Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue:

Discipline

Board's automatic 10-year license suspension for drug felonies held valid

Issue: Mandatory sanctions in professional licensing

The state nursing board correctly interpreted its governing statute to require ten-year mandatory suspensions for nurses convicted of felony drug offenses, the Commonwealth Court of Pennsylvania held September 17 (*Packer v. State Board of Nursing*).

The case involved the Pennsylvania nursing board's 2013 automatic 10-year suspensions of the licenses of two nurses, Angela Packer and Hope Murphy, who had pled guilty to felony drug charges. Both nurses appealed.

The nurses argued that the board had improperly changed from its past discretionary practice—entering into consent agreements and 3-year suspensions in drug conviction cases—and that the board improperly interpreted a section of its governing law concerning revocations.

The court, in an opinion by Judge Kevin Brobson, agreed that the language of the governing statute was ambiguous and that it owed no deference to the board's informal interpretation of the law. But the board's interpretation that the

*See **Discipline**, page 5*

Licensing

Mistake on license application still equals misrepresentation, court finds

Issue: Accidental errors on licensing applications

A mistake on a license application, even though unintentional, constitutes "misrepresentation," in violation of the Uniform Enforcement Act (UAE), and can lead to a justifiable denial of a license, the Superior Court of New Jersey Appellate Division held October 3 (*In the Matter of the Application of Y.L)*.

The case concerned a massage therapist who did not mention a prostitution arrest on her licensure application. In 2013, the Board of Massage and Bodywork Therapy denied a license to the applicant, named Y.L., after finding she had misrepresented her application.

Under the statute, licensing boards are able to deny an individual's license application if they are found to have "engaged in the use or employment of dishonesty, fraud, deception, misrepresentation, false promise or false pretense."

In 2012, Y.L asserted in her application that she had never been arrested for a criminal offense, and signed an affidavit stating: "All information provided in connection with this application is true to the best of my knowledge and belief. I understand that any omissions, inaccuracies, or failure to make full disclosure may be deemed sufficient to deny licensure."

The board discovered that Y.L. was, in fact, arrested for prostitution in a massage therapy establishment in 2004, but the charge was later dismissed. Y.L. wrote the board a letter acknowledging that she mistakenly neglected to note the arrest, and that "English is not my primary language." Y.L. also denied having any role in prostitution, asserting that she had no intent to deceive the board. The board still denied her application.

In Y.L.'s appeal, she argued that intent should be required in connection with the word "misrepresentation" in the affidavit she signed as part of her license application. She noted that the word "misrepresentation" was surrounded by terms that require intent, which she did not have.

The appeals court disagreed and also sided with the board in holding that she must wait at least two years to reapply for a license.

The opinion emphasized that New Jersey courts have traditionally held that misrepresentation, as in "an incorrect statement, negligently made and justifiably relied upon," can be the foundation for "recovery of damages" or "economic loss" due to reliance on the misrepresented information.

The Appellate Division concurred with the appeals court, noting a case where the director of the New Jersey Division of Medical Assistance & Health Services was not at fault for denying a pharmacy's application to join the State's Medicaid program because of an unintentional failure to disclose the criminal record of one of its employees (*Pharmacy v. Div. of Med. Assistance & Health Servs)*.

The court also contended that a ruling in the plaintiff's favor would instigate a highly unnecessary and contentious atmosphere in regard to application denials, "A testimonial hearing would likely be required in every instance where the applicant alleged the failure was not intentional," the court stated.

Competition

Oral argument in *NC Dental Board v. FTC*

Supreme Court justices stress competition, federalism, safety

Issue: Federal versus state regulation of professionals

In the interests of free competition, the U.S. Federal Trade Commission wants the North Carolina dental board to stop shutting down teeth-whitening operations in the state, and the board has resisted, filing suit against the federal agency.

After a loss in the Fourth Circuit U.S. Court of Appeals, the board's suit is now pending before the U.S. Supreme Court. During oral argument on October 14, the justices asked counsel for both sides numerous questions, giving a rare glimpse of how Supreme Court members think about professional regulation.

The high court justices showed the most concern about three areas: the proper allocation of authority between state government and federal agencies, whether members of state boards had a conflict of interest in setting policy about competitors, and the public-protection reasons for highly skilled professionals to be regulating their own fields.

Justice Ruth Ginsberg suggested that the board might have been acting beyond its authority. "One puzzle in this case: Why should there be an antirust exemption for conduct that is not authorized by state law? The objection here was that this board was issuing a whole bunch of cease and desist orders. They had no authority to do that. No authority at all."

Along the same lines, Justice Stephen Breyer wondered if the state exercised enough authority over a licensing board composed of practicing dentists: "…What we have here is … a group of dentists like the group of wine merchants, like the group of truckers, and of course they're not fixing prices, what they're doing is deciding who will be in the business and there we are, end of case. Is there supervision [over the dental board], yes or no? The FTC says, no, there isn't… The object of the antitrust laws is to prevent private individuals who compete with each other in business from getting together and making agreements. That kind of interest seems present here."

Justice Anthony Kennedy echoed Justice Breyer's concern about oversight: "…The concern is that there is no state policy if the state simply says…you take an oath and then you do what you want. And if the board says we think what's good for dentistry is good for North Carolina, our cases say that's not enough because you're pursuing your self-interest."

