Professional Licensing Report

Licensing, testing, and discipline in the professions

January/February 2018
Vol. 29, Numbers 7/8

Highlights in this issue

Licensing

Federal appeals court rejects hair braiders' constitutionality challenge

Issue: Constitutionality of entry requirements

The U.S. Court of Appeals, 8th Circuit, upheld the application of standard Missouri cosmetology license requirements for practitioners of African-style hair braiding January 11, rejecting a challenge of the laws' constitutionality filed by two hair braiders and backed by eight libertarian policy groups and U.S. Senator Rand Paul as amici (friends of the court) (*Niang v. Carroll*).

The court found that, whether or not all of the training required for that license was necessary for braiders, the state had a rational motive in imposing the requirements; therefore, they were not in violation of the U.S. Constitution's Fourteenth Amendment.

Entry restraints on hairbraiders, in particular those with skills in braiding African American hair, have become a rallying point for opponents of occupational regulation, who frequently charge that cosmetology training requirements are excessive or irrelevant curbs imposed on entrepreneurs offering a traditional skill, and diminish economic advancement opportunity for a minority group.

(See Licensing, page 11)

Discipline

Court strikes down mandatory waiting period for reinstatement

Issue: Imposition of waiting period for reinstating licenses

The Commonwealth Court of Pennsylvania, in a January 8 ruling, struck down a decision by the state's medical board to impose a mandatory 5-10-year waiting period for license reinstatement by a doctor suspended for violations of Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act.

The statutory scheme relied on by the board, the court held, was confusing and contradictory (*Acri v. Bureau of Professional & Occupational Affairs*).

The issue decided in the case is similar to that of another recent Supreme Court of Pennsylvania decision, *McGrath v. Bureau of Professional and Occupational Affairs*, which involved the discipline of nursing licensees under the Act.

In 2016, physician Joseph Acri pled guilty to four felony violations of the Controlled Substance Act after being caught illegally prescribing Oxycodone. The state's medical board moved to automatically suspend Acri's license on the basis of those convictions, the existence of which Acri acknowledged in a letter to the board.

Then, noting that license suspension was mandatory for licensees who were convicted of felonies under the Act, the board finalized the suspension order without providing Acri a formal hearing and held that he was required to wait 5-10 years to apply for reinstatement.

Acri appealed the decision to Pennsylvania's Commonwealth Court, arguing that the board had violated his right to due process when it denied the opportunity of a hearing and that the 5-10-year waiting period was incorrect.

The Commonwealth Court rejected Acri's argument that the board was required to provide a hearing before suspending his license, with Judge Patricia McCullough writing that, because the relevant statute governing the discipline of licensees who are convicted of a felony under the Act "does not provide the Board with discretion to impose a sanction that is less severe, Petitioner is not entitled to a hearing to present mitigating evidence."

". . Rather, the only legal issue before the Board in a suspension proceeding [for a violation] of the Act is whether Petitioner had the requisite felony conviction." Essentially, because Acri had already admitted the existence of his convictions, and because the board had obtained certified court records of those convictions, there were no issues of fact in dispute and a hearing was not necessary because the board had no discretion to determine sanction lessthan suspension.

Acri also argued that his suspension violated his right to substantive due process, on the grounds that his penalty was both too severe and that it lacked a "rational relationship to a legitimate government interest," but the court rejected this argument as well.

Judge McCullough, noting the serious nature of unlawfully prescribing painkillers for illegitimate, non-medical purposes, wrote that the state had a compelling interest in limiting public access to such drugs and that the license suspension of doctors who violate state prescribing laws bore a substantial relationship to safeguarding the public.

"[T]he misconduct for which Petitioner was suspended involves a core job duty of a physician and reflects an abuse of a privilege that petitioner would not otherwise possess but for his status as a physician," she wrote. "Because there is a strong correlation between the disciplined misconduct and Petitioner's fitness and competence to practice as a physician, we conclude that the Board did not violate substantive due process when it suspended Petitioner's license."

