Professional Licensing Report

Licensing, testing, and discipline in the professions

March/April 2017
Vol. 28, Numbers 9/10

Highlights in this issue

Discipline

Growing pressure to lift bans on applicants with records

Issue: "Good moral character" standards for entry into occupations

Policy development groups on both the left and the right have stepped up pressure on state legislators this year to restrict many licensing boards from using past criminal convictions to deny applicants a license.

On the right, the lobbying group ALEC (American Legislative Exchange Council), which has developed hundreds of pro-free-market model bills that state legislatures frequently adapt and enact, supports tighter restrictions on boards' ability to screen out applicants with criminal records.

ALEC added a "Collateral Consequences Reduction Act Model Legislation" to its war chest of proposed bills in 2017. Under the model bill, boards may only disqualify individuals from obtaining state recognition to practice a certain field if the criminal record includes a conviction for a

(See Discipline, page 6)

Regulatory Redesign

AZ governor orders boards to justify every licensing requirement

Issue: Deregulation of occupations

Arizona licensing boards were given just three months to justify all their licensing requirements, under a sweeping executive order that state governor Douglas Ducey issued March 29.

The Republican governor, who succeeded Jan Brewer in January 2015, alluded to right-to-work values in a statement accompanying the order: "Government should never stand in the way of someone's efforts to start a new life or profession."

In Executive Order 2017-03, Ducey mandated that state occupational licensing boards conduct a review of all licensing requirements and justify any found to be in excess of the national average for the particular

license, with specific reference to potential harm to individuals in the state of Arizona. For any fields in which 24 or fewer states require a license, the board is required to justify why the profession should be licensed in the state as well.

The order also required information on:

The Arizona boards specifically ordered to complete reports were those regulating accountancy, boxing and mixed martial arts, acupuncture, athletic training, barbers, behavioral health, chiropractors, cosmetology, dentistry, funeral directors and embalmers, homeopathic and integrated medicine, massage therapy, medicine, naturopathic physicians, nursing, nursing care institution administrators and assisted living facility managers, occupational therapy, dispensing opticians, optometry, osteopaths, pharmacy, physical therapy, podiatry, psychologists, respiratory care, technical fields, and veterinary medicine.

• **Criminal records' place in the screening of applicants** Boards were ordered to answer "whether applicants with a criminal record are barred from being licensed, for how long they are barred, and why the board believes the bar is necessary." The order stated: "If the board does not have a complete bar, but may use a criminal conviction to deny an applicant based on character, the board shall report how many applicants with criminal convictions were denied due to character concerns each year for the past five years."

• **Consent agreements** Boards were ordered to report the number of consent agreements entered into for each of the past five years, the total amount of fines and fees imposed under the agreements, and the ten most frequent violations resulting in a consent decree.

• **Timeframes for issuing of licenses** The average timeframe for approval for each type of license issued was also to be included in each board's report.

Ducey required the boards to produce the required information and submit it to his office by June 30, 2017.

Mississippi governor to control all licensing regulations

Issue: Deregulation of occupations

Mississippi legislators in April joined in a growing national trend to "regulate the regulators" in charge of professional licensing by establishing a powerful panel, to be led by the governor, that will vet any regulation proposed by a licensing board.

The purpose of the measure, House Bill 1425, signed by the governor April 11, is "to ensure that occupational licensing boards and board members avoid liability under federal antitrust law."

In line with the U.S. Supreme Court's 2015 ruling (*North Carolina State Board of Dental Examiners v. FTC*), that boards dominated by "active market participants" should be supervised, the new law sets up a panel to include the governor, attorney general, and secretary of state, or their respective designees, called the Occupational Licensing Review Commission. The panel will meet quarterly; the governor's office will provide research and clerical assistance.

Providing active supervision of any state occupational licensing boards controlled by "active market participants" is the purpose of the commission. (However, that supervision does not extend to individual disciplinary actions imposed by the boards.) All proposed regulations must be submitted to the commission before being filed with the secretary of state.

Also in the law is relatively novel language narrowing the definition of the "harm" against which occupational licensing is designed to protect consumers. The law now refers to "present, significant and substantiated harms that threaten public health and safety."

One loophole was included: the act does not apply to licensing boards that are not controlled by active market participants. Theoretically, this could mean that boards with a majority of public members could avoid the review provisions.

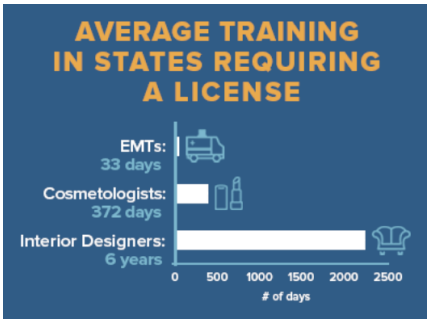
Federal File

Armed with new task force and website, FTC chair vows libertarian approach to occupational licensing

Issue: Deregulation of occupations

Maureen Ohlhausen, acting chair of the Federal Trade Commission, announced March 16 the creation of the Economic Liberty Task Force, which will identify "problematic licensing laws" and encourage state officials to review onerous licensing requirements.