Setting entry standards and setting scope of practice can both be anti-competitive, Justice Joseph Scalia pointed out. "What is a more obvious restriction of competition than preventing someone from competing?... I don't see how you draw that line… It's one thing to say that so-and-so can't practice, but it's another thing …to say that tooth whitening is part of the practice. It seems to me they both involve anticompetitive decisions."

On the other hand, Justice Breyer questioned the role of antitrust regulation in professional regulation. Regarding brain surgeons' deciding who could practice brain surgery in a state, he said, "I don't want a group of bureaucrats deciding that. I would like brain surgeons to decide that... I don't want … medical boards throughout the country to decide everything in favor of letting in the unqualified person, lest he sue them under the antitrust law for treble damages and attorneys' fees."

Justice Samuel Alito expressed support for federalism: "I really am not attracted to the idea of federal courts looking at state agencies, state regulatory agencies, to determine whether they are really serve the public interest or they are serving some private interest."

A ruling in the case, *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, is expected sometime in 2015.

Barber board may discipline non-licensee for displaying pole, court finds

Issue: Board jurisdiction over unlicensed entities on advertising

A state board was correct to fine an unlicensed barber for displaying a barber pole outside his businesses, a North Carolina appellate court ruled October 7 (*Kindsgrab v. North Carolina Barber Examiners*).

Following an investigation and hearing in 2012, the North Carolina Barber Examiners board fined Hans Kindsgrab $1,000 for having barber poles outside two of his establishments since they only held a Cosmetic Arts Licene issued by the North Carolina Board of Cosmetic Art Examiners, a "separate bureaucratic agency" from the N.C. Board of Barber Examiners. The board also ordered Kindsgrab to pay the board an additional $1,650 for attorney and staff fees.

The court ruled that the board's imposed fines were rightfully assessed since a barber permit did not exist for the business. As a result, Kindsgrab was not allowed to display a barber pole or advertise his barber services.

Kindsgrab argued that since he did not possess a barber license, he could not be subject to any disciplinary action by the board and that it would be unconstitutional for the board to discipline him. The court, however, disagreed, noting that the North Carolina statute reveals "no indication that the imposition of civil penalties is limited solely to licensees."

The Court ruled that the board will find that an individual or entity is guilty of fraudulent misrepresentation for:

(a) Operating or attempting to operate a barbershop without a permit;

(b) Advertising barbering services unless the establishment and personnel employed therein are licensed or permitted;

(c) Using or displaying a barber pole for the purpose of offering barber services to the consuming public without a barbershop permit.

"We hold that the imposition of civil penalties on non-licensees is reasonably necessary for the board to serve its purpose of preventing non-licensees from engaging in the practice of barbering," the Court ruled, "it is clear from the board rules that civil penalties may be assessed for violations by an 'individual or entity,' not just against those licensed by the board."

Court rejects antitrust challenge of discipline for ad violations

Issue: Federal antitrust law and state regulation of professionals

In an October 24 ruling, a federal court rejected a challenge of the Virginia medical practice act by a chiropractor who was sanctioned by the Virginia Board of Medicine. The plaintiff, Yvonne Petrie, brought suit against the board, appealing her sanction and alleging the board's action violated federal antitrust laws, as well as Virginia law (*Petrie v. Virginia Board of Medicine*).

Petrie has been licensed as a chiropractor in the state of Virginia since 2006. As she describes it, her practice includes the incorporation of "complementary and alternative medicine, functional neurology, and functional medicine in order to address underlying health issues such as neuropathy, autoimmune conditions, Type 2 diabetes, and thyroid conditions."

In February 2013, the Virginia Board of Medicine determined that Petrie violated sections of the Virginia Code, alleging that Petrie "advertised and promoted her services in a manner that was false and misleading." The board claimed that Petrie acted outside the scope of her chiropractic practice by "holding herself out as a nutritionist able to 'reverse' Type 2 diabetes and treat thyroid and metabolic disorders."

The board asserted that she did not meet the criteria listed in Virginia law to present herself as a registered dietician and nutritionist, and thus was acting outside the scope of her practice by offering "diet and nutrition counseling, ordering blood, saliva, and urine testing, and performing procedures with a laser." The board fined Petrie $25,000 and her license was suspended for six months.

Petrie appealed the board's decision and brought a federal suit against the board, alleging breach of antitrust law. She charged "that the Defendants entered an agreement to allocate the relevant service markets to medical doctors and excluded chiropractors, including Plaintiff, from competing in those markets in violation of the Sherman Antitrust Act."

At a pre-trial hearing, the board members, as defendants, filed a motion to omit the testimony of two expert witnesses, David Edelberg and Stephanie Chaney, both chiropractors who gave testimony in support of Petrie's claims. Edelberg cited an expert report concluding that medical boards have made

efforts to contain and eliminate "unconventional" practices such as chiropractic. Conventional medicine feels threatened, according to the report, because chiropractic poses "serious financial competition" as an alternative method of medical treatment. As competitors without training in chiropractic medicine, Edelberg maintained, medical board members could not render a fair judgment.

The court said Edelberg's testimony is not helpful in considering specifically how the restraint of Petrie's business is reasonable or not. The reasonableness of the restraint, the court points out, is the pertinent issue, and not "whether conventional medicine has historically attempted to eliminate chiropractic."