Acri had more success with his last argument, which challenged the board's determination that he was required to wait 5-10 years to apply for the reinstatement of his license. Acri argued that the language governing reinstatements of licenses suspended for violations of the Controlled Substance Act was ambiguous.

Pennsylvania licensing law does impose a ten-year waiting period following a conviction under the Act, but only for *applicants* seeking licensure. In addition, a section of law imposing a five-year waiting period for such licensees disciplined for violations of the Act deals only with revoked licenses, not suspended ones.

This somewhat confusing discipline scheme, wrote Judge McCullough, suffers from "infirmities in language, structure, and operation" similar to the *McGrath* case, which had challenged a similar suspension and rehabilitation scheme as applied to nursing licenses in the state.

As such, while ultimately upholding the decision to suspend Acri's license, the court rejected any legal interpretation that imposed a mandatory waiting period and held that any attempt at reinstatement by Acri would be handled under standard reinstatement procedures, which lack such waiting periods.

Surgeon's claim that hospital retaliated against him with false report to national data bank okayed to proceed

Issue: Alleged malicious filling of adverse action to Data Bank

A physician and chief of surgery who discovered his hospital was filing falsified data about surgery mortality and complications to raise the institution's reimbursement rates, and who blew the whistle on the hospital, will get a chance to pursue his complaint of defamation against it in court, thanks to a January 31 ruling by the District Court of Appeal of Florida, Second District (*Hakki v. Galencare, Inc.).*

The physician, Hadi Hakki, alleges that Northside Hospital threatened to destroy his career if he did not keep quiet about the false reports, and that it attempted to do so by filing false reports about him with the National Practitioner Data Bank (NPDB). The appeals court reversed a trial court's dismissal of Hakki's suit, allowing the case to proceed.

Hakki says he discovered shortly after his appointment as chief of surgery that the hospital relayed falsified data about morbidity, mortality, and complications of its surgeries to the Society of Thoracic Surgery, which then relayed it to the Centers for Medicare & Medicaid (CMS). CMS utilizes the reports to set Medicare reimbursement rates that vary based on data linked to quality of patient care.

When Hakki confronted hospital executives regarding the fraudulent reporting, they refused to take any action and threatened to destroy his career; Hakki then reported the hospital to authorities. After he refused to voluntarily relinquish his medical staff privileges, the hospital filed an adverse action against Hakki with the NPDB.

Hakki filed suit, and the trial court agreed with the hospital that it was immune because the allegations arose out of the hospital's actions relating to his clinical staff membership and no acts of intentional fraud were argued.

But the appeals court reversed the order of dismissal, finding that Hakki had provided non-hospital evidence including the NPDB report and letters from witnesses who had personal knowledge that the information contained in the report was false, so he did not need to rely upon confidential hospital information.

The case was remanded to the trial court for further proceedings.

"Consent agreement" not the same as "consent order"

Issue: Violations of monitoring agreements with licensees

A Maryland court, in a January 24 ruling, affirmed a decision of the state's dental board to revoke the license of a doctor who repeatedly violated a consent agreement he entered into with the board to monitor his recovery from cocaine use (*Hyde v. Maryland State Board of Dental Examiners*). The case turned on the difference between a "consent agreement" and a "consent order" under Maryland licensing law.

In 1999, physician David Hyde self-reported a cocaine problem to Maryland's Dentist Well-Being Committee and entered into a consent agreement with the state dental board as the result of "unprofessional acts" towards one of his employees. Maryland code designates two types of agreements between licensees and boards: "consent agreements" and "consent orders."

Hyde's trouble continued. Pursuant to the agreement, Hyde entered a treatment facility, but was soon discharged based on his failure to progress, and then subsequently failed to participate in further treatment or provide urine samples as required.