The FTC's new "Economic Liberty" website features graphic displays of licensing requirements that the agency views as disproportionate.



Although the task force is mostly meant as an advisory resource for state officials, it will have the ability to take legal action against licensing boards engaged in anti-competitive behavior.

"I believe that economic liberty is central to opening doors of opportunity and increasing competition, entrepreneurship, and innovation that benefits all consumers," said Ohlhausen, who promised that the FTC will be partnering with governors, state attorney generals, state legislators and members of Congress. "We will be working to help them advance economic liberty initiatives that remove barriers to entry and competition," she said.

Ohlhausen is "particularly concerned that occupational licensing disproportionally affects those seeking to move up the lower and middle rungs of the economic ladder, as well as military families and veterans," she stated in a February speech.

"Occupational licensing regulations can prevent individuals from using their vocational skills and entering new professions, as well as starting small businesses or creating new business models."

A new website is part of the task force's agenda. "The FTC's Economic Liberty Task Force has moved quickly to create a website that will gather many existing resources, from the FTC and elsewhere, into a central repository for stakeholders. It will be a dynamic resource and will grow to incorporate additional work by the task force and others in this important area," Ohlhausen said. The website also presents selected examples of state initiatives by governors who have adopted the agency's goal of occupational licensing reform.

Congress could use federal funds to reduce occupational regulation

Issue: Federal support for deregulation of professions

Praising the "power of employment," two U.S. Senators and two U.S. House members introduced a bill called the New Hope and Opportunity Through the Power of Employment (HOPE) Act April 27. The bill aims to pare down states' "overly burdensome and unnecessary state licensing mandates."

The bipartisan measure (S. 945), introduced in the Senate, would amend the Perkins Career and Technical Education Act of 2006 to "authorize funds to identify and eliminate excessive occupational licensure." This provision would expand governors' access to money already allocated under the Perkins Act, giving them discretion to use the funds for reducing and eliminating what are considered unneeded regulations.

In Texas, said co-sponsor Rep. Henry Cuellar (D-TX), more than a quarter of workers require a license for their jobs. He points to an average $304 in fees, required testing, and training requirements that are costly, over-extensive, not shown to protect consumers, and intentionally designed to limit the number of people in a particular field.

Encouraging entrepreneurship and boosting opportunities for job creation were two of the reformist goals of the bill's sponsors. The bill and accompanying rationale employ language similar to that in model legislation promoted by the American Legislative Exchange Council since 2008. As a free-market lobbying group, ALEC supports reducing consumer protection and worker protection laws, as well as anti-union bills and other legislation to expand the labor pool, making the argument that such measures will increase job opportunities.

Scope of Practice

AG opinion: Physical therapists cannot perform dry needling

Issue: Resolving disputes over exclusive rights to practice

Facing a turf war in which practices that seem the same are labeled by different names, the attorney general of New Jersey in February issued an opinion holding that physical therapists' scope of practice does not include treatments that break the skin—specifically, the use of dry needling.

The opinion by AG Christopher Porrino was welcomed by acupuncturists, who have complained for several years that physical therapists are performing acupuncture when they conduct dry needling, and that they are not qualified to perform acupuncture.

The New Jersey State Board of Physical Therapy Examiners, which authorized physical therapists in the state to perform dry needling in 2009, disagrees with the decision. But the board said it would advise licensees to stop taking new dry-needling clients and to phase out existing practices in this treatment by December.

Both acupuncturists and physical therapists use similar needles (called "dry" because they are not employed for injecting substances). But acupuncture, based on traditional Chinese medicine, aims to stimulate or harness nerve impulses to reduce pain or address other conditions, while physical therapists say dry needling is focused on muscles.

Porrino's opinion stated that the physical therapy board did not have the authority to expand its scope of practice "so significantly" by including dry needling.

Title Protection

Hearing ordered to decide if "PsyA" title use deceives public

Issue: Rationales for barring use of particular titles

The Court of Appeals of Oregon, in an April 18 decision, reversed a board decision to discipline a psychologist associate for deceptive conduct and improperly holding himself out as a licensed psychologist.

The court ruled that the licensee's use of the phrase "PsyA" on his stationery and business cards could not be assumed to be deceptive conduct without a fact-finding hearing on the subject (*Wolff v. Board of Psychologist Examiners*).

Christian Wolf, a licensed psychologist associate, has a master of arts in psychology, but not a doctorate, and is authorized to engage in the limited practice of psychology in Oregon without immediate supervision.

In 2013, concerned that Wolff was nonetheless holding himself out as a licensed psychologist, the board began a disciplinary case against him on the grounds that he was improperly using title abbreviations and other signifiers on his business cards and other stationery, and in Internet forums.

Chief among the board concerns was Wolff's unorthodox use of the abbreviation "PsyA"; the phrase is not a recognized abbreviation in the field, the board asserted, and Wolff's use of the phrase was deceptive and unprofessional conduct.