Chaney's expert report alluded to the "generally broad scope of chiropractic." Doctors of Chiropractic (DCs), she noted, are trained in pharmacology and to conduct and analyze radiographic studies as well as "blood, urine, saliva and stool tests." Her report asserts that Petrie is qualified to treat patients with a laser in such therapy as dietary and hygienic interventions, and that interventions by a chiropractor can "reverse diseases such as Type 2 Diabetes."

The court dismissed the testimony of Chaney as well, noting that there was no specific discussion of the scope of chiropractic in Virginia and how chiropractic is regulated in the state.

Discipline

Automatic license suspensions get court okay *from page 1*

law prevented its discretion about sentencing was not unreasonable—and it was more reasonable than the disciplined nurses' reading. The nurses' 10-year suspensions were upheld.

Prior to August 2013, if a nurse had a felony conviction under the Drug Act, the nurse would need to be enrolled in a nursing assistance program. If the nurse were enrolled, then the board would usually place the nurse on probation.

The disciplined nurses argued that the statute for automatic suspensions was ambiguous and could be interpreted to allow for a lesser punishment. The court agreed about the ambiguity in the statute, but found nonetheless that the statute warrants the board's interpretation that a 10-year suspension should be automatic for drug felons.

Since August 2013, however, the nursing board has been applying for a Notice and Order of Automatic Suspension once it has learned of a nurse felony conviction. In other words, the nurse is notified that his or her nursing license has been automatically suspended for a 10-year period. "The law is structured in a manner that affords the board discretion ... to suspend or revoke a license under certain circumstances," the court wrote.

"It would appear that the General Assembly ... viewed those circumstances to be sufficiently serious such that it removed from the board its discretion not to suspend or revoke a license. In other words, the General Assembly viewed those circumstances to be so serious that suspension is mandatory and automatic."

Reciprocal license suspension for drug use "arbitrary and capricious"

Issue: Board suspension must be consistent with facts of case

A Texas board's decision to enforce a suspension of a pharmacist's license in the state of North Carolina due to substance abuse was "arbitrary and capricious," the Court of Appeals in Texas agreed October 31. The ruling (*Witcher v. Texas Board of Pharmacy*) rejected the board's request for a rehearing on the matter and allows the pharmacist to continue practicing in Texas.

Tiana Jean Witcher received her Texas pharmacist license in 1987 and her North Carolina pharmacist license in 1992.

During personal leave related to her husband's death in a car accident, Witcher became intoxicated and had to be treated for alcohol poisoning. She referred herself to the North Carolina Pharmacist Recovery Network (NCPRN), a program for pharmacists with alcohol-drug problems, and consented to a monitoring contract with NCPRN in January 2009.

After Witcher failed to comply with some of the terms' of her voluntary monitoring agreement, the North Carolina licensing authority suspended her license in April 2010, citing concerns that she was "unfit to practice pharmacy."

Witcher returned to Texas after her license was suspended and enrolled in the Texas Pharmacist Recovery Network (TxPRM), successfully finding employment as a pharmacist in Texas while voluntarily participating in therapy.

She maintained that she did not abuse alcohol after her October 2008 hospitalization for alcohol poisoning and did not abuse alcohol on the job. The court also notes records that Witcher "exhibited no signs of alcohol impairment on the workplace or elsewhere" as a pharmacist in Texas.

Based on the active suspension of Witcher's license by North Carolina, however, the board initiated disciplinary proceedings to suspend Witcher's Texas license until the North Carolina suspension was lifted.

The five-year probated suspension, Witcher asserted, was "in keeping with board precedent" in cases of impaired pharmacists who had engaged in "significantly more egregious conduct" but who had demonstrated current fitness to practice to the board's satisfaction.

Witcher admitted that she was subject to discipline by the board given the suspension in North Carolina. But Witcher also argued that since she had not abused alcohol since October 2008 and it wasn't alleged that she was unfit to be a pharmacist, a five-year probated suspension was appropriate.

After an evidentiary hearing, the ALJ agreed with Witcher's assessment, also noting that there was no intent to "evade compliance with the reinstatement provisions of the North Carolina order, but only to avoid the considerable financial hurdles she would face to achieve that compliance." Witcher never had an instance of working on the job impaired and has taken all the necessary steps to prove she can safely practice pharmacy in Texas, the ALJ also noted.

The board nonetheless rejected the ALJ's recommendation, citing unwritten policy that a pharmacist with an active suspension in another state cannot practice pharmacy in Texas. The board also required Witcher to submit to "simultaneous monitoring" by the TxPRN and NCPRN, seemingly disregarding the fact Witcher would have to be simultaneously present in two states to attend meetings and drug and alcohol screenings for both programs.

The district court ultimately found, and the appeals court agreed, that the enforced suspension of Witcher's license in Texas was unreasonable and "arbitrary and capricious in light of the facts found by the board and its conclusions of law."

The court also found that the board violated the formal rulemaking requirements in the Administrative Procedure Act (APA), and was negligent in utilizing an unwritten policy to implement an enforced suspension, which resulted from "improper ad hoc rulemaking." The court denied the board's request for a rehearing, and ordered that the board adopt a decision in line with the facts and findings of the trial court.

Reciprocal license suspension for sexual misconduct held legitimate

Issue: Sanctions based on discipline in another state

The state medical board has the right to sanction a physician's Ohio license if another state has already taken similar action, the 10th District Court of Appeals of Ohio ruled September 18 (*Shah v. State Medical Board of Ohio*).