In 2000, the board charged him with violating the agreement and suspended him for 45 days followed by five years' probation. In 2004, his treatment provider reported that Hyde had tested positive for cocaine, and the board again suspended him and provided that, if Hyde were to be reinstated, he would be required to undergo much stricter regular drug testing.

In 2006, Hyde, now reinstated, again failed to adhere to the testing regimen and again tested positive for cocaine. The board revoked his license. In 2011, again reinstated and under a consent agreement, Hyde again tested positive for cocaine after multiple failures to maintain a testing schedule. The board again revoked Hyde's license.

Hyde appealed and, by arguing that the board did not have the authority to revoke a license for the violation of a consent agreement—as opposed to a traditional board order—successfully convinced a state circuit court to remand his case back to the board, despite his not having raised this issue during his administrative hearing. The board appealed and the case went up to the Maryland Court of Special Appeals.

Addressing Hyde's argument, the court held that the board had the power to revoke his license. Hyde's agreement with the board, wrote Judge Melanie Shaw Geter, had the status of a formal board order, and Hyde's contention that it was merely an "agreement" was a misinterpretation of Maryland law.

"Consent agreements," which Hyde believes his agreement to be, connote a type of informal agreement entered into involving administrative, non-disciplinary matters. "Consent orders" are formal agreements involving disciplinary issues. Although Hyde characterized his agreement with the board as a "consent agreement," it involved a formal decision on a discipline issue and was more accurately a "consent order" and had the full force as any other order of the board.

After addressing and rejecting arguments about the sufficiency of the board's evidence and its use of expert witnesses, the court affirmed the board's decision to revoke Hyde's license.

RNs' discipline for salvaging hepatitis C pills reversed over unproven harm

Issue: Standards for proving behavior subject to discipline

Following the reversal of a disciplinary decision against a physician who participated in the salvage and use of several hepatitis C pills that had been placed in a medical waste container, a second court decision reversed discipline against two nurses involved in the same incident (*Francis and DeBenedictis v. Delaware Board of Nursing*).

In both cases, the licensing board imposing the discipline failed to provide evidence that the use of the pills caused any harm, a required element of the regulations under which the licensees were punished.

In 2015, after a worker spilled twelve very expensive hepatitis C pills at the Delaware Corrections Center, supervising nurses Christine Francis and Angela DeBenedictis, under orders from their own medically-licensed superiors at the corrections center, fished the $1,000 pills out of the waste container.

After being inspected by a pharmacist, those pills were returned to be usable stock. This event was eventually reported to state licensing authorities, prompting several discipline cases against the individuals involved. Eventually, the Delaware Board of Nursing found the two nurses in violation of state nursing regulations, they appealed, and the case went up to the Superior Court of Delaware.

On appeal, the two nurses argued that the board's decision lacked substantial evidence, an argument that the court accepted, finding that, while the board had provided evidence that the event happened and that the practice of re-using such pills was not generally accepted, it had also failed to provide any evidence that the nurses actually caused harm to a patient, a required element of the disciplinary regulations that the nurses were held to have violated.

In making this decision, the court looked to *Spraga v. Delaware Board of Medical Licensure and Discipline*, an earlier case based on the same events, in which the court overturned a disciplinary decision against a doctor at the Correctional Center because the state's medical board failed to prove that the re-use of the pills caused any harm.

"The facts in this case are ugly," wrote Judge Ferris Wharton for the court. "The idea of administering pills that had an 'adventure' through a prison sharps container is unpleasant. However, the Court is concerned not with optics but with evidence, and the evidence—or lack thereof—supports the nurses' contention that there was no risk of harm to the patient."

". . . The State . . . presented no evidence of harm and the Hearing Officer, in his findings of fact, cited nothing for the proposition that administering wasted pills caused or was likely to cause harm."

Because every charge upheld against Francis and DeBenedictis required that showing of harm, all discipline imposed on the two nurses was in error. The court reversed the board's decision.