The board also took issue with statements by Wolff that he possessed a "Master of Arts of Clinical Psychology" and that he had been "practicing" psychology for 15 years. "Practice," the board asserted, was reserved for use only by those who have a doctorate in the field, and Wolff's use of the phrase falsely represented himself as a practicing psychologist without his being properly licensed.

For his part, Wolff noted that, although he did use the phrases in question, he always followed the "PsyA" abbreviation with a statement that he was a psychologist associate, that he did possess a master's degree with an emphasis on clinical psychology, and that, under Oregon law, he was authorized to "practice" psychology, although to a limited extent. None of his actions, Wolff claimed, were fraudulent or amounted to representing himself as a licensed psychologist.

After a hearing in which an administrative law judge granted the board summary judgment on the question of whether Wolff's use of the terms was deceptive, saying there was no genuine disagreement of the facts in the case, the board suspended Wolff's license for one year and imposed a $10,000 penalty. Wolff appealed.

In his appeal, Wolff argued that the administrative law judge was wrong to grant summary judgment to the board on the grounds that no material disagreements of fact existed between the parties, and the court agreed, reversing the board's decision and remanding the case down for further consideration.

A factual finding was required that Wolff's statements would have misled the public, and a reasonable fact-finder could have found that those statements were not deceptive. By not holding a hearing, the ALJ had improperly truncated the

case. "Viewing the evidence in the light most favorable to petitioner," wrote Judge Darleen Ortega, "there remained genuine issues of material fact as to whether petitioner's use of 'PsyA,' 'Master of Arts Clinical Psychology,' and 'practicing psychology' was misleading or deceiving to the public . . . Based on the summary determination record, we conclude that that was a disputed issue of material fact, which was inappropriate to resolve at the summary determination stage of the proceedings."

The board's decision was reversed and the case was remanded to the board.

Discipline

Policy groups concur on easing criminal record queries *(from page 1)*

State Scorecard

In its 2016 report, the National Employment Law Project graded 40 overall state licensing laws including the District of Columbia that to some degree restrict occupational licensing boards' consideration of criminal records. The results:

Most effective: Minnesota

Satisfactory: Connecticut, Hawaii, Maine, New Hampshire, New Jersey

Needs Improvement: Arkansas, California, Colorado, New Mexico, New York, North Dakota

Minimal: District of Columbia, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Missouri, Montana, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, Washington, Wisconsin.

Unsatisfactory: Arizona, Delaware, Florida, Georgia Kentucky, Louisiana, Rhode Island, South Carolina, Utah, Vermont.

felony or violent misdemeanor, the type of crime is expressly codified in the statute as a disqualifying offense, and "the board concludes the state has an important interest in protecting public safety that is superior to the individual's right."

In addition, if a potential candidate petitions the board for entry to the occupation, the ALEC model bill would require the board to supply clear and convincing evidence that, based on the person's record, the person is "more likely to re-offend by virtue of having the license than if the individual did not have the license," and a re-offense would cause greater harm than barring the person from licensure.

The National Employment Law Project (NELP), a New York-based policy analysis organization, is also calling for called for easing of state licensing entry standards that prevent people with criminal records from qualifying for entry to various occupations—but for different reasons than ALEC's.

NELP is concerned that U.S. criminal justice policy has resulted in nearly one in three U.S. adults having a record—creating a major barrier to their participation in the labor market and lifelong consequences that are devastating to many. In the belief that lifting state occupational licensing barriers can help remedy this problem, NELP supports fairer and more consistently applied licensing laws.

NELP's 2016 report *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People With Records* outlines the landscape of barriers created by blanket bans, overly broad criminal record inquiries, a lack of transparency and predictability in the licensure decision-making process, and confusion caused by a "labyrinth of different restrictions."

In evaluating 40 states' licensing laws, NELP considered four criteria: whether the law prohibits blanket rejection of applicants with conviction histories; whether

The National Employment Law Project recommends ten policy changes to reform criminal-record inquiries:

1. Remove automatic blanket bans from state laws.
2. Limit scope of criminal record inquiry for state license applicants.
3. Require examining whether a conviction is occupation-related and how long ago it occurred.
4. Require consideration of applicants' rehabilitation and mitigating circumstances.
5. Provide notice and a fair hearing to applicants who are disqualified.
6. Eliminate self-reporting in the application process and "ban the box" from the applications.
7. Remove vague "good moral character" or "moral turpitude standards.
8. Evaluate states' occupational licensing restrictions and reform to admit qualified applicants with records.
9. Provide clear guidance to license applications about potential disqualification.
10. Adopt overarching state laws on criminal records that supersede individual licensing laws.

the law incorporates "EEOC factors"—which include considering whether a conviction is occupation-related and how much time has passed since the conviction—whether the law limits the scope of record inquiry or the consideration of certain types of record information, and whether the law requires consideration of rehabilitation.

How frequent are blanket bans that automatically disqualify people with certain records from licensure? The American Bar Association, along with the U.S. Department of Justice, maintains an inventory of licensing law provisions against people with a record that documents 27,254 state occupational licensing restrictions in 2015. (*See* https://lawlibrary.blogs.pace.edu/2015/03/10/searchable-inventory-for-collateral-consequences-of-convictions/.)

These restrictions included 12,000 for individuals with any type of felony, 6,000 based on misdemeanors, more than 19,000 permanent disqualifications, and more than 11,000 mandatory disqualifications.

Confusing stipulation order may invalidate immunity of board

Issue: Clarity of wording in official orders

A federal court in Colorado issued a decision March 17 allowing a suit brought by a nurse against the state's nursing board to continue on the grounds that the stipulation order she signed was confusingly titled. The court said this fact raised the possibility that she signed the document under duress and that the board had violated her constitutional right to due process (*Tavernier v. Colorado State Board of Nursing*).

Carol Tavernier, the nurse at the center of the case, was employed at a hospice center in Colorado Springs. As a result of her heavy caseload, she claims, she was frequently behind on keeping up patient charts. After a 2013 audit uncovered several deficiencies in Tavernier's chart work, the hospice fired her and filed a complaint with Colorado's nursing board.

As a result of the complaint, the board ordered Tavernier to undergo mental and neuropsychological testing, and she was eventually diagnosed with "Other Specified Neurodevelopmental Disorder."

The board then moved to discipline Tavernier on the grounds that she had a disability that would prevent her from practicing safely and it proposed a stipulation agreement under which she would be placed on a two-year probation restricting her areas of practice and be subject to a practice monitor.

Tavernier, apparently under the mistaken impression that the board had already made a final decision in her case and that she had no option to keep her license except to agree to the proposed stipulation, signed the document and returned it to the board, which then posted the discipline—including a statement that Tavernier suffered from a mental disability—on its website.

Tavernier later testified that she disagreed with the allegation that she suffered from a disability and did not understand that she would be agreeing to that assessment by signing the stipulation.

In 2016, Tavernier filed suit against the board, alleging violations of the Americans with Disabilities Act and the publishing of false information about her on its website. Tavernier's suit claimed that she had not voluntarily and knowingly enter into the stipulation agreement with the board, essentially arguing that its language was confusing and led her to believe that she had no choice.

In their defense, the board defendants claimed various types of immunity from suit, not all of which were successful. Judge Scott Varholak agreed that the stipulation letter—which was titled "Stipulation and Final Agency Order"—had the potential to be confusing, raising the possibility that Tavernier could have signed the order under duress, especially given that her earlier diagnosis noted that she suffered from a neurodevelopmental disorder.

Thus, Tavernier had alleged enough facts to raise the question of whether the board had violated her constitutional rights to due process, which would invalidate the board's claim to sovereign immunity, a type of immunity afforded to states under the Eleventh Amendment that protects them from suit unless they have waived that protection, but that makes an exception for constitutional violations.

The board member defendants also claimed they were protected from suit by quasi-judicial immunity, which is afforded to non-judges acting in a judicial capacity. Judge Varholak agreed: the functions of the board members were "functionally comparable" to those of judges, he wrote, and the same rationale that protects members of the judiciary also applies to board members.

Accordingly, he dismissed the claims against the individual defendants, but allowed Tavernier's suit seeking to overturn the effects of her to continue against the board.

Without hearing, board must give written reason for sanction decision

Issue: Specifying rationales for disciplinary sanctions

A state appellate court in Kentucky upheld a decision by the state board for engineering and land surveying not to hold further hearings on the degree of sanction to be imposed on a licensee after the case was remanded to the board by the Kentucky Supreme Court (*Kentucky State Board of Licensure for Professional Engineers and Land Surveyors v. Curd*).

However, the court held in its March 31 ruling that the board was nevertheless at fault for failing to provide a written rationale for the sanction it chose. The court remanded the case to the board for a third time to supply the missing rationale.

The board prosecuted licensee Joseph Curd, Jr., for giving misleading testimony while engaged as an expert witness during a trial. Following a hearing, the board suspended his license for six months.

Curd appealed and met with some success at a state circuit court, which found the statutes underpinning the board's discipline decision to be unconstitutionally vague in his case, and held that the board should not engage in the policing of expert testimony except in extraordinary circumstances.

Both the board and Curd appealed aspects of that decision and eventually the case reached the Kentucky Supreme Court, which agreed that one challenged regulation was unconstitutionally vague and faulted the board for not adequately explaining how it settled on a sanction for Curd. The court remanded the case to the board to reconsider Curd's discipline.

On remand, the board, believing that the Supreme Court's remand did not require it to hold any further hearings in the case, denied Curd's request to that effect. Then it re-issued the six-month suspension of Curd's license, making no specific findings as to why it settled on that penalty.