The physician in the case, Mahendrakumar Shah, held a license to practice medicine in West Virginia since 1984. In 2010, a complaint filed with the West Virginia Board of Medicine alleged that Shah had "engaged in sexual activity with his patients in exchange for prescriptions in the course of his medical practice."

Shah denied giving unwarranted prescriptions to patients for sex, but admitted having sex with one of his patients. Shah and the West Virginia board reached an agreement that Shah was to surrender his medical license and certificate to prescribe controlled substances. He was also ordered to close his medical practice and prohibited from ever applying for a medical license in the state of West Virginia again. Shah agreed, signing the consent order.

Shah also had a license to practice medicine and certificate to prescribe controlled substances in the state of Ohio. The Ohio board informed Shah that Ohio could take disciplinary action against him based on the West Virginia action.

Shah requested and received a hearing on the matter, after which a hearing officer issued a report and recommendation. The hearing officer concluded that the consent order "constituted an action taken by an agency responsible for authorizing, certifying, or regulating an individual to practice a health care occupation or provide health care services in this state or another jurisdiction." Thus, Shah could be subject to further sanctions from boards in other states where he was licensed to practice medicine.

The hearing officer recommended an indefinite suspension of Shah's license "for not less than one year" and a permanent limitation on Shah's ability to prescribe controlled substances. The Ohio board adopted and modified the recommendation to permanently revoke Shah's medical license.

After a trial court affirmed that decision, Shah went to the Court of Appeals, claiming that the punishment was not in accordance with the law and that the sanctions imposed did not justly correlate to his conduct. Since the board gave sufficient reasons for modifying the hearing officer recommendation and permanently revoking Shah's license, the Court of Appeals was compelled to affirm the board's decision.

"When the board's order is supported by reliable, probative, and substantial evidence and is in accordance with law, a reviewing court may not modify a sanction authorized by statute," the court said.

Revocation upheld for scheme to dodge state Medicaid exclusion

Issue: Existence of victim not needed to revoke license

California's Fourth District Court of Appeal, in a September 12 ruling, affirmed the State Board of Pharmacy's decision to revoke the license of a pharmacist who was found to have orchestrated an elaborate Medicaid fraud scheme (*Hoang v. California State Board of Pharmacy*).

In 2005, pharmacist Tue Hoang, manager of Orange Pharmacy in California, refused an on-site fraud prevention review, which was mandatory for pharmacies seeking to submit claims for particular prescriptions under the state Medicaid program, known as Medi-Cal. Hoang's refusal led to exclusion from the program.

To circumvent the exclusion, Hoang ordered the Orange Pharmacy to dispense Medi-Cal prescriptions, forwarding the pertinent prescription information to another local pharmacy (Pacific Pharmacy). Pacific Pharmacy submitted the claims as its own, returning the payments to Orange Pharmacy.

"Between July and December 2005, payments from CalOptima's PBM to Pacific increased from approximately $43,000 to over $73,000," the ruling stated. "One of defendant's inspectors estimated 38 percent of Pacific's reimbursements from CalOptima between August 2005 and November 2006 were for Orange-filled prescriptions. He prepared a tabulation of invoices Orange had provided to Pacific for billing CalOptima that totaled over $149,000."

The California State Board of Pharmacy learned of Hoang's conduct, and brought him before an administrative law judge, who recommended that Hoang's license be placed on probation for five years. The board declined the judge's recommendation, however, electing to permanently revoke Hoang's license and Orange Pharmacy's permit, an action that the appellate court affirmed.

The court cited four primary factors in deciding to affirm the board's decision of license revocation: 1) license revocation does not hinge on the existence of a victim; 2) the plaintiff failed to adequately show remorse for his conduct; 3) the plaintiff clearly benefited financially from illegal, fraudulent behavior; 4) the board (defendant) had every right to revoke plaintiff's license and his pharmacy's permit on its own discretion.

Court finds licensee acted on advice of board director; discipline reversed

Issue: Board director's advice conflicting with discipline

A state board's decision to a suspend a counselor's license for withholding a 10-year-old's records from the child's parents was reversed and remanded by the Court of Appeals of Oregon, in an October 8 ruling, since the counselor was acting on the advice of the board director (*Weldon v. Board of Licensed Professional Counselor and Therapists*).

In 2008, the parents of a 10-year-old child arranged for their child to begin counseling with licensed counselor Rachel Weldon based on the child's social difficulties in school. At the third session, the child revealed that her 11-year-old brother was committing acts of abuse against her, telling Weldon that he would kick her, slap her in the face, and verbally berate her.

The child told Weldon, however, that her parents did not believe her claims of abuse by her brother. At the fifth session, Weldon called the parents in the presence of the child to make an appointment for the mother, father, and sibling to come in. Weldon did not disclose the purpose of the meeting.

After failing to show up at the scheduled meeting, the mother, father, and sibling were present for a meeting on August 21, where Weldon informed them that she was legally obligated to report abuse to the proper authorities. Weldon also told the parents that she hoped they could take steps to stop the abuse before it reached the level that would require mandatory reporting by her, and that if the parents continued counseling with her she would not report the abuse.