Court reverses revocation over use of adversarial document in decision

Issue: Proof that licensee performance falls below standard of care

The Supreme Court of Alaska overturned a revocation decision by the state's medical board February 9, after the board declined to adopt the recommendation of an administrative law judge in favor of an adversarial filing by the state agency

responsible for prosecuting license discipline cases (*Odom v. State of Alaska, Division of Corporations, Business & Professional Licensing*).

By failing to adopt the ALJ's recommendation, the board also failed to include its factual findings in its final decision, with the result that the decision was not supported by a sufficient amount of evidence.

As part of a treatment plan, David Odom, a physician with a focus on weight loss and anti-aging treatments in Fairbanks, prescribed the drug phentermine, an appetite suppressant, and a thyroid compound. The patient, who had been previously diagnosed with a heart condition, lost more than 30 pounds while using the drugs, but, six months after her last appointment with Odom, she suffered a heart attack and died.

Following the death, the patient's husband filed a license complaint against Odom and, after an investigation, the Alaska Division of Corporations, Business & Professional Licensing charged Odom with inappropriately providing phentermine to a patient with heart condition and with prescribing too high a dose of thyroid hormone, although the division also officially stated that the prescriptions did not cause the death of the patient.

A series of conflicting decisions followed. An administrative law judge hearing Odom's case found that the Division had failed to prove that Odom's treatment of his patient fell below the standard of care and recommended that he not be sanctioned.

However, the Division filed a motion to the state Medical Board to impose moderate discipline against Odom's license on its own interpretation of the evidence, and the Board, to the surprise of everyone and after rejecting a late filing to oppose the Division's motion, revoked Odom's license.

Odom appealed, and although a state superior court found the board's evidence sufficient, it returned the case to the board on the grounds that it had violated Odom's due process rights by rejecting his late attempt to oppose the Division's motion. On remand, the board simply reaffirmed its decision, the superior court affirmed, and Odom appealed to the state supreme court.

Hearing the appeal, the justices of the court censured the Board's methods for determining Odom's sanction. Justice Peter Maassen wrote that the board, after declining to adopt and modify the ALJ's recommendation for its own decision, had just used the Division's adversarial filing as the basis for its decision.

Thus, rather than modifying "an ostensibly impartial decisional document that clearly sets out the Board's rationale and helps facilitate review," the Board's decision only asserts that its conclusion can be reached based on the evidence contained in the ALJ's recommendation before using the language of the Division's filing.

This created an odd result: Because the Division had only sought a suspension of Odom's license, the board's quoted decision also provides evidence in support of a suspension, before reaching the then unexplained decision to revoke Odom's license.

The result of all this is that, by failing to officially adopt the ALJ's evidentiary findings, the Board's written opinion did not sufficiently support its final decision. Further, when given a second chance to issue a decision, on remand, the board

only stated that its earlier decision was supported by substantial evidence—without providing that evidence.

The Court also noted that, in cases involving incompetency concerning only a single patient, suspension or modification of practice boundaries is the usual solution. The board provided no explanation as to why it would impose the unusually strict punishment of revocation in Odom's case.

"We conclude that the Board's final decision fails to comply with its statutory duty to be consistent in the application of disciplinary sanctions or explain the inconsistency," Judge Maassen wrote, "and it therefore does not support the sanction imposed."

The Court also rejected the Board's evidence. The only expert witness who testified against Odom stated that he himself did not prescribe phentermine and admitted that he had not reviewed any recent studies or otherwise done detailed research, instead relying on the drug's product literature and conversations with cardiologists to establish that phentermine should not be prescribed for a patient with a heart condition.

In contrast, Odom's own expert witnesses cited several recent studies that contradicted the now-outdated and inaccurate product literature, as they claimed, and testified that they, themselves, prescribed the drug to patients with heart conditions.

