IN RE: JAMES A. WALCKNER

NO. BD-2017-081

S.J.C. Order of Term Suspension entered by Justice Lowy on March 27, 2018, with an effective date of April 26, 2018.[1]

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[1] The complete order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. BD-2017-081

BOARD OF BAR OVERSEERS
NO. C2-15-0153

IN RE: JAMES A. WALCKNER

MEMORANDUM OF DECISION

This matter came before me on an information and record of proceedings filed by the Board of Bar Overseers (board). The board recommended that the respondent, James A. Walckner, be suspended from the practice of law for one month for knowingly making false statements of material fact in his application for admission to the bar of the Commonwealth. See Mass. R. Prof. C. 8.1 (a) and (b).[1] After a hearing and review of the parties' submissions, I conclude that a suspension of one month is too lenient. For the reasons that follow, I order that the

[1] Massachusetts Rule of Professional Conduct 8.1, as appearing in 426 Mass. 1427 (1998), provides, in pertinent part, that "an applicant for admission to the bar, . . . shall not (a) knowingly make a false statement of material fact . . . [or] (b) knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority. . . ."

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respondent be suspended from the practice of law for a period of five months.

Background. On December 5, 2011, the respondent filed an application for admission to the bar. Question 10 (b) of the application was in two parts. The first part asked: "Have you ever been disbarred, suspended, reprimanded, censured, or otherwise disciplined or disqualified as an attorney, or as a member of any other profession, or as a holder of any public office?" The respondent answered: "No." The second part asked: "If yes, state the dates, the details and the name and address of the authority in possession of the record thereof and attach a copy of the record." Having already answered in the negative, the respondent left the second part of the question blank. At the end of the application, the respondent certified that his answers to each of the foregoing questions were "true, complete and candid." The respondent was admitted to the bar on June 14, 2012.

In May, 2016, bar counsel filed a petition for discipline against the respondent, alleging that his answer to Question 10 (b) of his application was false, and violated Mass. R. Prof. C. 8.1 (a) and (b), because he had twice been disciplined while employed as a police officer. Specifically, bar counsel alleged that, in August, 2002, the respondent had been suspended for one day without pay after making two serious, unsubstantiated

accusations against two fellow officers. In one statement, the respondent claimed that another officer was the target of a town investigation; in another, he stated that he thought a different officer had tipped off a drug dealer who was under investigation. Bar counsel additionally alleged that, in December, 2008, the respondent had again been suspended, this time for four days without pay, for sleeping on the job and insubordination.

The respondent filed an answer to the petition, and a hearing was held before a hearing committee (committee). The respondent admitted that he had been previously disciplined, but testified that he had not disclosed the prior disciple because he interpreted Question 10 (b) not to require disclosure of all workplace discipline. Instead, the respondent stated that when he answered the first part of Question 10 (b), he considered the term "profession" to cover only non-employer discipline. The respondent argued that because an earlier question on the application, Question 7, already asked about his prior employment, he understood "the authority in possession of records" referenced in the second part of Question 10 (b) to mean external professional licensing or regulatory authorities.[2]

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[2] Question 7 of the application asked the respondent to list all jobs he had after his eighteenth birthday, and provided: "If your reason for leaving any employment was a result of being

The committee considered the language of the question and flatly rejected the respondent's explanation.

Not only did the committee decline to credit the respondent's testimony, but also it found his testimony to be "lacking in candor." See Hearing Comm. Rep. at par. 29. It concluded that the respondent knowingly provided false statements in response to Question 10 (b), in violation of Mass. R. Prof. C. 8.1 (a), and that the omitted disciplinary information was material because it was relevant to the Board of Bar Examiners' (BBE) evaluation of the respondent's character and fitness to practice law. See id. at pars. 23, 25-27. The committee also concluded that the respondent's failure to provide the requested information concerning his discipline as a police officer constituted a violation of Mass. R. Prof. C. 8.1 (b). See id. at par. 22.