The parents, however, stopped coming to counseling meetings with Weldon. Weldon reported them to DHS, but the agency deemed the allegations of abuse

The board's amended final order differed "dramatically" from the ALJ's proposed order, the court found. "First, the board 'restated' the issues before it because, in its view, 'the Proposed Order did not adequately or specifically address each alleged violation by petitioner.' It then made extensive credibility determinations, setting out approximately nine pages of findings as to the credibility and reliability of petitioner, father and mother, and Sabin. The board noted that 'the credibility and reliability of witnesses are pivotal to this case because of the material contradictions between petitioner's testimony and the testimony of mother and father'."

'unfounded.' The child's parents requested a copy of their child's file, but Weldon refused, explaining that "she did not believe it was in the child's best interest to release the file directly to them, but that she would release the file to another counselor or therapist." She explained that she believed she had discretion under Oregon law and HIPAA (the federal Health Insurance Portability and Accountability Act) regulations to withhold the file from the parents in the best interest of the child because she had reported the matter to DHS.

In December 2009, the board notified Weldon that it intended to discipline her for her refusal to turn over the child's file to the parents.

But part of Weldon's defense to the allegation was that she had relied on advice from the board in not turning over the records. In finding 37, which was redacted by the board in its final order, the ALJ found that a conversation had occurred between Weldon and board executive director Becky Ecklund concerning the matter.

In that conversation, Weldon informed Ecklund of the case and her concerns about the father's assertion that his daughter was exaggerating, and her report to the DHS. "Ecklund told [petitioner] that she receives calls like this from counselors, and that based on what the board's attorneys have advised, a counselor does not need to release a child's records to the parents if the counselor believes the child might be exposed to further danger."

Weldon immediately made note of her conversation with Ecklund after it concluded, and the discussion was found to be "compelling evidence" for the Court of Appeals, which wrote that Weldon "was told by the board that she did not need to release child's records to parents if she believed that child might be exposed to further danger." As a result, the court reversed and remanded the previous board decision for reconsideration.

Unlicensed-practice SWAT team raid was criminal, not just "doing their jobs"

Issue: Checking unlicensed practice via SWAT-like raid

A lawsuit against two Florida deputies who were part of a 2010 raid on a barbershop may go forward, the U.S. Court of Appeals for the Eleventh Circuit ruled September 14 (*Berry v. Orange County Sherriff's Department*). The deputies used overly aggressive "SWAT-like tactics," while checking for license violations, the appeals court said. It found that the search was illegal and as a result, the deputies are not protected by immunity.

The raid occurred when the Department of Business and Professional Regulation and the Orange Country Sheriff's Office conducted a large sweep operation in Pine Hills, a neighborhood near Orlando. Strictly Skillz, a barbershop owned by licensed barber Brian Berry and suspected of hosting unlicensed cosmetologists, was included in the sweep. No violations were discovered.

PLR reported on this unlicensed practice raid in the July/ August 2013 issue. This year's ruling concerned two deputies, Keith Vidler and Travis Leslie, who claimed that they should be immune from any civil litigation brought against them "for doing their jobs." But the judges emphatically rejected their position, noting their raid was carried out without a warrant and calling their conduct criminal.

The judges described the raid as a "scene right out of a Hollywood movie," with officers playing the part of rogue cowboy heroes, or overzealous villains, seeking to wreak havoc by abusing their power, "Unlike previous inspections of Strictly Skillz, ... the August 21 [2010] search was executed with a tremendous and disproportionate show of force, and no evidence exists that such force was justified."

The Eleventh Circuit strongly condemned the raid four years ago. "With some team members dressed in ballistic vests and masks, and with guns drawn, the deputies rushed into their target destinations, handcuffed the stunned occupants—and demanded to see their barbers' licenses," the court wrote.

The deputies were out of bounds in using a SWAT-team approach to merely check whether or not barbers were properly licensed, the court said. Adding to the improper nature of the raid, it was also revealed that inspectors from the Florida's Department of Business Professional Regulation (DBPR) had conducted an inspection of the Strictly Skillz establishment just two days prior to the raid. That inspection found no infractions of any kind either.

The establishment was one of several raided in predominantly minority areas, and deputy sheriffs claimed they suspected unlawful activity was taking place.

The DBPR fired several employees and settled out of court with numerous barbers, including Brian Berry. The Sheriff's Office, however, concluded that its deputies did nothing wrong.

Mandatory license denial for felons is not double jeopardy, court rules

Issue: New license requirements and old convictions

New mandatory federal rules that require mortgage brokers to reapply for a license and that deny licenses to applicants who have been convicted of felony fraud do not improperly re-litigate settled issues, even if a licensee has already been disciplined for the underlying conduct, the Fourth District Court of Appeal of Florida ruled September 3 (*Emiddio v. Florida Office of Financial Regulation*).

In 2002, Jeanne Emiddio, a licensed mortgage broker, pleaded no contest to felony Medicaid fraud. As a result of her conviction, Florida's Office of Financial Regulation (OFR) moved to revoke her license but eventually allowed her to keep it on a probationary status.

Subsequently, in response to the mortgage crisis in 2008, Congress passed the Secure and Fair Enforcement for Mortgage Licensing Act, which created a new professional title, "loan originator," to cover both mortgage lenders and brokers. The act forbade licensure of applicants who have been convicted of felony fraud, required all applicants to apply through a national system, and required states to implement its provisions to avoid federal intervention.

To comply with the new law, Florida altered its licensing scheme, barring applicants with felony fraud convictions. The new scheme invalidated existing mortgage broker licenses and required former licensees applicants to re-apply through the new system.