Essentially the same was also true for the Division's assertion that Odom had over-prescribed thyroid hormone. The Division's expert witness—without much experience—testified that Odom's practices were dangerous, but Odom's own experts provided a large body of convincing evidence otherwise.

"The evidence detracting from the Board's decision is dramatically disproportionate to the evidence in support of it," wrote Justice Maassen, "meaning that we cannot conscientiously say that the supporting evidence is substantial." The Board's evidentiary findings could not stand.

Having rejected the Board's decisional reasoning, the court reversed the decision to revoke Odom's license.

Pretrial diversion protections do not apply to license actions

Issue: Differing standards for evidence in criminal v. disciplinary actions

Statutory protections prohibiting the use of arrest records against drug use defendants who have successfully completed pretrial diversion programs do not apply to disciplinary actions against licensees in the health professions, an appellate court in California held January 28 (*Medical Board of California v. Superior Court (Erdle)*). The court ruled that that legislation passed subsequent to that which created the protections carved out an explicit exception.

After being arrested for cocaine possession in 2013, physician Brandon Erdle entered a pretrial diversion drug treatment program, the completion of which could entitle him to dismissal of the criminal charges he faced. However, prior to Erdle's completion of the program in 2016, California's medical board moved to discipline him based on the same events that led to his arrest.

During the disciplinary process Erdle claimed that the board was prohibited from using information from his arrest record under California law governing diversion programs like the one he was engaged in. However, the administrative

law judge hearing the case cited a section of the state's Business and Professions Code which expressly states that the medical board is not prohibited from disciplining a licensee in a pretrial diversion program on the basis of facts also contained in an arrest record.

In an attempt to reconcile the two provisions, the ALJ prohibited the use of the arrest record during the hearing but allowed the arresting officer to testify and permitted the officer to use the arrest record to refresh his memory prior to giving that testimony. Following the hearing, the ALJ recommended that Erdle be disciplined.

Erdle appealed this decision, challenging the arresting officer's use of his arrest record to refresh his memory for testimony. Under California law protecting participants of diversion programs, Erdle claimed, any evidence of his cocaine possession admissible in his disciplinary proceeding had to be derived from sources entirely independent of his arrest record. The judge hearing Erdle's appeal agreed and overturned the board's decision. The board appealed, and the case rose to a California Court of Appeals.

California Penal Code, Section 100.4: "A record pertaining to an arrest resulting in successful completion of a pretrial diversion program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate…"

California Business and Professions Code, Section 492: "Notwithstanding any other provision of law, successful completion of any diversion program under the Penal Code . . . shall not prohibit any agency established under Division 2 . . . of this code . . . from taking disciplinary action against a licensee or from denying a license for professional misconduct, notwithstanding that evidence of the misconduct may be recorded in an arrest record pertaining to an arrest."

The Court of Appeals disagreed with the lower court's conclusion of its effort to reconcile the two conflicting statutes. Justice Timothy Reardon noted that the section of the Business and Professions Code allowing the use of evidence contained in arrest records was passed subsequent to the section of the Penal Code protecting pretrial diversion participants.

He wrote that that the later law's "plain language provides a blanket exception from the restrictions on the use of arrest records contained in the [protecting legislation] for licensing decisions made by the healing arts agencies."

Justice Reardon, citing that law's legislative history, noted that it appeared to have been passed specifically out of concerns that the earlier protection law would prevent health licensing agencies from disciplining licensees who engaged in drug abuse.

The later statute, explained the Justice, was intended to provide an exception to the earlier legislation.

After additionally noting the practical difficulties of implementing a system where arresting officers are permitted to testify, but without the use of the arrest records they help write, the court held in favor of the board, affirming its revocation decision.