With respect to the question of sanction, the committee weighed in aggravation the respondent's lack of candor in his testimony, and weighed in mitigation evidence proffered by the respondent concerning certain whistleblowing activities. In general, those whistleblowing activities consisted of reporting to State police the lieutenant who had verbally and physically assaulted his subordinates. After the report, the lieutenant

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terminated or resignation in lieu of termination, attach a rider page fully explaining the circumstances."

was arrested; he eventually admitted to sufficient facts, and was placed on probation for eighteen months. Considering aggravating and mitigating factors together, and the sanctions imposed in similar cases, the committee recommended that the respondent be suspended from the practice of law for one month. Both bar counsel and the respondent appealed to the board.

A majority of the board adopted, with one exception, the committee's findings of fact and recommendation.[3] It rejected bar counsel's argument that the respondent's whistleblowing activities should not be considered in mitigation because they were not causally related to the misconduct, and concluded instead there is no such requirement. One member wrote separately, concurring in the majority's findings, but dissenting regarding the sanction imposed. The dissenting member focused on the lack of causal relationship. Finding no causal relationship to mitigate the misconduct, the dissenting member recommended that the respondent be suspended from the practice of law for six months.

Discussion. The subsidiary findings of the committee, as adopted by the board, "shall be upheld if supported by

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[3] The board rejected the committee's conclusion that the respondent included irrelevant information on his application about lawsuits and other legal proceedings to "create the aura" of full disclosure. It concluded instead that the information the respondent provided about college discipline, civil litigation, and any other legal or administrative proceedings was responsive to Questions 9, 10 (c), and 12.

substantial evidence," see S.J.C. Rule 4:01, § 18 (5), as appearing in 453 Mass. 1315 (2009), and the committee's ultimate "'findings and recommendations, as adopted by the board, are entitled to deference, although they are not binding. . . .'" Matter of Weiss, 474 Mass. 1001, 1001 n.1 (2016), quoting Matter of Ellis, 457 Mass. 413, 415 (2010). "The hearing committee . . . is the sole judge of credibility, and arguments hinging on such determinations generally fall outside the proper scope of [] review." Matter of McBride, 449 Mass. 154, 161-162 (2007), citing Matter of Abbott, 437 Mass. 384, 394 (2002).

1. Misconduct. Without unpacking the outer boundaries of the phrase "member of a profession" in Question 10 (b), there is substantial evidence to support the board's conclusion that the respondent knowingly made false statements of material fact in his application for admission in violation of Mass. R. Prof. C. 8.1 (a), and that his failure to provide the requested information concerning his discipline as a police officer constituted a violation of Mass. R. Prof. C. 8.1 (b).

In large part, the board's conclusion is based on the committee's decision not to credit the respondent's testimony in view of his entire application. See Matter of McBride, 449 Mass. at 161-162; S.J.C. Rule 4:01, § 8 (3), 426 Mass. 1427 (1998) (committee is "the sole judge of credibility"). Specifically, in Question 10 (c), the respondent was asked if

"any charges or complaints [had] been made concerning [his] conduct as an attorney, or <u>as a member of any profession</u>, or as a holder of any public office?" The respondent answered in the affirmative and appended information about a lawsuit filed against him "[d]uring the scope of [his] employment as a police officer," and a citizen's complaint "concerning [p]rofessional [c]onduct . . . [d]uring the scope of [his] employment as a police officer." See Application Appendix at 1-3. The respondent also disclosed college student discipline, as well as information about divorce proceedings and a complaint for modification of child support filed in the Worcester Probate and Family Court. See <u>id</u>. The respondent's answer and disclosure in response to Question 10 (c) supports the committee's finding, adopted by the board, that the respondent was aware that discipline while a police officer was captured by the language of Question 10 (b) asking about discipline "as a member of a profession," and that the respondent's answer in response to that question was intentionally false. The omitted information was material because its non-disclosure inhibited the BBE's ability to evaluate the respondent's character and fitness to practice law. See <u>Matter of Resnick</u>, 26 Mass. Att'y Disc. R. 544, 549 (2010). As the board noted, information withheld and misrepresented need not, by itself, have automatically led to denial of admission; it is sufficient that it would have put the