Accordingly, when Emiddio re-applied for licensure in 2010, OFR denied the application based on her prior convictions. Emiddio contested the decision, arguing that OFR's decision not to revoke her license in 2004 should be the final word on her offending conduct; using the same events to now deny her licensure, she claimed, would impermissibly re-litigate her earlier, now-settled case.

Judge Alan Forst, in the court's written opinion, disagreed, ruling that the state could deny Emiddio a license. The introduction of the new standards created a new legal situation, to which principles preventing the re-opening of a previous case did not apply.

In addition, Forst continued, while a per se bar against all applicants convicted of fraud felonies might be unconstitutional—even when the state's governor has restored their civil rights—Emiddio had failed to raise that issue in a lower court, and was barred from doing so on appeal.

Court rejects argument that discipline requires link to particular conduct

Issue: Specifying details of unprofessional conduct

Due process does not require that a board match specific actions a licensee took with specific types of unprofessional conduct, the Supreme Court of New Hampshire held July 11 (*Bloomfield v. New Hampshire Veterinary Board*).

The court upheld discipline by the state's board of veterinary medicine against a vet whose demonstration of a "dominance" technique on a Shih Tzu puppy, against the wishes of its owners, immediately preceded its death, although it may not have caused his death. .

The court said that, whether or not the veterinarian's actions killed the puppy, the vet was guilty of unprofessional conduct for ignoring the owners' concerns.

The sad tale started when the owners brought their puppy to Bloomfield for vaccination and de-worming. During the visit, Bloomfield, on his own initiative, and after having been told by the couple that they did not have any concerns about the dog's behavior or dominant tendencies, determined that the puppy was, in fact, "dominant," and proceeded to demonstrate what the Court termed a "dominance-submission technique," which involved picking the dog up and pinching his snout.

The dog struggled, then ceased breathing, dying later that day from what was revealed to be an excess of fluid in his lungs.

The board determined that Bloomfield's actions did not cause the puppy's death, but it nevertheless reprimanded Bloomfield for "failing to respect the opinion of the owners" and applying an excessive restraint, actions that the board determined were "unprofessional conduct."

Bloomfield appealed, arguing that the board's rules did not adequately define "unprofessional conduct," that the board's finding that he acted excessively was without evidence, and that the board had improperly failed to provide expert testimony on the standard of care or to provide him notice of the basis of the board's action against him.

The court disagreed. "Unprofessional conduct," wrote Justice James Bassett, quoting precedent, may take "numerous and varied" forms, and due process does not require the board to specify which actions fall under that term. A board rule that defines "unprofessional conduct" as a violation of the American Veterinary Medical Association's Principles of Veterinary Medical Ethics required Bloomfield to conduct a physical examination of the puppy before demonstrating the restraint technique and to respect the opinion of the owners regarding the puppy's behavior, two things that Bloomfield failed to do.

Bloomfield's claim that the board had improperly not used expert witnesses also failed. Noting that the board was comprised of veterinary professionals, Justice Bassett wrote that Bloomfield's professional violations "are not so complex as to be outside the competence of the Board to decide in the absence of expert testimony."

Central licensing agency can appeal board decision not to discipline

Issue: State agency review of board decision against discipline

The Office of Professional Regulation (OPR) within the office of the Vermont Secretary of State has the power to appeal a Board of Nursing decision, the Supreme Court of Vermont held October 14. The court

reinstated the decision of an appellate officer to vacate the board's consent order suspending the practice of the appellee (*Shaddy v. State of Vermont Office of Professional Regulation*).

David Shaddy was a nurse who was accused of diverting narcotics and entered into a consent order suspending him from practice. Shaddy's former employer, Brattleboro Retreat, reported suspicions that Shaddy was diverting narcotics to the nursing board. The board then referred the matter to an Office of Professional Regulation (OPR) attorney to arrange a summary suspension proceeding.

In the consent order, Shaddy conceded that there existed enough evidence for the state to prove its case. Shaddy did not, however, admit liability.

One year after signing the consent order, Shaddy filed to amend the judgment, contending that he did not do what the board said he did and that his attorney compelled him to enter into the consent order, even though he didn't want to.

After a hearing, the board decided to grant Shaddy most of the relief he sought, finding that he was well organized and credible, that he showed a good reason for his request, that he sought relief within a reasonable time, and that his claims were supported by the documentation he provided at the hearing.

Alleging a "miscarriage of justice," the board also found that the evidence against Shaddy is insufficient, and that the facts demonstrated an extraordinary situation warranting reopening of final judgment. Based on these findings, the board threw out the consent order, dismissing the charges against Shaddy without prejudice.

The OPR attorney appealed, and an appellate officer conducted an "on-the-record review without taking new evidence." Notably, an appellate officer is only supposed to reverse a board decision "if substantial rights of the appellant have been prejudiced."

The appellate officer found several criteria for reversal: first, the board should not have considered evidence in relation to merit; second, the board did find a proper basis to vacate the earlier judgment; and third, the board made no findings of fact and failed to allow the state to evidence.

Shaddy appealed the officer's decision to the superior court, contending that the OPR attorney had no power to appeal the nursing board's decision. The court concurred, noting that prosecution power rests with the board, not the OPR, and the case was sent back to the nursing board.