Renewal of license does not rule out revocation under felony-revocation law

Issue: Application of estoppel doctrine under retroactive revocation law

An Illinois nurse whose license was revoked after Illinois passed legislation mandating the permanent revocation of licenses held by people convicted of forcible felonies lost an appeal of the revocation February 20. The Court of Appeals of Illinois ruled that, although the state's licensing body had initially renewed his license after the passage of the new law, it was not prevented from later revoking it (*Shakari v. Illinois Department of Financial and Professional Regulation*).

In 1975, at the age of 21, the physician Batu Shakari was convicted of attempted murder and sentenced to time served and two years' probation. In

1981, he applied for a licensed practical nursing license and was allowed to sit for the licensing exam after appearing before a committee to explain his conviction. He was licensed the following year.

Shakari applied for a registered nurse license in 1989 and was again allowed to sit for the examination and successfully obtained a license. From the date of his initial licensure until 2015, Shakari was never subject to disciplinary action.

In 2011, the Illinois General Assembly passed legislation—intended to reform the state's professional disciplinary process—mandating the permanent revocation of any health licensee convicted of a forcible felony.

Although the Department renewed Shakari's license in 2014, pursuant to the new legislation, the state's Department of Financial and Professional regulation permanently revoked his license in 2015. Shakari appealed, and the case eventually rose to the Court of Appeals of Illinois.

Shakari made two primary arguments on appeal. First, he argued that the new law applied only to health care licensees whose convictions occurred after they became licensed, not to those who, like himself, acquired licensure after their convictions, a question the court considered one of first impression.

Second, Shakari argued that, because the Department had actually renewed his license after the 2011 law was passed, the agency should be prohibited from now changing its mind and revoking that license.

Unfortunately for Shakari, the court held that the language of the new law applied to strip licensure from those convicted of violent offenses regardless of whether the conviction occurred before or after their initial licensure. "In either situation, the licensee is currently a health care worker who, at some time in the past, 'has been convicted' of a triggering offense," wrote Judge Mary Mikva.

"The relevant point in time for assessing a licensee's status as a health care worker who 'has been convicted' of a triggering crime is the moment when the license is revoked . . . It does not matter how long ago the conviction resulting in that status occurred." In addition, Judge Mikva noted, the new law prohibits new applicants with triggering convictions from acquiring new licenses, a result that would be incongruous with the distinction Shakari was asking the court to make.

The court also rejected Shakari's argument that a form of estoppel prevented the Department from revoking his license after the agency initially renewed it following the enactment of the new laws. The new legislation, wrote Judge Mikva, revokes the licenses of convicted health care workers by law, and thus the Department did not have the authority to renew Shakari's license in 2014.

"When the order of an agency exceeds the agency's jurisdiction, that order is void," the judge explained. "And when an agency mistakenly believes that it has the authority to take certain actions, that misapprehension of the law cannot form the basis for a defense of collateral estoppel."

Judge Mikva acknowledged the seeming harshness of the revocation, and noted that, under a 2017 amendment to the law, people like Shakari now had the ability to petition for the restoration of their licenses and even a confidential classification of their disciplinary record. And, in fact, the judge noted, some of the Department's arguments before the court seemed to encourage Shakari to avail himself of this new procedure.

Having rejected Shakari's arguments, the court affirmed his discipline.

Court disbars judge who stole cocaine of people charged before he ruled on their drug crimes

Issue: Mitigating factors in weighing appropriate disciplinary sanctions

A judge who stole, for his personal use, cocaine that was stored as evidence against juvenile defendants charged with drug crimes in his own court lost his bid for a retroactive suspension of his law license January 18, when the Supreme Court of Pennsylvania agreed that his offenses merited disbarment (*Office of Disciplinary Counsel v. Pozonsky*).

The court found, among other things, that Judge Paul Michael Pozonsky's alleged cocaine addiction, which he attempted to use as a mitigating factor in his behavior, was contradicted by his own statements and dwarfed by the egregiousness of his behavior.

Pozonsky led a team of professionals including a prosecutor, defense counsel, police officer, and treatment provider in the Washington County Drug Court program, which was set up to assist with therapy or sometimes impose sanctions against offenders with substance abuse problems.