BBE on notice of relevant information and led to further inquiry into the respondent's character and fitness. See id.; Matter of Moore, 442 Mass. 285, 295 (2004) (an applicant's fitness to practice law "is a most serious issue," and "[q]uestions exploring this issue are not to be answered by gamesmanship"). Accordingly, the board's conclusion is amply supported by the record.[4]

2. Sanction. Having determined that there was substantial evidence of the charged misconduct, I turn to the question of sanction. With respect to the aggravating factors, the board properly considered the respondent's lack of candor before the committee in aggravation. See Matter of Curry, 450 Mass. 503, 532 (2008) ("lack of candor and [] misrepresentations under oath to bar counsel constitute a serious factor in aggravation"); Matter of Eisenhauer, 426 Mass. 448, 457 (1998) (lack of candor

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[4] I take this opportunity to reiterate that truthfulness and candor are the cornerstones upon which the legal profession is built. See Matter of Moore, 442 Mass. 285, 295 (2004), quoting Matter of Provanzano, 5 Mass. Att'y Disc. R. 300, 304 (1987). See also Matter of D'Amato, 29 Mass. Att'y Disc. R. 159, 169 (2013). Nowhere is this more important than when an applicant applies for admission to the bar. See Britton v. Board of Bar Examiners, 471 Mass. 1015, 1018 (2015); Strigler v. Board of Bar Examiners, 448 Mass. 1027, 1029 (2007). Because it is a bar applicant's obligation to "assure the members of the board that he or she possesses the necessary qualifications for admissions," Strigler, supra, "applicants should always err on the side of over disclosure." Matter of Resnick, 26 Mass. Att'y Disc. R. at 552 . "If the meaning and scope of a particular bar application question is unclear [], [applicants] should contact the Board of Bar Examiners to ascertain exactly what information is being sought in response to that question." Id. at 552.

before committee "further compounded [] transgressions"). The board erred, however, in weighing the respondent's whistleblowing activities in mitigation. While our cases recognize that "special factors" may be considered in mitigation of sanction, there must be a relationship between the mitigating factors and the charged misconduct. See, e.g., Matter of Corbett, 478 Mass. 1004, 1006-1007 (2017) (no nexus between psychological issues and misconduct); Matter of Haese, 468 Mass. 1002, 1007-1008 (2014) (no nexus between medical problems and misconduct); Matter of Johnson, 444 Mass. 1002, 1003 (2005) (no nexus between personal misfortune and professional misconduct); Matter of Dragon, 440 Mass. 1023, 1024 (2003) (no nexus between misconduct and illness); Matter of Ring, 427 Mass. 186, 191 (1998) (no nexus between depression and misconduct); Matter of Schoepfer, 426 Mass. 183, 188 (1997) (reduction in sanction warranted where "disability caused the misconduct"); Matter of Nickerson, 422 Mass. 333, 335-338 (1996) (cooperation with authorities in prosecution of others involved causally related to misconduct); Matter of Luongo, 416 Mass. 308, 311 (1993) (rejecting evidence of alcoholism for lack of causal connection between alcoholism and misconduct); Matter of Greenidge, 30 Mass. Att'y Disc. R. 174, 191 (2014) (misconduct caused by disability); Matter of Kydd, 25 Mass. Att'y Disc. R. 341, 345 (2009) (misconduct caused by inexperience). There is no such

relationship here. However commendable the respondent's whistleblowing activities may have been, substantial acts of community or public service neither excuse professional misconduct nor mitigate the appropriate sanction in the absence of any causal connection. See, e.g., Matter of Finneran, 455 Mass. 722, 735 (2010) (distinguished career of public and pro bono service); Matter of Finn, 433 Mass. 418, 425 (2001) (services to underserved population); Matter of Kennedy, 428 Mass. 156, 159 (1998) (community service, pro bono representation of clients, and favorable reputation in the community).