Curd appealed again, and again a circuit court held in his favor, ruling that the board was required to hold another hearing on remand for the consideration of the sanctions. The board appealed that decision, and the case went back to the Court of Appeals of Kentucky, which issued a decision on March 31.

The Court of Appeals agreed with the board on the issue of a hearing. Procedural due process, wrote Judge Janet Stumbo, simply requires that an affected party be given the opportunity to be heard at a meaningful time and in a meaningful manner and, because Curd had already been afforded a hearing during the initial disciplinary process, he had already been afforded that level of process.

Further, the state Supreme Court had only remanded the case for reconsideration of the sanction, and had said nothing about requiring a new hearing.

However, the failure of the board to provide a written rationale for its decision to issue Curd a six-month suspension caused the court to ultimately reverse the decision and remand the case back to the board for a third time.

"The Supreme Court remanded the case to the Board in part because 'it did not provide insight into how the sanction was apportioned among the various violations found,'" the judge added.

"We believe the Court was requiring the Board, on remand, to make findings detailing the appropriateness of whatever penalty was decided upon. The Board did not do so; therefore, on remand, it must remedy this deficiency."

Complaint tracking failure exposed patients to licensees accused of sexual misconduct

Because complaints against licensees of the Maryland Board of Professional Counselors and Therapists were not properly tracked, some therapists accused of sexual misconduct continued to see patients, the Maryland legislature's Office of Legislative Audits said in an April report. The board regulates 7,800 active licensees.

The auditors found that complaint logs were incomplete and the required referrals to the attorney general's office (OAG) in some cases were not made. For example, three complaints of alleged unlicensed practice, unprofessional conduct, and lack of supervision were at least ten months and possibly two years late in being referred. In the case of two other complaints, the recommended investigation was still not complete after three years.

Four complaints, two of them for sexual misconduct, were submitted to OAG between six months and one year after the board recommended the administrative action, including license revocation, be taken.

The source of the problem, the auditor found: the board was not aware of the delays because it did not periodically review the complaints recorded on the log that tracks steps in the complaint process.

The board told auditors that the referral delays were an oversight due to staffing issues and lack of enough digital storage media such as compact discs to transfer the complaint files to the state attorney general. generals' office. The auditors found this excuse unpersuasive: "Having enough digital storage media does not appear to be a valid reason for not forwarding complaints to OAG more timely."

Board members immune in malicious prosecution case

Issue: Board member immunity under Eleventh Amendment

An appellate court in Michigan dismissed malicious prosecution claims against members of the state chiropractic board by a chiropractor whose discipline was overturned as legally unsound (*Serven v. Health Quest Chiropractic*). The April 6 decision by the state Court of Appeals overturned a decision by a lower court, which had held that the board members were not entitled to immunity.

The case began in 2006, when Health Quest Chiropractic, a clinic whose co-owner, Solomon Cogan, was also chairman of Michigan's chiropractic licensing board, provided services to a patient injured in an auto accident.

State Farm, the insurance company paying for these chiropractic services, retained chiropractor Bruce Serven to perform an independent examination of the patient; after the exam, Serven reported that the patient was not suffering from any injury or condition related to the accident, that no further chiropractic treatment was needed, and that Health Quest's treatments of the patient had been medically unnecessary.

Based on that report, State Farm denied further payment to Health Quest, a decision that elicited a lawsuit from the clinic. State Farm prevailed at the following trial, in which Serven testified adversely against Cogan and the clinic.

Following the trial, Silvio Cozzetto, Health Quest's other co-owner, filed a complaint against Serven, alleging that Serven performed his chiropractic tests improperly and failed to properly consult existing medical records for his patients, leading to faulty results which caused the termination of insurance benefits.

The state's attorney general then filed a discipline complaint against Serven, alleging negligence, a lack of good moral character, and "a track record of performing unnecessary treatment." Eventually, at a meeting in which Cogan was present, the chiropractic board placed Serven's license on a one-year probation.

Serven successfully appealed the decision; the Court of Appeals of Michigan held that the decision of the board's disciplinary committee was "legally unsound" and reversed and remanded the case with instructions to expunge his record.

After the outcome of his disciplinary case, Serven filed a lawsuit against Cogan and two other board members, claiming malicious prosecution, abuse of process, improper interference with his business relationships, and violations of his rights to due process and equal protection.

When a state circuit court denied the board defendants' claims of immunity and allowed the interference and abuse of process claims to continue, the board defendants appealed to the Court of Appeals.

In their response to the suit, the board defendants argued that their actions in Serven's case were protected from liability by quasi-judicial immunity, a type of immunity afforded to non-judges acting in a judicial capacity.

Although the appeals court noted that the existing procedural safeguards had failed in Serven's case—Cogan, an equity partner in the clinic, "should have played absolutely no role in the decision," the judges noted—it likened the board's disciplinary committee to a "judge who renders a final decision" and noted that "absolute immunity does not fall away even when the judicial or quasi-judicial official acts maliciously or corruptly."

The lower court had based its decision to deny immunity to the board members on an analogy to *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, a 2015 Supreme Court case that stripped a type of limited immunity from licensing board members under federal antitrust law.

The appeals court rejected that approach; the specifics of antitrust law controlled the decision in that case, the judges explained, and it was not applicable to Serven's situation.

Although the seeming level of impunity for malicious disciplinary actions appeared troubling, the judges noted the existence of "internal governmental mechanisms for handling . . . alleged misconduct." Serven, they wrote, could have filed a complaint with Michigan's State Board of Ethics, but he had not done so. The board members were entitled to absolute quasi-judicial immunity, the court concluded; it remanded the case to the lower court to rule accordingly.

Court remands discipline order over reference to dropped charge

Issue: Admissible evidence in imposition of discipline

The Commonwealth Court of Pennsylvania, in an April 20 decision, overturned a decision by the state nursing board to suspend the license of a nurse who improperly used her patient's checkbook, after the board cited a non-existent conviction for jewelry theft while determining the nurse's punishment (*Freeman v. Bureau of Professional and Occupational Affairs*).

Mardea Freeman, licensed as a nurse in Pennsylvania since 2013, was criminally charged with theft from a Home Depot in December 2013, then arrested in April 2014 for stealing jewelry and using the checkbook of a patient at a nursing home where she was employed.

She was admitted to a rehabilitation program for her first offense but convicted of a misdemeanor for using the checkbook and prohibited by the trial court from employment caring for senior citizens. The charge that she stole jewelry from the patient was dropped.

When Freeman renewed her nursing license in March of 2014, she affirmatively but falsely denied that she had been convicted of a crime or placed in a rehabilitation program.

One year later, the state nursing board took action against Freeman, bringing charges related to her convictions from her thefts from the hardware store and her patient, and for failing to mention those convictions on her renewal application.

During her hearing, Freeman testified about a series of difficulties in her personal life which she hoped would mitigate her offenses, including an abusive relationship and two years she spent living in a shelter—where she studied to become a nurse—and her life raising her young son and working long hours to make ends meet because her husband was incarcerated.

Court voids board order made while case still on appeal

A Texas appellate court issued an unusual decision voiding a board order made while the board did not actually have control of the case, in a March 15 decision (*Dass v. Texas Board of Professional Engineers*).

After engineer Raghunath Dass's license was suspended in 2012 for violations of a board order regarding the use of an engineering seal, Dass appealed. A circuit court struck some of the board's finding and remanded the case, but Dass again appealed, this time to the Court of Appeals of Texas. Despite the pendency of that appeal, the board went ahead with the remand, eliminated the findings faulted by the circuit court, and issued an amended order.

Dass then dropped his appeal of the circuit court judgment on the grounds that the amended board order had made his objections moot, but filed a separate appeal of the new amended order. That appeal eventually reached the Court of Appeals.

The procedural problem was that the remanded order was issued while Dass's appeal was still pending before the Court of Appeals. At that point, the court had possession of the case and the board had no power to issue a decision. Because of that, the amended order was void. And, because the amended order was void, there was no existing board decision that the court could review.

"Having held that the Board's amended order is void because the Board lacked jurisdiction to modify its original order while that order was on appeal, and thus, that the district court and this Court lack jurisdiction to review the merits of the amended order, we vacate both the Board's order and the district court's summary judgment and dismiss the case," the court ruled.

At the conclusion of the hearing process, the board, moved alternately by the circumstances of Freeman's life and the seriousness of the offense of theft from an infirm patient, suspended Freeman's license for six months.

Although it would normally revoke a license for an offense like Freeman's, the board noted, it cited the "significant mitigation . . . given the instability [Freeman] faced in her life and the fear that must have generated." The board suspended Freeman's license for three years, but stayed all but six months, with the rest to be served in probation. Freeman appealed.

In her appeal, Freeman argued that the board violated her right to due process by relying on unsubstantiated facts when it decided her sanction, and that it had improperly weighed her mitigation evidence against the seriousness of her misconduct.

Her most significant argument on the first point was that the board, while determining the amount of sanction it would place on Freeman's license, referred to a conviction for the theft of jewelry from her patient, even though that charge had been dropped.

The court agreed with Freeman on this point, holding that the citation of the board to Freeman's conviction of jewelry theft was not supported by the evidentiary record in her discipline case, and noted that it was possible the board's incorrect recognition of the theft may have influenced the severity of Freeman's discipline. "

Here, we do not know the extent to which the Board's decision to increase Freeman's sanction was influenced by its stated and erroneous belief that her criminal conviction included stealing jewelry," wrote Judge Mary Leavitt.

Given this error, the court vacated the board's order and remanded the case to the board to impose a new sanction based on the evidentiary record.

Entry Requirements

Applicant trained online loses appeal of license denial

Issue: Establishing equivalency of online programs for training

The Court of Appeals of Georgia, in a March 16 decision, upheld the state psychology board's denial of a waiver to a licensure applicant, who argued that the significant amount of face-to-face time she spent with her school's faculty and the substantial difficulties she would face entitled her to a waiver of state licensure requirements against non-residency education programs (*Welcker v. Georgia Board of Examiners and Psychologists*).

When Joy Welcker applied for a Georgia psychologist license after obtaining a doctorate from an online-only school, the psychology board denied her application on the grounds that all applicants must have resided full-time at a school for at least one continuous year during their studies, a requirement that would prohibit all graduates from online-only institutions.

Welcker asked for an interview with the board and filed a waiver request for the residency requirement, but the board denied both. Welcker appealed, but a trial court declined to address the denial of her application, ruling that it was not a contested case as required under Georgia's Administrative Procedure Act.

In her appeal, Welcker argued that the trial court had erred when it declined to review the denial of her application without a hearing. The Court of Appeals disagreed. Under Georgia law, the board is authorized to deny a license, without hearing, to any applicants who fail to show that they have met the qualifications for licensure.

Without the right to a hearing, wrote Judge Carla McMillian, the denial of a license cannot be termed as a "contested case" under the law, and was thus not reviewable by the lower court.

Welcker also challenged the board's denial of her waiver request. To qualify for a waiver of a psychology licensure requirement in Georgia, an applicant must show that the purpose of the statute underlying the requirement was achieved by other means and that strict application of the rule would result in a substantial hardship to the applicant.

Although she could not strictly meet the continuous residency requirement, she conceded, Welcker argued that she had met the purpose of the residency rule. She had accumulated over 1,000 hours of face-to-face hours with her program's faculty over the years of her studies. This, she argued, met the purpose of the rule and entitled her to a waiver.

The court disagreed. The requirement, Judge Carla McMillian wrote, contemplated a continuous, in-person residency, and the accumulation of hours over an entire course of study did not meet that requirement, either in the letter of the law or in its purpose, which was to "facilitate acculturation in the profession" through real-life contact.

In denying her waiver, the board also rejected Welcker's contention that the decision would cause a substantial hardship for her. Although the denial of a waiver did appear to place a significant burden on Welcker, forcing her to leave her home state or begin her professional education all over again, the court held that, according to a reading of the rules implementing the waiver, "substantial hardships" would apply only to applicants who are already practicing, not new applicants.

So, despite the actual hardships the requirement would seemingly place on her, Welcker did not qualify to have those hardships considered by the board.

"The term 'substantial hardship' in this context 'means a significant, unique, and demonstrable economic, technological, legal, or other type of hardship to the person requesting a variance or waiver which impairs the ability of the person *to continue* to function in the regulated practice or business," wrote Judge McMillian .

"The Board asserts that because Welcker has not received a license to practice psychology, she cannot establish that the denial of a waiver would impair her ability to continue to function in that profession. Such an interpretation is supported by a plain reading of the verb 'to continue' and we cannot ignore the plain language of the statute."

Online-school grad loses bid to sit for licensing exam

Issue: Candidate eligibility to take licensing examination

A student who graduated from an online law school but was denied the opportunity to sit for the West Virginia bar exam lost an appeal of the decision in which he claimed that the bar examiners had violated his constitutional right to equal protection by denying students of internet-based schools from sitting for the exam (*Antion v. Board of Law Examiners*).

The Supreme Court of West Virginia, in the April 7 decision, ultimately decided that the student was differently situated from students who graduated from traditional law schools and was not subject to equal protection in the matter.

Robert Antion graduated from Concord School of Law, an online school that is not accredited by the American Bar Association (ABA). When he applied to take the West Virginia bar exam, the state board of law examiners denied his request on the grounds that he did not meet the education requirements. West Virginia bar rules prohibit candidates who graduate from non-ABA schools if more than half of the classes are internet-based.

Antion appealed the denial, arguing that the rules—which seem to categorically deny Internet-based legal education in West Virginia without regard to the actual quality of the program—were in violation of the state constitution's Equal Protection guarantees. There was no rational basis to discriminate between the quality of the internet-based education he received at Concord and a more traditional law school, he argued.

The court did not agree, rejecting Antion's equal protection claim. Turning away from the question of whether internet-based programs could be of similar quality to traditional schools, the justices noted that the key fact in the case was that Concord was not an ABA-accredited school.

The rule prohibiting Internet-based programs, they wrote, was part of a set that determined which students from non-ABA-accredited schools could sit for the exam. Antion, the justices wrote, "who was educated online, is not similarly situated to applicants who were educated at ABA-accredited law schools."

Because he was differently situated from other students, the state bar rules were not violating Antion's right to equal protection by treating him differently from those other students.

Testing

National exam administrator not required to provide due process

Issue: Duties applicable to private testing agencies

A federal court in New York, in a March 3 decision, dismissed several claims filed by a funeral director against the International Conference of Funeral Service Examining Boards. The suit stemmed from the Conference's denial of his request to forward his test scores to a state licensing agency, without providing him the opportunity to contest its decision (*Fox v. International Conference of Funeral Service Examining Boards*).

The conference had denied the request on the grounds that the funeral director had shared information about its exam questions with others.

The Conference is an organization comprised of U.S. and Canadian funeral service regulatory boards, with the purpose of administering licensing exams, including the National Board Exam (NBE), the basic licensing exam for funeral directors in many states.

Trent Fox, the funeral director who filed the suit, took and passed the NBE for a license in New York, assenting to language—which was displayed in writing within the testing program—promising he would not disclose any part of the test to others, a familiar sight to anyone taking an institutional exam.

Despite that language, some time after taking the exam, Fox seems to have shared information regarding the test questions with faculty from the American Academy McAllister Institute of Funeral Service, the school that Fox had attended while studying for his license.

When Fox decided to pursue an additional license in Missouri, he asked the Conference to send his NBE scores to that's state funeral service licensing agency, but the Conference denied that request and sent him a letter requesting a response to evidence—in the form of emails—it possessed showing he had participated in the sharing of items from the exam.

The emails were uncovered during a lawsuit against the Academy, which alleged that the Institute had disseminated exam questions amongst its students. Following the letter, the Conference invalidated Fox's scores, barred him from retaking the test for five years, and fined him $500.

In response, Fox sued the Conference, arguing that, because the organization fulfilled the public function—delegated by the states—of administering licensing exams, and because it was comprised of government regulatory agencies, it owed him the same due process on any invalidation of his scores that would be required of a government agency.

By allowing the Conference to set policy in a number of areas—developing the exam and the rules by which applicants may take it, assessing costs and fees to applicants, deciding who may take the exam, and acting as the final decision maker on violations of Conference rules—New York State had adopted those policies as its own, Fox argued.

Unfortunately for Fox, Judge Kenneth Karas noted that the "overwhelming weight of authority" holds that private entities administering examinations for the states are not state actors. Further, the Conference's "only role in the licensing process is the administration of the NBE," wrote Judge Karas, and it does not have power over Fox's actual license, nor can it set standards for licensure.

Although the Conference disciplined Fox by withholding its scores, that discipline was not derived from any state authority, as the NBE's administration was separate from state licensing regulation. "While the invalidation of Plaintiff's NBE scores and the ban on retaking the NBE might result in Plaintiff not receiving a license in Missouri, that decision will be made by the State of Missouri, not the Conference."

Although Fox tried to draw a distinction between the Conference and other exam administrators on the grounds that the conference was entirely comprised of state and provincial governmental agencies, Judge Karas pointed to Supreme Court precedent holding that supra-state organizations—even when comprised of state actors—are not subject to the authority of any one state and are thus not engaged in state action.

Fox also argued that the agreement he made not to disclose the contents of the test—supplied and agreed to in the minutes before he began the exam—was a procedurally unconscionable agreement, as he had very little time to consider the terms and because his ability to pursue a funeral director license was contingent on his assent.

However, Judge Karas noted that the *substantive* terms of the agreement were not unreasonable; such agreements were standard when an entity like the Conference was about to disclose copyrighted material and where exposure of the questions will provide applicants with unfair advantage on the exam.

Judge Karas dismissed all but one claim filed by Fox, leaving only a breach of contract claim, which he asked the parties to prepare to discuss.

Dentists to offer national alternative to use of live-patient exam

Issue: Appropriate methods for testing of clinical skills

Addressing a long-simmering controversy over the required use of live patients to test the skills of candidates for dental licensure, the American Dental Association (ADA) governing board voted in February to approve development of an objective clinical examination (OSCE).

The ADA announced several years ago that it supported elimination of patients from the dental licensure examination process, but it has now taken a stronger position on the issue by committing to developing an objective national exam. Other health sciences fields —including medicine, nursing, optometry, and physical therapy—currently use such an exam to test clinical skills.

Some states—Minnesota, for example—already accept the National Dental Examining Board of Canada's test, also considered an objective clinical examination, to qualify licensure candidates. That exam has candidates rotate through various stations and answer extended multiple-choice questions using simulated clinical scenarios and patient situations.

The ADA Board of Trustees directed that a pilot of the OSCE be available in 2019, with the examination to be officially deployed in 2020.

Professional Licensing Report is published bimonthly by **ProForum**, a non-profit organization conducting research and communications on public policy, 9425 35th Ave NE, Suite E, Seattle WA 98115. Telephone: 206-526-5336. Fax: 206-526-5340. E-mail: plrnet@earthlink.net Website: professionallicensingreport.org Editor: Anne Paxton. Associate Editor: Kai Hiatt. ISSN 1043-2051. Listed, Legal Newsletters in Print.

Subscriptions, which include both printed and PDF copies of each issue, are $198 per year, $372 for two years, $540 for three years, $696 for four years. Online access to PLR content is included in the subscription price; online-only subscriptions are $179 per year. Additional print subscriptions for individuals (within the same physical office or board only) are $40 each per year and include a license to distribute a PDF copy to a single recipient. Licenses to distribute extra PDF copies only, to individuals within the same physical office or state licensing board, are $15 per recipient per year.