As judge, Pozonsky ordered state troopers, who had seized cocaine to be used in criminal prosecutions or juvenile adjudications that Pozonsky was to preside over, to store the cocaine in an evidence locker in his chambers. When regularly removing quantities of the drug from the locker to smuggle it out of the courthouse to consume at home, he substituted baking powder and other substances for the cocaine.

After the thefts were discovered, a criminal prosecution followed and Pozonsky finally pled guilty to several second-degree misdemeanors and ended up serving one month in jail plus two years of probation. His law license was temporarily suspended.

In discipline hearings, Pozonsky's criminal convictions were considered incontrovertible evidence of criminal misconduct. Mitigating factors offered by Pozonsky included his lack of prior discipline, his denial of using drugs while on the bench, his assertion that his drug use did not compromise the cases he was adjudicating, his efforts to treat his addiction, his community service, his cooperation with the disciplinary panel, and many character letters from community members.

But the court said, "upon review, we find Pozonsky's grievous conduct far outweighs the mitigation evidence he offered," and it ordered he be disbarred from the practice of law.

"Mirroring" of discipline by another state "unduly harsh" and arbitrary

Issue: Reciprocal discipline and due process requirements

A chiropractor who was reprimanded by the Kentucky chiropractic board in 2012 and then reciprocally reprimanded by the chiropractic board in Illinois under a "sister-state" provision of the law in 2014 won reversal of the Illinois reprimand in a January 9 decision of the Court of Appeals of Illinois, Fourth District. (*LaBrot v. Illinois Department of Financial and Professional Regulation, et al.)*

The licensee, Thomas LaBrot, admitted reviewing a chiropractic file of another Kentucky chiropractor's patient without being registered to perform peer reviews or meeting the requirements to perform peer reviews. The Illinois board filed an administrative complaint, following LaBrot's report of the Kentucky reprimand, indicating his violation was a ground for revocation or suspension

under the state chiropractic practice act. LaBrot filed a motion to dismiss the complaint, alleging that the Department of Financial and Professional Regulation failed to disclose exculpatory evidence showing the Kentucky reprimand did not merit discipline.

The evidence to which LaBrot alluded was a letter by the Department's chief medical coordinator noting possible reasons no disciplinary action was taken for 215 doctors who had their clinical privileges revoked or restricted by medical facilities.

But the Department failed to respond to LaBrot's request to produce the letter, giving LaBrot the opportunity to cite state law providing that a disciplinary action may be dismissed if the Department fails to comply with discovery.

The administrative law judge held a hearing on LaBrot's claims and ruled against him, citing his lack of remorse for the offense of failing to follow peer review guidelines as the primary statutory aggravating factor. She recommended that LaBrot be reprimanded and fined up to $1,000 to mirror the Kentucky discipline.

On appeal, the court did not overturn the ALJ's finding that the letter was not relevant to LaBrot's case, and the court agreed that the letter was not exculpatory. But the court did find that, in light of the mitigating circumstances (his unblemished record, and the lack of injury to any patient), the sanction was overly harsh and thus an abuse of discretion.

As to LaBrot's lack of contrition, the court added, "The AlJ did not find anything in LaBrot's demeanor made him seem less contrite," and failed to take into account other facts indicating contrition: that he promptly ceased peer-review operations in Kentucky before he was disciplined and corrected the errors after an agreed order was entered.

The court also found that the sanction imposed by Illinois was unrelated to the purpose of the statute, which is to protect the public health and welfare from individuals not qualified to practice medicine. "The law already requires the public be informed" of LaBrot's failure to comply with Kentucky registration requirements, which is reported on his public profile, maintained by the state on the Internet, the court said.