Considering the respondent's lack of candor in aggravation, and the absence of factors in mitigation, I conclude that a suspension for a period of five months is appropriate. The Court's decision in Matter of Moore, 442 Mass. at 295, makes clear that "the relatively light suspensions of from one to three months" for conduct involving false statements and omissions in applications for admission to the bar are no longer appropriate. See Matter of D'Amato, 29 Mass. Att'y Disc. R. 159, 165 (2013) (noting that Matter of Moore, supra, "put the bar on notice that, going forward, future sanctions [for misrepresentations on applications] would be more severe and

could include disbarment").[5] Instead, bar discipline cases involving false statements and omissions in applications for admission to the bar are subject to "much harsher sanctions . . . 'to address the seriousness of the misconduct, to reassure the bar and the public that such conduct is completely contrary to the oath of office taken by every lawyer, and to underscore that, when it is uncovered, such conduct will be treated with the utmost severity.'" Matter of Moore, supra, quoting Matter of Foley, 439 Mass. 324, 339 (2003).

A five month term suspension is comparable to the discipline imposed in bar discipline cases decided after Matter of Moore, 442 Mass. at 295, taking into account the less egregious nature of the misrepresentation at issue here. See Matter of Moore, supra at 289-290, 296 (two-year suspension for failure to disclose previous employment as attorney involving

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[5] See Matter of Finn, 433 Mass. at 420, 423-424, 426 (2001) (three-month suspension for intentionally false statements in bar application to conceal student loan default and unauthorized practice of law); Matter of Donovan, 13 Mass. Att'y Disc. R. 142, 143-144 (1997) (eighteen month suspension for failing to disclose two-year long student loan fraud investigation, where application did not require disclosure of the pendency of criminal investigations); Matter of McGarvey, 15 Mass. Att'y Disc. R. 390, 391-392 (1999) (two month suspension for false answer to question concerning discipline in any other profession and for failing to disclose nursing license surrendered in lieu of administrative proceedings); Matter of Ruzzo, 10 Mass. Att'y Disc. R. 233, 233 (1994) (one month suspension for failure to disclose application for admission to practice law in different jurisdiction and denying having ever been party to any non-criminal proceeding).

allegations of criminal conduct, sanctions by bar, and lawsuit, aggravated by lack of candor and failure to take responsibility for misconduct); Matter of D'Amato, 29 Mass. Att'y Disc. R. at 164-166, 169 (twelve-month suspension with six months stayed, for failure to disclose two prior convictions); Matter of Parker, 27 Mass. Att'y Disc. R. 695, 695-697 (2010) (fifteen-month suspension for failure to disclose criminal charges dismissed prior to submission of bar application and unreported subsequent convictions); Matter of Resnick, 26 Mass. Att'y Disc. R. at 545 (one-year suspension for false statement and omissions on application of complaints filed against attorney in different profession); Matter of Betts, 26 Mass. Att'y Disc. R. 49, 50-51 (2009) (twelve-month suspension with six-months stayed for intentionally failing to disclose two prior criminal convictions on bar application); Matter of Voykhansky, 24 Mass. Att'y Disc. R. 719, 720, 724 (2008) (one-year suspension for intentional misrepresentation of undergraduate degree on bar application).[6]

In sum, I conclude that a term of suspension of five months is appropriate. Accordingly, an order suspending the respondent

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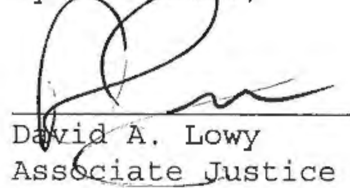
[6] As the dissenting member noted, Matter of Slavitt, 449 Mass. 25 (2006), is factually distinct. In that case, the Court imposed a two-month suspension on an attorney who submitted a letter of recommendation for admission to the bar on behalf of an applicant he knew to be unfit. Id. at 32. The Court distinguished the cases relied on by bar counsel in arguing a longer suspension was warranted because those cases "involve[d] misrepresentations to the BBE made by the applicants themselves." Id. at 33.

from the practice of law in the Commonwealth for five months shall enter in the county court.

By the Court,



David A. Lowy
Associate Justice

DATED: March 27, 2018