florida |
| May 1998 – Jan 2000 | - Married, had a baby, moved back to Pittsburgh, PA
- Stayed home took care of my daughter |
| Jan 2000 – 2002 | - Started company called Extra Touch (Gift Basket Company).
Closed down in Oct 2002 |
| Nov 2002 – Jun 2005 | - Had another baby Nov. moved to St. Loius [sic] for my husbands [sic] work |
| Jun 2005 – Present | - Moved back to Pittsburgh and filing for divorce
- Took care of my daughters |

(Faxed Letter from Petitioner to Board (October 7, 2008), R.R. at 119a.)

Petitioner did not do so until December 1, 2008, after she was notified that the Board would be reviewing her Application at an upcoming meeting. (Board Op. at 12.)

Moreover, the Board did not find as fact that Petitioner notified the Board of her unlicensed practice and subsequent Consent Agreement via a September 2008 letter. To the contrary, the Board found that it *never* received a copy of the Consent Agreement from Petitioner in September 2008, purportedly revealing Petitioner's past practice activity. Although the Board was aware at the time it issued the Provisional Denial that Petitioner had, in fact, practiced dentistry based on Petitioner's eventual disclosure on December 1, 2008, the Board found as fact that it was not aware that Petitioner was *previously sanctioned* for practicing without a license via the Consent Agreement until Petitioner filed her appeal. (FOF ¶¶ 19, 25.) As the Board reasonably explained, this is because the name on the Consent Agreement, Jinan Dahar, was not the same name on the Application, Jinan El-Fahel. (Board Op. at 12.) Moreover, a review of the record establishes that although Petitioner's social security number and date of birth were listed on the Application, that personal identification data was not listed on the Consent Agreement. We can not dispute the Board's statement that it was not privy to the information sent to Inspector Bogus due to the "walls of division" between the Board's prosecutorial and adjudicative arms. See Lyness v. Pennsylvania State Board of Medicine, 529 Pa. 535, 549, 605 A.2d 1204, 1211 (1992) (stating that due process requires "the prosecutorial functions in a group of individuals, or entity, [to be] distinct from the Board which renders the ultimate adjudication").

Section 4.1(a)(2), (3) of the Act authorizes the Board to refuse to issue a license to practice dentistry for "[m]aking *misleading*, deceptive, untrue or fraudulent

representations” and for “[p]racticing fraud or deceit in obtaining a license to practice dentistry.” 63 P.S. § 123.1(a)(2), (3) (emphasis added).⁷ The phrase “misleading, deceptive, untrue or fraudulent representations,” as used in section 4.1(a)(2) of the Act, includes the following conduct by dentists: “(1) Misrepresenting or concealing a material fact in obtaining, renewing or seeking reinstatement of a license or certificate.” 49 Pa. Code § 33.212(1). Here, the facts found by the Board are supported by substantial evidence. Petitioner concealed or failed to reveal material facts regarding her prior “Practice Activity” in the Application and her employment history in response to the Board’s numerous discrepancy letters. As such, the Board did not err in confirming the Provisional Denial in its Order.

Next, Petitioner argues that the Board improperly considered her prior practice of dentistry without a license because she has already been disciplined for that infraction by paying a \$1,000 fine and by complying with the Consent Agreement’s directive to cease and desist from practicing dentistry. Moreover, Petitioner argues that the Provisional Denial by the Board did not reference her prior unlicensed practice of dentistry as a reason for the denial and, thus, the Board should not have mentioned that as an additional reason to confirm the Provisional Denial. We disagree.

⁷ As this Court stated in Moses v. Commonwealth, State Dental Council and Examining Board, 400 A.2d 664 (Pa. Cmwlth. 1979), the Board need not “find evidence of each of the common law elements of fraud, i.e. misrepresentation, materiality, scienter, reliance and damages.” Id. at 666 (discussing repealed Section 3(i) of the Act of May 1, 1933, P.L. 216, as amended, former 63 P.S. § 122(i), which “makes unlawful ‘fraudulent or unlawful practices, or fraudulent, misleading or deceptive representations’”).

The Board's Order denied the appeal of the Provisional Denial because Petitioner made "misleading statements to the Board during the application review process *and . . . practiced unlicensed dentistry in Pennsylvania for a period of approximately five years.*" (Order at 1, September 18, 2009 (emphasis added).) When this Order is compared to the Provisional Denial, we conclude that they are consistent with each other because the Provisional Denial, indeed, mentions that Petitioner "did, in fact, practice dentistry for a significant period of time." (Provisional Denial at 1, R.R. at 9a.) As previously mentioned, when the Board issued the Provisional Denial, it was aware of Petitioner's past unlicensed practice of dentistry, which she had disclosed in the December 1, 2008 letter, but was unaware that Petitioner had been sanctioned for her conduct via the Consent Agreement. Petitioner neither argues, nor is this Court aware of a rule or law prohibiting the Board from accepting new evidence after a Provisional Denial is filed, which would bolster the Provisional Denial, particularly when it was *Petitioner* who attached the new evidence of the Consent Agreement to her appeal of the Board's Provisional Denial for the Board to consider. Furthermore, Petitioner fails to present any legal argument as to why the Board could not deny the Application based on Petitioner's unlicensed practice of dentistry, especially in light of the Board's statement that "it could have provisionally denied the application due to having disciplined [Petitioner] less than 12 months earlier for numerous years of unlicensed practice." (Board Op. at 13.) Additionally, even if the Board had been aware of the sanctions, there was nothing in the Consent Agreement that would prevent the Board from using the already-sanctioned unlicensed practice as a basis for denying the Application. See 63 P.S. § 123.1(6) (authorizing the Board to refuse to issue a license to practice dentistry if an applicant "violat[es] any of the provisions of this act"). In other words, the Consent Agreement does not contain a provision stating that Petitioner's misconduct

in that matter could never be used against her in the future if she applied for a license to practice dentistry.⁸

Accordingly, the Board's Order confirming the Provisional Denial of Petitioner's Application for a License to Practice Dentistry is affirmed.⁹

RENÉE COHN JUBELIRER, Judge

⁸ In addition, the Consent Agreement contains a provision, which states:

This Agreement contains the whole agreement between the participants. There are no other terms, obligations, covenants, representation, statement or conditions, or otherwise, of any kind whatsoever, concerning this Agreement.

(Consent Agreement ¶ 11, R.R. at 4a.)

⁹ The consequence of this Court's opinion and order, affirming the Board's Order, in no way prohibits Petitioner from reapplying for a license to practice dentistry.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jinan El-Fahel,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2019 C.D. 2009
	:	
Bureau of Professional and	:	
Occupational Affairs, State Board of	:	
Dentistry,	:	
	:	
Respondent	:	

ORDER

NOW, May 26, 2010, the order of the Bureau of Professional and Occupational Affairs, State Board of Dentistry in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge