Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Federal File

Court may not order board to delete discipline from databank during appeal

Issue: Federal vs. state tracking of disciplinary actions

A state court in Alabama overturned a lower court's decision ordering the state's pharmacy board to remove information from the National Practitioners Data Bank during the pendency of a disciplinary appeal.

The board had a mandatory duty to report disciplinary actions to the Data Bank, regardless of whether a licensee appeals, the court found October 27 (*Ex Parte Alabama State Board of Pharmacy*).

In 2016, the board suspended pharmacist Demetrius Parks's personal license and those of two pharmacies owned by her for five years. Parks appealed, asking the reviewing court to stay the board's decision while the judicial review was pending. Although the court granted that request subject to conditions prohibiting Parks from dispensing controlled drugs,

(See Federal File, page 13)

Discipline

Pardon of underlying crime does not excuse unlicensed practice, court rules

Issue: Nexus between criminal conduct and licensing status

A nurse whose license was revoked after she engaged in unlicensed practice during a suspension for an earlier drug conviction was not entitled to relief from her revocation. Regardless of her pardon, she could not be excused from engaging in unlicensed practice, the Superior Court of Delaware held September 8 (*Michael v. Delaware Board of Nursing*).

In 2008, nurse Maia Michael illegally used a Drug Enforcement Agency number to impersonate a physician and order a Xanax prescription for herself, an action which eventually led her to plead guilty to a criminal charge of obtaining a controlled substance by deception. The Delaware nursing board then took up her case and, following disciplinary hearings, declared Michael unfit to practice, suspending her nursing licenses for five years.

Despite the suspension, Michael continued to practice as a nurse. This resulted in a second disciplinary action that ended with the permanent revocation of Michael's licenses in 2013.

Then, in a final twist, Delaware Governor Jack Markell issued a full pardon for Michael's criminal conviction in 2015. She then applied to the board for reinstatement, but the board denied the application on the grounds that the permanent revocation of Michael's license meant that it could not be reinstated, regardless of the pardon. Michael appealed the decision, and the case went up to the Superior Court of Delaware.

On appeal, Michael argued that the pardon of the underlying criminal conviction for which she was first disciplined had the effect of nullifying the entirety of the disciplinary process against her, including her second sanction for practicing with a suspended license. Michael argued that, as a result of the pardon, her earlier conviction should be treated as if the conviction had never occurred.

Michael's arguments were not successful. Hearing the case, Judge Jan Jurden noted that, under Delaware law, a pardon forgives, but does not erase, guilt. Thus, a pardoned conviction could still be used as the basis for professional discipline.

Further, although Michael's conviction formed part of the stated reason for suspending her license, the board made its own independent findings regarding the underlying conduct for that conviction, and the more important disciplinary action—the revocation of her license—was imposed by the board because Michael had practiced without a license.

"Michael's decision to practice nursing without a license," Judge Jurden wrote, "is entirely separate from her conviction, and her pardon." The court upheld the revocation.

Okay to revoke therapist's license for single DUI, court rules

Issue: Nexus between DUI conviction and licensing status

The state's physical therapy board was within its authority to discipline a physical therapist for a single conviction for intoxicated driving, a California appeals court held October 16. The court noted that the state's legislature has explicitly stated that a single criminal instance of dangerous consumption of alcohol is sufficiently related to a medical professional's practice as to warrant discipline (*Walker v. Physical Therapy Board of California*).

In 2011, physical therapist Grace Walker got into a minor car accident while under the influence of alcohol and then drove away from the scene. Walker later pled guilty to a misdemeanor hit-and-run—a fact that led the board to bring disciplinary charges against her.

After a hearing, the board issued a stayed revocation of her license and placed her on probation on the grounds that she had been convicted of a crime related to her practice and engaged in dangerous consumption of alcohol.

Walker appealed and, although a court found that her conviction was not sufficiently related to her practice to warrant discipline, it also held that Walker had used alcohol in a dangerous manner and upheld the board's disciplinary order.

On appeal, Walker argued that, under the physical therapy statutes, a finding that she had used alcohol in a dangerous manner was insufficient cause for the board to impose discipline without a finding that the consumption was also related to her practice.

The court disagreed. Justice Terry O'Rourke first noted that California's Medical Practice Act explicitly states that the dangerous use of alcohol is related to the qualifications of practitioners, and both the physical therapy board and the state legislature have applied the Medical Practice Act to physical therapists.

"In doing so, the Legislature made an implied finding that the use of alcohol in a dangerous manner is sufficiently related to a physical therapist's fitness to practice his or her profession to justify the suspension or revocation of his or her license," wrote Justice Terry O'Rourke.

Although the lower court had held that no evidence existed showing that Walker's consumption of alcohol had affected her practice, it had correctly "concluded that the Board was not required to make a separate nexus finding" that would have made that connection, Justice O'Rourke wrote.

Citing older cases, Justice O'Rourke wrote that existing California precedent "supports the conclusion that the use of alcohol in a dangerous manner—or conduct resulting in alcohol-related conviction—meets the constitutional nexus requirement because the Legislature has appropriately determined it is unprofessional conduct logically related to the fitness of an individual to treat patients."

Although Walker argued that cases concerning nurses and physicians—such as those cited by the court—were not relevant to her case "because nurses are more directly responsible for the health and welfare of their patients," Justice O'Rourke rejected that reasoning, again citing the clear language of the state legislature in applying the dangerous-alcohol-conduct provision to physical therapists. The justice also rejected an argument by Walker that physical therapists could only be disciplined for habitual alcohol use; that decision was based, again, on the explicit language of the statute.

The court affirmed the disciplinary decision and dismissed the case.

Board not obliged to give license status to prospective employers

Issue: Affirmative duty of board to report licensing status to employers

An appellate court in California, in an October 13 decision, rejected a suit by a physician seeking both to void his license probation and to claim damages from an alleged failure by the state's medical board to communicate with a hospital who, seeking to employ the physician, had enquired with the board whether that probation restricted the physician's license (*Moores v. Medical Board of California, Division of Medical Quality*).

In making the decision, the court held that the board had no affirmative duty to communicate licensing status to prospective employers.

In response to concerns about the quality of his work, William Moores was fired from his employment as a surgeon in 1999. A board disciplinary process followed two years later, with the board charging Moores with negligence and incompetence involving eight patients, after which Moores entered into a stipulated settlement with the board, accepting a five-year probation.

According to the settlement, that probation would be tolled if he was not actively practicing medicine and, in November 2001, Moores sent a letter to the board informing them that he was, in fact, stopping his practice.

In 2003, after being informed by the board that his probation had been tolled since the board received his letter in 2001, Moores wrote a letter contesting the decision.

He declared that he had been engaged in seeing five to ten patients per month on an unpaid basis, although a few of the instances cited by Moores as evidence seemed to be only casual encounters in which he dispensed informal medical advice outside of a clinical setting, such as telling a man he met in a copy store to take Motrin for knee problems. The board confirmed his un-tolled status, holding that his described activities did not constitute the practice of medicine.

When Moores applied for work with the Department of Veterans Affairs in San Diego in 2005, the medical staff coordinator there sent the board a letter asking whether Moores had complied with the terms of his probation and if the position it was offering him was consistent with that probation.

The board did not provide a written response to the department, although the medical coordinator did speak to board employees over the phone, and was informed by a board employee that she would have to consult the board's website for the information. The Department subsequently decided that Moores's license was restricted while he was under probation and that it could not hire him.

Moores continued to send letters to the board declaring that he was treating patients for no compensation until 2011, when he filed a petition with the medical board for the termination of his probation. The board denied the petition in 2013 after a hearing that Moores declined to attend.

In 2012, Moores filed suit against the board, alleging both that the board improperly tolled his probation and that it failed a mandatory duty to report his licensing status to the Department of Veterans Affairs. The case eventually went up to a state Court of Appeals, which issued a decision October 13.

The court rejected Moores's complaint that the board had improperly tolled his probation, ruling that he had improperly filed suit against the board instead of seeking a writ of mandate forcing the board to act, as is required under California law.

Although Moores argued that a writ was not required where a plaintiff was seeking monetary damage for a board's failure to adhere to a settlement, Justice Robert Dondero, writing for the court, noted that, despite that reframing of the issue, "the ultimate fact [Moores] seeks to prove is that the board has acted contrary to law in continuing to restrict his license by tolling his probation."

The court also rejected Moores's second claim that the board failed a mandatory duty to provide information on his licensing status to the Department of Veterans Affairs, holding that the board had no duty to respond to physicians' potential employers.

Although California law requires the board to disclose specific information regarding negative license actions to inquiring members of the public, in order to sue the board for that failure, Moores also had to prove that his injury from the violation of those laws was one of the consequences that the state's legislature had intended to prevent by enacting it.

He was unable to make such a case. "Our research has not disclosed any case law suggesting that the purpose of [the disclosure law] is to assist physicians in their efforts to obtain employment," wrote Justice Dondero. From prior case history, Justice Dondero concluded, the disclosure law instead seems to have been intended to protect consumers and to protect physicians from the release of information unrelated to their practice by placing limits on what information would be disclosed.

The law did not require the board to disclose disciplinary information to prospective employers of physicians, the court said, affirming a lower court's decision to dismiss the case.

Expunged conviction may not be used to reject license applicant

Issue: Impact of expunged convictions on moral character status

An appellate court in Pennsylvania overturned a board decision rejecting an application for reinstatement by a licensee who had gone through a drug diversion program and had the conviction for which he was originally disciplined expunged (*Kearney v. Bureau of Professional and Occupational Affairs*).

In March 2010, Timothy Kearney, a licensed physician assistant, checked himself into a treatment center for drug addiction issues related to pain medications. He had been diverting fentanyl and Oxycontin, for which he pleaded guilty to a single felony count. In 2011, the board suspended Kearney's license for ten years.

In December of that year, Kearney was accepted into a diversion program, in which he underwent counseling and monitoring and completed a six-month probationary criminal sentence, after which a court dismissed his criminal charges.

In 2014, Kearney petitioned the board to reinstate his license in light of his addiction treatment and the dismissal of the criminal charges against him. The board rejected this petition on the grounds that Pennsylvania's Medical Practice Act mandated a ten-year suspension in response to his felony conviction.

It did not make an independent determination whether Kearney was capable of resuming practice in a competent manner. Kearney appealed the board's decision, arguing that, because his conviction had been expunged, the board had acted improperly when it considered that conviction in denying his request for reinstatement, and the case went up to Commonwealth Court of Pennsylvania, which issued a decision October 16.

On appeal, Judge Patricia McCullough, writing for the court, noted that, under Pennsylvania law delineating court-ordered expungements, 'the records shall not . . . be regarded as an arrest or prosecution for the purpose of any statute or regulation or license or questionnaire or any civil or criminal proceeding or any other public or private purpose" (internal quotation marks omitted).

"When an individual enters pleas of guilt or *nolo contendere* in the face of a . . . charge, the charge is held in a state of abeyance, and if an individual complies with the terms and conditions of the imposed rehabilitative probations, the charge is dismissed, and the criminal record expunged—the end result being that the proverbial slate is completely and unconditionally wiped clean . . . The entire record of the criminal proceedings cannot be considered by a state occupational licensing board, let alone be deemed as a 'conviction' by that board, regardless of whether something in the record can be viewed as an admission of guilt."

Here, by participating in the drug court program, Kearney had withdrawn his guilty plea, "thereby rendering it void as a matter of law," the trial court dismissed the charges, and "the case was resolved without an adjudication of guilt." It was, Judge McCullough wrote, as if the entire matter "ceased to exist."

Additionally, under Pennsylvania's Criminal History Record Information Act, criminal convictions which have been expunged or annulled are explicitly prohibited from being used in consideration for a license. Thus, whether or not Kearney's original case resulted in a conviction, that conviction had been expunged and was not available to the board for consideration.

Writing that the "Board rested its decision exclusively on a criminal record that no longer exists and cannot be used to deny reinstatement" of Kearney's license, Judge McCullough held that the board had erred and that its discipline would be reversed.

Court reinstates board decision on appeal, over abuse of discretion

Issue: Evidence standards for evaluating moral character

An Ohio appellate court overturned a lower court's decision that the state's board of education violated the due process rights of a licensee by providing her with incorrect charging papers and basing its decision on unreliable witnesses. In an October 30 ruling, the court held that the lower court abused its discretion (*Langdon v. Ohio Board of Education*).

In 2013, Michelle Langdon was placed on leave from her work as an intervention specialist with disabled high school students while her employing school investigated allegations that she had engaged in several instances of unprofessional behavior. Prior to any decision by the school, Langdon resigned and then allowed her teaching license to lapse.

When she tried to renew her license the next year, Ohio's board of education charged her with unprofessional conduct, alleging that Langdon had engaged in verbally abusive and borderline-physically abusive behavior with students and other staff, breached confidential student information, and engaged in marijuana use on school property.

One specific and distinct charge accused Langdon of repeatedly calling a fellow staff member "a big, gross, disgusting wildebeest." After a hearing, the board revoked Langdon's license.

Langdon appealed, and a trial court reversed the board's decision on the grounds that it had denied Langdon due process by providing her charging documents containing vague and incorrect information, and that its decision was not sufficiently supported by evidence. The board appealed, and the case went up to the Court of Appeals of Ohio in Butler County.

Addressing Langdon's claim that the board had denied her due process, the court noted that the board had provided Langdon with a complete set of charges, relevant law, and details regarding her case, although it had made some errors of date, a fact noted by the lower court when it overturned her discipline.

However, noting that the information supplied to Langdon identified all the students and staff involved in each specific incident, despite the date errors, Judge Robing Piper wrote: "Details exist within each count, regardless of date, that allowed Langdon to determine what specific instance was being addressed and what details created the basis for alleging 'conduct unbecoming' a teacher."

Taking into account that Langdon had successfully defended herself against some charges, Judge Piper held that the record showed that Langdon was aware of what specific occasions were being referenced in the charges, despite the errors, and concluded that she did receive fair notice.

Langdon had also successfully challenged the board's interpretation of the phrase "conduct unbecoming"—one standard under which she had been charged—saying that the board had never provided a specific definition for the phrase and had, thus, deprived her of due process by denying her knowledge of the charges against her.

However, Judge Piper, citing the relevant regulations, noted that the term was well defined in Ohio's administrative code cited in the charging documents. Further, there was no evidence that the parties in the case were confused as to the standard, concluded Judge Piper, and thus Langdon was not denied due process in this way.

The appellate court also found that the lower court had abused its discretion by failing to defer to the board's resolution of evidentiary conflicts. In its decision, the lower court concluded that the testimony of three of the state education department's witnesses was insufficiently reliable and substantial to support the board's decision.

Courts may overturn evidentiary decisions that fail to meet a certain standard, but the lower court, in this case, explained its decision only by saying that each of the witnesses had a personality conflict with Langdon and failed to provide any evidence that undermined their testimony. The judges also overturned the lower court's determination that the accepted evidence did not sufficiently prove that Langdon had engaged in unprofessional conduct.

Having rejected the lower court's ruling on several issues, the court reinstated the board's decision.

Physician fighting 1999 suspension wins court ruling in 7th Circuit

Issue: Tolling dates of statutes of limitations for appeals

For nearly 20 years, an Illinois physician suspended by the state's Department of Financial and Professional Regulation in 1999 has been appealing the ruling. The doctor, Robert Wilson, won several court victories over the years, only to see the board reinstate his nominally five-year suspension each time.

But Wilson had some success again September 7, when the United States Court of Appeals for the Seventh Circuit overturned a lower court's decision that a federal suit he filed against the board was barred for not being timely. (*Wilson v. Illinois Department of Financial and Professional Regulation*).

In 1998, Wilson injected a drug intended to induce unconsciousness into a near-death patient suffering from considerable pain. However, after Wilson administered the drug, the patient's heart stopped, a coroner classified the patient's death as murder, and the state's Department of Financial and Professional Regulation summarily suspended Wilson's license.

Although the coroner eventually retracted that decision, and a prosecutor declined to bring criminal charges, after a disciplinary hearing, the Department suspended Wilson's license for five years. Prior to this decision, Wilson appealed the decision in state court while simultaneously pursing a federal case he filed

prior to the board's decision. While the federal case was dismissed because Wilson had not perfected his administrative appeals, the state case continued.

Wilson met with partial success in his appeal. A state court vacated the suspension four separate times, only to have the department reinstate its original decision on remand each time. In 2008, after a state circuit court set aside the most recent decision to suspend Wilson, from 2006, the department again issued a five-year suspension.

At this point, Wilson's license had been effectively suspended for 11 years, six years longer than the original suspension. Finally, in 2014, a state court held that the evidence in the case did not support suspension of Wilson's license at all. The department did not appeal that order.

Unfortunately for Wilson, the department *did* still determine that, because he had not practiced medicine for 17 years, it could not reinstate his license until he completed a three-year medical education program.

Wilson filed a second federal suit, this time seeking damages, but his suit was first thrown out by a judge who determined he had filed too soon, as the administrative case had not yet ended, and then by another judge who determined that Wilson's case was filed too late, after the end of the statute of limitations applicable to his case, which was ruled to have started tolling after the first federal case was dismissed.

But Wilson argued successfully that the federal court hearing his first federal suit, filed in 1999, held that he was prohibited from litigating his case in federal court while state proceedings were ongoing. Because those state proceedings did not end until 2014, that was the year his statute of limitations began to toll.

If Wilson had declined to appeal in state court, Judge Frank Easterbrook wrote, then the statute of limitations would have ended his chance to bring a federal suit in 2002. However, Wilson did appeal, and although "it took much longer than Wilson could have anticipated to vindicate his rights . . . the Department's doggedness in reinstating his suspensions despite its multiple losses in state court does not supply a good reason to prevent [federal] litigation when at last it became possible."

The lower court judgment invalidating Wilson's suit was vacated, and the Court of Appeals returned the case for further proceedings.

Licensure

Mental-health questions on applications may dissuade licensees from seeking treatment, study finds

Issue: Public safety vs private need for mental health treatment

Because of potential negative repercussions affecting their licensing, nearly 40% of physicians in a recent national study by the Mayo Clinic reported that they would be reluctant to seek formal medical care for treatment of a mental health condition.

The study, "Medical Licensure Questions and Physician Reluctance to Seek Care for Mental Health Conditions," appeared in the October 2017 *Mayo clinic Proceedings*. The authors looked at initial and renewal license applications in 50

states plus the District of Columbia, extracting and coding application questions relating to physician's mental health, physical health, and substance abuse.

Some states ask about both current and past mental health conditions or treatment. In this study, the applications were classified as "consistent" if they inquired only about current (within the last 12 months) impairment from a medical or mental health condition or did not ask about mental health conditions.

The other database for the study stemmed from a 2014 national survey related to careseeking attitudes by physicians for a mental health problem. The survey asked physicians "If you were to need medical help for treatment of depression, alcohol/substance use, or other mental health problem, would concerns about the repercussions on your medical licensure make you reluctant to seek formal medical care?"

In states where applications were found to be "consistent," physicians showed the least reluctance to seek care, the authors reported. The application forms that were congruent with the American Medical Association, American Psychiatric Association, and Federation of State Medical Boards policies, or in clear compliance with the Americans with Disabilities Act of 1990, were from states where physicians were less likely to report reluctance to seek care for a mental healh condition.

If an intial application had such questions, there was a 22% increase in the odds the physician would be reluctant to seek help, independent of age. "This observation suggests that the questions on the initial licensure application may leave a lasting impression on physicians," the study noted.

"Physicians working in states in which medical licensure application questions inquire broadly about current or past diagnosis or treatment of a mental health condition, past impairment from a mental health conditions, or presence of a mental health condition that could affect competency were 21% to 22% more likely to be reluctant to seek help," the study concluded.

"These findings support continued efforts to develop regulations and policies that encourage physicians to seek help. They also support universal use of consistent licensure questions across the U.S. states."

The recommended application language developed by the American Psychiatric Association is: "Are you currently suffering from any condition that impairs your judgment or that would otherwise adversely affect your ability to practice medicine in a competent, ethical, and professional manner?" (Yes/No)

This wording "encourages physicians to consider any physical or mental health issue that could impair their performance and helps to destigmatize mental illness," enabling licensing boards and their members to protect the public without violating the ADA, the authors state.

While changing licensure applications to meet this standard might require legislative change, it is a simple but potentially meaningful step to reduce barriers to physicians' seeking help for mental health conditions, and could be implemented at minimal cost, the study says.

Board cannot deny license for drug conviction unrelated to practice

Issue: Nexus between prior criminal conduct and eligibility for license

A Pennsylvania court overturned a decision by the state's barber board that denied reinstatement of a licensee whose license had been revoked after criminal drug convictions.

The court held September 12 that, while the board could revoke a license for a felony conviction, it could not later deny reinstatement based on that conviction unless it was related to the practice of the licensee (*Fulton v. Bureau of Professional and Occupational Affairs*).

Marvin Fulton, the licensee, is a licensed barber and barber manager. In 2002, after Fulton was convicted on a drug charge, Pennsylvania's Board of Barber Examiners placed his license on probation. In 2009, well after his probation had ended, Fulton was again convicted for the possession and sale of cocaine. The board revoked his license in 2010.

After Fulton was paroled in 2015, he petitioned the board to allow him to take the barber manager examination and reinstate his license. The board denied Fulton's petition on the grounds that Fulton had been twice convicted of drug trafficking, that drugs had been found in his barber shop, and that he had not shown sufficient rehabilitation.

Although Fulton's charging records did show that cocaine was found at the address of his barbershop, he claimed that the drugs were not found in the shop, but in his apartment, which was in the same building, and the charging papers did not specify in which of the two locations the drugs were found.

Fulton appealed the board's decision and the case went up to the Commonwealth Court of Pennsylvania.

On appeal, Fulton challenged the decision of the board by arguing that his convictions were unrelated to his barbershop and that the board thus had no authority to use them as the basis for discipline.

The court, in an opinion by Judge James Colins, agreed. Noting that Fulton's charging documents contained only the information that cocaine was found at an address that contained both Fulton's barbershop and his apartment, Judge Colins said:

"Given [Fulton]'s uncontradicted testimony that the drugs were found in his residence . . . and the complete absence of any other evidence as to which of the separate premises was involved or that both were involved, . . the Board's conclusion that Petitioner's drug activity occurred at or involved his barbershop is not supported by substantial evidence in the record."

Analyzing Pennsylvania statutes that govern license reinstatement in the face of criminal convictions, the court held that those statutes did not allow the barbering board to deny an applicant "based on a criminal conviction without any evidence that the conviction relates to or is based on conduct that has some effect on the applicant's work as a barber or use of his barber license."

" . . . The Barber License law requires only that applicants be at least 16 years old, have at least an eighth-grade education, have a specified amount of barber training and experience, and pass the applicable barber examinations and does not require that applicants demonstrate that they are of good moral

character or restrict licensure based on prior criminal convictions. This statutory language stands in sharp contrast to licensure statutes for other professions."

In fact, Judge Colins noted, it was *because* of barbering's lack of penalty for criminal convictions that the state Department of Corrections established a barber training program for prisoners.

Although the court acknowledged that, under the state's Criminal History Record Information Act, the board could *revoke* a license on the ground that a licensee had been convicted of a felony, Judge Colins noted that the issue in the case involved only an application for *reinstatement*, not the board's power to revoke.

The board also argued that a drug conviction should be disqualifying for a barbering license, due to the community-gathering-space nature of barber shops, but the court rejected this argument as well, holding that it was inconsistent with the barbering license statute.

Judge Colins also noted that, unlike other professionals—nurses, pharmacists, and physicians—who are subject to denial of a license in the face of drug convictions, barbers do not have access to restricted substances.

"The possibility of drug sales through a barbershop and of adverse effect on the community invoked by the Board arises from the fact that a barbershop is a commercial establishment, not from the nature of barbering as a licensed profession, and would be equally present in other commercial establishments, such as corner grocery or convenience stores, that are not subject to professional licensure requirements."

The court reversed the board's denial and remanded it for the board to consider whether there was evidence that drugs were found on the premises of Fulton's barbershop.

Unreliability undercuts character witness testimony for reciprocity

Issue: Evaluation of applications made under reciprocal licensure

The Health Professions Appeal and Review Board in Ontario returned a reciprocal licensure case to the province's medical college after a witness whom the College had relied on to evaluate an applicant's character— and who had provided what seemed like damning testimony as to the applicant's character and competence—was found to be an extremely unreliable witness (*J.S. v. College of Physicians and Surgeons of Ontario*).

The case involved a medical license reciprocity application from an anesthesiologist identified only as "J.S." J.S. graduated from a medical school in India in 1990 and has been practicing since.

In 2005, he moved to Canada, engaged in three separate fellowships around the country, and has been specially licensed in New Brunswick and employed at a hospital there since 2008. His New Brunswick license was known as a "defined license," and was issued on the basis of local need and J.S.'s history of practice there during his fellowships.

In 2010, J.S. submitted an application for an Ontario license under provisions which allow out-of-province license holders to gain reciprocity. Unfortunately, in his application, he answered no when asked whether he had ever withdrawn or resigned from a medical training program, a category that applied to J.S.

because he had ended his final fellowship early to go to New Brunswick to take a job offer.

As Ontario did not have an exact equivalent to the "defined license" category in New Brunswick, J.S. did not qualify for a reciprocal license in the province and the College of Physicians and Surgeons there rejected his application.

In 2012, New Brunswick eliminated the category of "defined license" in the province and J.S. was upgraded to a full license. In 2015, he again applied for a reciprocal license in Ontario.

Unfortunately, he again answered the question regarding withdrawal from a medical training program incorrectly in the negative, and also incorrectly answered a question asking if he had ever been refused a license anywhere, since he had been rejected by the college after his 2010 application.

The answers to both questions were later changed after consultation with the College. More unfortunate for J.S. was the testimony of one of his references, his department director from the hospital at which he was employed, who stated that he had reservations about recommending J.S. for a license and gave a rather scathing review of his professional character, rating him below competent in every category and stating that he would not allow J.S. to treat the director's own family. J.S.'s other references provided very positive reviews.

In November 2015, the Ontario College refused J.S.'s application on the grounds of character and competence deficiencies, based on J.S.'s inaccurate answers on his license application and on his director's negative testimonial. J.S. appealed and the case went up to the Review Board.

In his appeal, J.S.'s attorney argued that the board erred when it based its refusal, in part, on J.S.'s incorrect answers on his license application, as the College had not shown that J.S. intended to deceive the College when he answered the questions incorrectly, and that J.S. had thought the application rejection question to refer to licensing bodies other than the Ontario College.

Although J.S. had incorrectly answered the question, his cover letter noted the fact that the College had turned down his 2010 application. In addition, his attorney explained, J.S. did not think that the shortened term of his Ontario fellowship qualified him as having "withdrawn or resigned" from a training program.

The Review Board concluded that this testimony exonerated J.S.'s answers and that a determination that he had intended to deceive the College was unreasonable. "While the errors on the application are unfortunate, they are not of a nature and quality that should disqualify the Applicant from being able to practice his chosen profession in Ontario," the Review Board stated.

Regarding the negative testimonial from J.S.'s department head, the board noted that it had taken extensive testimony on the matter that the College had not been able to consider. The director's tenure at the hospital where J.S. was employed had been, at times, a rocky one, and he had actually faced a vote against him remaining department head, creating what one witness described as serious tensions, and several witnesses testified to personal tensions between the director and J.S.

Reviewing the director's testimony about specific incidences that gave him concerns about J.S.'s competency, the board declined to credit his testimony about any of them. In one case, in which the director had noted that J.S. had

proceeded to take a patient into an operating room against the judgment of other on-duty physicians, the board went so far as to note that, "At the hearing it became clear that there were no such cases: none of the physician witnesses, including the head of surgery, had heard of such cases and [the director] was unable to substantiate his statement."

In addition, the Review Board noted that the director had never filed a formal complaint or concern about J.S. with any applicable authority. "It is logical to assume that had [the director] any viable concern for patient safety stemming from the Applicant's practice, competence or skill, it would have been incumbent upon him to raise it . . . and take other action and not just raise it, apparently for the first time, with the [College] at this Board hearing . . . In these circumstances, and without any sustainable explanation from [the director], the Board can place no weight on his testimony in relation to patient safety concerns."

Every other witness who testified as to J.S.'s qualifications gave him good to glowing reviews, with the overwhelming body of testimony indicating that he was a consummate professional and community leader.

"An applicant should not be prohibited from exercising interprovincial mobility rights based on concerns raised by an individual who has not otherwise raised the issues through appropriate channels in the province of origin," the Review Board wrote, "particularly when there is a preponderance of credible evidence, pertaining to character and professional knowledge of the applicant, to support a finding that standards of character and knowledge have been met."

The Review Board returned the case to the Registration Committee of the College, with the recommendation that it issue a license to J.S.

Federal File

Court may not order board to remove discipline from federal databank *(from page 1)*

Parks later filed another request, asking the court to remove language regarding her suspension from the National Practitioner Data Bank while her appeal was pending.

While allowing the parties to continue the hearing on that request, the court ordered a "temporary stay" which not only required the board to clear the language from the Data Bank, but added a provision allowing Parks to resume practicing.

In response to that order, the board filed a mandamus petition with the state's Court of Civil Appeals, arguing that the trial court was required to allow the board to present evidence before it changed the conditions of the original stay allowing Parks's pharmacies to remain open but preventing her from practicing. The appeals court agreed, ordering the lower court to vacate its order and hold a hearing on the requested stay.

The trial court held that hearing, accepted evidence from the board, and then made substantially the same decision again, allowing Parks to practice during the pendency of the appeal and ordering the board to send a void report to the Data Bank, which would remove Parks's information. The board then again filed a writ of mandamus, asking the Court of Appeals to order the lower court to reinstate the original stay.

The court agreed with the board again. Judge William Thompson, in his written opinion for the court, noted that, under federal law, the state is required to submit information to the Data Bank within 30 days when an adverse action is taken against a licensee, as well as any revisions of that action. While a dispute process exists within the federal regulations establishing Data Bank procedures, Parks had declined to take part in that process.

"The court's research has revealed no authority that would exempt the board from these mandatory reporting requirements," Judge Thompson wrote. According to the Data Bank's guidebook, which the lower court had relied upon when ordering the board to void its report, the only three reasons for voiding information sent to the database were if the action was reported in error, if it did not meet reporting requirements, or if the action was overturned on appeal.

This suggests, Judge Thompson continued, that a board "is still required to make an initial report of an adverse action even when the health-care practitioner or entity who is the subject of the report has appealed from that action."

The trial court's order that the board void its report of Parks's discipline to the Data Bank "requires the board to violate its mandatory obligations under federal law . . . and impedes the accomplishment of Congress's objectives in enacting the [Healthcare Quality Improvement Act] and the legislative scheme Congress developed to carry out those objectives," wrote Judge Thompson. Federal law, therefore, preempted that order.

The board also challenged the original stay on other grounds, but the Court of Appeals rejected those arguments, saying that the board had not overcome the presumption that the stay would not be detrimental to public safety or that the lower court had not abused its discretion in upholding the board's decision.

Scope of Practice

Position statement on practice scope did not violate rulemaking process

Issue: Distinguishing between formal rules and position statements

A court in North Carolina issued another ruling August 2 in the state's ongoing legal battle between its acupuncture and physical therapy boards, holding that a position statement posted by the North Carolina Board of Physical Therapy Examiners supporting the practice of needle insertion by its licensees was not a violation of the rulemaking process. (*North Carolina Acupuncture Licensing Board v. North Carolina Board of Physical Therapy Examiners*).

The case involves the practice of dry needling, a type of needle therapy in which solid needles are inserted into a patient's muscle trigger points in order to relieve pain. The practice is substantially similar to that of acupuncture: the two procedures use the same needles, inserted into the same places in the body to achieve the same physical results.