The OPR attorney requested an interlocutory appeal, which was granted by the Vermont Supreme Court.

The Vermont Supreme Court highlights two issues: whether the state is able to appeal a Board of Nursing decision, and whether the OPR attorney is a representative for the state in the appeals process.

Shaddy contended that the board's decision should be final and not subject to challenge. The court disagreed, finding that Shaddy's argument was unpersuasive and that a "party aggrieved," such as the state in this case, may appeal a decision by the board.

The court also decided that the OPR attorney is an actor of the state, similar to the Attorney General's office. The legislature retracted the obligation that once existed for the Attorney General's office to be the sole prosecutor for complaints.

The Court saw no reason to disassociate the OPR attorneys from the state, writing, "We are satisfied, however, that the Legislature intended in its 2003 enactments that OPR attorneys assume the role formerly played by the Attorney General and represent the State of Vermont in such proceedings."

Discipline reinstated for doctor who left troubled history off application

Issue: Application omissions

The state's Department of Financial and Professional Regulation was not unduly harsh when it revoked the license of a doctor who had omitted a troubled history of failed and incomplete residencies from his license application, the First District Appellate Court of Illinois ruled September 10. The court overturned a state circuit court that rejected several attempts by the state to discipline (*Kazmi v. State Department of Financial and Professional Regulation*).

The doctor whose license was at issue in the case, Syed Kazmi, had a history of trouble. After graduating from medical school in 2000, Kazmi was refused credit for one residency in Grand Rapids, Michigan as a result of deficient performance and a habit of self-prescribing medicine.

Kazmi was also dismissed from Thomas Jefferson in Pennsylvania, when the institution learned he had not received credit for the earlier residency. He withdrew from the University of Wisconsin, was dismissed from a fourth institution in Indiana, and then finally completed residency at Jackson Park Hospital in Chicago. In his applications to many of these residencies, Kazmi omitted his prior troubles.

When Kazmi applied for licensure in Illinois in 2007, he omitted all but his final, successful residency, out of fear that that state's medical board would deny him a license. At that time, Kazmi also applied for a license in Ohio.

While the Illinois board granted Kazmi a license, Ohio's board, after discovering his many omissions, permanently denied Kazmi's application. In 2011, Illinois, now wise to Kazmi's omissions, revoked his license. Kazmi appealed.

"Had Dr. Kazmi been truthful in his applications," the judge wrote, "he never would have obtained either the residency at Jackson Park Hospital or an Illinois medical license . . . "[H]is failure to disclose his past and his affirmative misrepresentations of his employment history prevented any meaningful assessment of Dr. Kazmi's fitness to practice medicine. Thus, the department correctly concluded that Dr. Kazmi's behavior warranted the most serious sanction."

A state circuit court overturned the revocation, holding that the sanction was too severe. On remand, the state suspended Kazmi's license for an indefinite period of time, no less than three years. The circuit court again invalidated the discipline, ruling it too severe.

The state came back a third time, indefinitely suspending Kazmi's license, but this time with a minimum of 19 months. Again, the circuit court invalidated the sanction. Only on the fourth try, in which the minimum suspension was lowered to nine months, was the discipline affirmed.

The state then appealed the original dismissal, asking that its original decision—to revoke Kazmi's license—be reinstated, and the case went before the Illinois state Appellate Court which issued an opinion by Judge Mary Mikva.

Mikva noted Kazmi's "numerous misrepresentations," as well as the fact that Ohio had already permanently barred Kazmi from obtaining a license. Under Illinois' Medical Practice Act, the Department has the power to revoke a license for either of these two offenses, she wrote.

Faced with the department's seemingly clear statutory authority to revoke his license, Kazmi argued that revocation would nonetheless be a disproportionate sanction for his offenses. Judge Mika, however, noted that as the result of his residency trouble, Kazmi was not actually qualified for a medical license.

"If the department can deny an application for failure to meet the requirements for a license," she concluded, "then the department must be able to revoke a license obtained by means of deliberate misrepresentation of an applicant's qualifications."

Licensee may have been fired for following board advice and refusing to break law, court finds

Issue: Professional responsibility versus employer orders

An Indiana nurse who sued her former employer, claiming that she was terminated for refusing to provide antibiotics to undiagnosed patients, won the right to continue her suit, in a December 2 ruling, after a state appellate court overturned a summary judgment that had dismissed her case (*Stillson v. St. Joseph County Health Department*).

The nurse, Beverly Stillson, worked at a clinic run by the Health Department in St. Joseph County, set up to treat sexually transmitted diseases. The clinic only employed one physician, who did not see patients. As a result, Stillson and another nurse, Courtney Dewart, treated patients themselves, taking samples and administering treatments based on Centers for Disease Control guidelines.

In 2011, Stillson emailed the state nursing board asking for guidance on the scope of her practice; she wanted to know whether, without the input of a lab, nurse practitioner, or physician, she was allowed to provide antibiotics to patients who appeared to have an STD.

The assistant director of the board replied to Stillson, declining to comment on her specific situation, but telling her that if she did not feel comfortable with procedures she was asked to carry out, she should document it and refrain from practicing unsafely.

Stillson and Dewart later became concerned about a new policy that would require them to provide medication to patients based solely on their stated history, without a lab test or physician's order.