The physical therapy board, as expressed in position statements issued in 2010 and 2014, considers dry needling to be within the purview of the practice of physical therapy, while the Acupuncture Licensing Board believes the therapeutic use of needles to be the sole purview of licensed acupuncturists.

In 2014, the physical therapy board undertook a rulemaking process to set standards for training for dry needling. The acupuncture board objected to the

move, and the state's Rules Review Commission rejected the process as outside the authority of the physical therapy board.

In response, the physical therapy board posted a position statement on its website stating its belief that physical therapists could continue to practice dry needling with proper training, but that the specifics of that training were not set by regulation.

Following the position statement, the acupuncture board requested a declaratory ruling from the physical therapy board that dry needling was not within the practice of physical therapy.

The physical therapy board rejected that request by instead issuing a declaratory ruling stating that physical therapists could continue the practice. The acupuncture board challenged that ruling, and the case went up to the North Carolina Superior Court for Wake County, which issued a decision August 2.

In its challenge, the acupuncture board's primary argument was that, because the Rules Review Commission had rejected the physical therapy board's rulemaking on dry needling, that board was now precluded from issuing a position statement allowing the same practice.

The court, in an opinion by Judge Louis Bledsoe, III, disagreed. "Analyzing the plain language and structure of the [state's] Administrative Procedure Act," he wrote, "the Court concludes that the Rules Review Commission's objection does not have a preclusive effect outside the rulemaking process . . . No part of the statutory framework . . . indicates that the legislature intended the Rules Review Commission's objection to a specific rule to restrict an agency's ability to act on a particular subject matter when the agency is lawfully acting outside of formal rulemaking procedures."

Since it applied only to the rulemaking process, the Commission's objection did not settle the matter of whether dry needling can be within the purview of the physical therapy board or prevent it from issuing position statements on the matter.

The acupuncture board also argued that, in issuing a position statement stating that physical therapists may practice dry needling, the physical therapy board was improperly avoiding the rulemaking process.

Again, the court, disagreed. "The Revised Position Statement limits itself to stating the Physical Therapy Board's interpretation of its own enabling statutes and existing regulations," wrote Judge Bledsoe. The statement "does not set forth standards or policies for the practice of dry needling by physical therapists."

Because the position statement was only an interpretive one, and did not create new obligations, the court concluded that it was a non-binding interpretation and not a violation of the rulemaking process.

Addressing other arguments made by the acupuncture board, the court examined the regulations governing the physical therapy board and the evidence it offered in support of its position statement and held that the board reasonably concluded that dry needling was contained within the practice of physical therapy.

Waiver of appellate hearing precludes submitting supplemental evidence, court affirms

Issue: Appellant's ability to present supplemental evidence

An Ohio appellate court upheld a decision against a physician who, after successfully arguing that his decision to waive a hearing did not preclude him from appealing the state medical board's decision to deny him a license, had claimed that the board improperly rejected his submission of supplemental evidence. (*Edmands v. State Medical Board of Ohio*).

While the physician's waiver of a hearing did not preclude his appeal, it did preclude his ability to submit evidence supporting his case, the court ruled.

At the time Christopher Edmands applied to the Ohio medical board for an osteopathic medical license, the West Virginia medical board had already placed his license on probation for pre-signing blank prescription forms—which nursing staff would later fill in—at the hospice where he was employed. When the board notified Edmands that it intended to decide whether to refuse his application, Edmands affirmatively stated that "he was not requesting a hearing." The board subsequently moved to permanently deny Edmands's application.

Edmands appealed that decision, arguing that the notice provided by the board was confusing and that he had been denied an opportunity for a meaningful hearing. A trial court dismissed that appeal on the grounds that Edmands had waived his right to a hearing, but a state court of appeals reversed, ruling that Edmands's decision to not request a hearing did not preclude an appeal from the board's decision.

On remand, the trial court rejected Edmands's claim that the board's evidence was insufficient, and upheld the discipline against him. Edmands appealed again, and the case went up to the Court of Appeals of Ohio for Franklin County.

In his second appeal, Edmands argued that the board had improperly ignored a letter he sent attempting to supplement the evidentiary record in his case. However, the court noted that, by rejecting his right to an appeal, Edmands also rejected his right to submit evidence to the board, meaning that the board could properly have disregarded his supplemental material.

Although Edmands also argued that the board's decision to permanently deny his application was excessive, Judge William Klatt noted that Ohio law specifically gives the board the authority to permanently deny applications if an applicant has been sanctioned by another state's board. Edmands could not deny that he had been placed on probation by the West Virginia board. Therefore, the trial court had no authority to overturn the board's decision.

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