Responding to their concerns, an attorney from the St. Joseph Health Department created a document explaining that, because the overall policy was created by a physician, it should be considered a standing order from a doctor, as "nurses are authorized to assess a patient and carry out a physician order if the patient meets the physician's criteria to be treated." The county attorney likened the treatment of those patients to a nurse's following orders for care of an inpatient at a hospital.

When the nurses still refused to provide medication to undiagnosed patients, the department ordered Stillson to participate in its Employee Assistance Program based on what it called her "unprofessional behavior." Then, after a

series of incidents—some seemingly related to the policy and some not—the department fired her.

In response, Stillson filed a claim against the department, claiming that the firing was in retaliation for her refusal to violate the law by engaging in the unlicensed practice of medicine. After a trial court granted summary judgment for the department, Stillson appealed to the Court of Appeals of Indiana.

To support her case, Stillson introduced a disciplinary memo that the department had created after she refused to provide medication to a syphilis patient whom she claimed had not been diagnosed by a physician. The memo indicated that Stillson had been ordered by department officials to provide the medication and that her refusal to do so—as well as angry comments she made to Department staff immediately afterward—had caused department officials to consider terminating her employment.

Stillson's evidence, the court ruled, was sufficient to raise the question of whether she had been fired for refusing to treat undiagnosed patients. The case was remanded to the trial court for further proceedings.

Testing

Specialty board not required to adapt exam for doctor with disability

Issue: Alternative licensure exam for applicants with disabilities

An accomplished physician who had suffered impairment from multiple brain tumor surgeries was not entitled to an alternative exam in his quest for recertification, the U.S. Court of Appeals for the Third Circuit held September 3 (*Rawdin v. American Board of Pediatrics*).

While attending college, David Rawdin was diagnosed with a brain tumor that required brain surgery, chemotherapy, and radiation. Rawdin completed and graduated from medical school, but twice failed Step III of the United States Medical Licensing Exam (USMLE), a multiple-choice format section of the exam.

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A neuropsychologist consulted by Rawdin concluded that he had cognitive impairment due to the cancer treatment of his brain tumor. This impairment affected his memory retrieval system, according to the doctor, which would make it difficult to capably complete a multiple-choice medical exam.

Shortly following the neurological examination, Rawdin's tumor came back and he needed to have more surgery and treatment. Those led to numerous complications, and he left the medical profession for four years.

Rawdin returned and based on the neuropsychologist's diagnosis, submitted a request for accommodations when taking Step III for the third time, which was granted. He was provided double time to take the exam, an individual testing room, and "off the clock" breaks.

Rawdin passed Step III on this attempt, achieved his Pennsylvania medical license in 2000, and began practicing at the Children Hospital in Philadelphia (CHOP) after completing a pediatric residency. According to reliable accounts, Rawdin "flourished" at CHOP and successfully treated more than 10,000 babies.

However, the hospital required its physicians to achieve board certification within five years through ABP (American Board of Pediatrics). Among the requirements to achieve board certification is passing a multiple choice exam (the General Pediatrics Certifying Examination).

Rawdin failed twice, and went to be reevaluated by his neuropsychologist, who used a variety of tests. The tests revealed that Rawdin's memory "was weak" in comparison to his general intelligence. The neuropsychologist determined that Rawdin's memory "was not efficient," specifically citing Rawdin's struggle retrieving information out of context.

A second neuropsychologist, Edward Moss, agreed with the findings, noting that Rawdin had difficulty pulling "together on command discrete bits of unrelated information" and that Rawdin would "perform at a higher level" on the exam if it was given in a different format. Like Rawdin's neuropsychologist, Moss noted that Rawdin's overall intelligence was within the "average range."

Rawdin did not pass the exam by the five-year deadline to achieve his certification. The hospital gave Rawdin an extra year to obtain certification based on a letter from Moss explaining Rawdin's impairment, while noting Rawdin's "excellent performance" as a doctor. After he failed to pass the exam in the extra year given, he was terminated in 2010.

Rawdin wrote to ABP, explaining his impairment and requesting an alternative route to achieving certification. ABP rejected Rawdin's request, asserting he had to pass the exam in its current format; otherwise it would "fundamentally alter the nature of the certification process."

In 2011, Rawdin applied to take the exam again, and his neuropsychologist told the ABP of Rawdin's diagnosis. The ABP granted the request for extra time and short breaks, but denied the request for open-book and advance knowledge accommodations since the ABP would not be able to "adequately, reliably, and validly" test Rawdin's knowledge." Rawdin's request to write an essay instead of a multiple-choice exam was also denied. The ABP stated that an essay would not be as reliable and would be too expensive.

After again failing the exam, Rawdin filed suit against the ABP, asserting that they failed to accommodate his disability. ABP claimed that its exam items do provide context and do not require test takers to "dredge up the information out of nowhere." Thus, ABP said, Rawdin should not be granted special accommodations beyond extra time and short breaks. The court agreed, noting that since the doctors who evaluated Rawdin did not know the specifications of the exam in question, their testimony was not credible.

Furthermore, the court wrote, "even if Rawdin's impairment fell within the categories of disabilities that the regulation covers, ABP has shown that the exam "best ensures that its results will accurately reflect Rawdin's aptitude rather than his disability."

While acknowledging Rawdin's aptitude and prowess as a doctor, the Court denied his suit against ABP, finding that he was not disabled and not entitled to accommodations because such accommodations were unreasonable and would "impose an undue burden on ABP."

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