Finally, the court noted, the imposed discipline was not suitable because Illinois does not deem it necessary to require licensed chiropractors involved in peer review to complete similar registration requirements. Reversing the disciplinary order, the court stated that although the Department is authorized to impose sanctions for violation of sister-state rules and regulations, here, "The decision to mirror the Illinois punishment to the Kentucky punishment is arbitrary."

Licensure

8th Circuit upholds training regimen for hair braiders (from page 1)

The practice of African-style hair braiding is a form of hair-styling that typically involves the braiding of hair but not cutting or the use of chemicals, as found in more common cosmetology practice. Despite the limited scope of hair braiding, the Missouri professional licensing scheme requires hair braiders to complete a

standard hairdressing or barbering cosmetology license, which includes at least 1,000 hours of training, much of it not directly related to braiding.

The two hair braiders, Ndioba Niang and Tameka Stigers, who were unhappy with this regulatory structure, found support from several libertarian groups and allies: the Pacific Legal Foundation, Public Choice Scholars, Cato Institute, Reason Foundation, Individual Rights Foundation, Senator Rand Paul, the Goldwater Institute, Beacon Center of Tennessee, and the Show-Me Institute, in their lawsuit against the state.

Niang and Stigers argued both that the standard cosmetology licensing requirements were not related to the legitimate regulation of their profession and that the state violated their rights to equal protection by treating hair braiders and barbers/hairdressers too similarly.

After a federal district court rejected their arguments, the braiders appealed, and the case went up to the 8th Circuit Court.

In the earlier ruling, the federal district court justified its decision in favor of the licensing requirement based on two additional purposes: stimulating more education on African-style braiding and incentivizing braiders to offer more comprehensive hair care. The braiders objected that the district court cannot offer its own justifications, but the 8th Circuit cited case law providing that challengers of a regulation have the burden to negate not only the state's justification, but also "every conceivable basis which might support it."

In Niang's and Stigers's view, the Missouri licensing regime is too overbroad and under-inclusive to be rationally related to the state's interest. They pointed out that the state conceded that only about 10 percent of the required training courses is relevant to African-style braiders, and that almost all the exams do not test on braiding.

The state had argued that the licensing requirements were necessary to protect consumers and ensure public health and safety. It cited evidence of health risks associated with braiding such as "hair loss, inflammation, and scalp infection." In addition, the state presented evidence of scalp conditions that braiders must recognize as unsuitable for braiding.

The judges at the appeals court found in favor of the state. First, Judge Duane Benton held that the “requirement furthers legitimate government interests in health and safety.” This holding rejected the braiders' argument that the training requirements were not related to their practice and that regulating braiding as standard cosmetology did not suit the state’s goal of protecting public health.

Judge Benton acknowledged that “the fit between the licensing requirement and the State’s interest is imperfect, but not unconstitutionally so.” Whether or not the requirements were overbroad as applied to braiders, as long as the state believed that the requirements were a rational way to achieve its goal and those means had some rational connection with license applicants’ fitness, the courts would not strike down them down.

Addressing the braiders’ equal protection claim, Judge Benton wrote that the premise underlying their argument was flawed. While the braiders defined their profession in a way as to encompass only the act of braiding, the judge wrote, that “was not the only way to define professions that involve hair dressing and other similar services . . . A legislature rationally could conclude that African-style hair braiding is not a different profession than barbering and cosmetology.”

Because the practice of barbering was statutorily defined as to “dress the hair for the general public” and cosmetology, in part, as “arranging, dressing . . . or similar work upon the hair of any person,” the court held that the legislature had so concluded.

As long as the state's action was rationally based and "free from invidious discrimination," it does not violate the Fourteenth Amendment the court ruled. "Here, the fit between the licensing requirement and the state's interest is imperfect, but not unconstitutionally so."

Having addressed the braiders' argument, the circuit court affirmed the district court, ending the case.

Deregulation efforts more likely in Republican states with fewer minorities

Issue: Proposed deregulation of licensed professions

Initiatives to deregulate licensed professions and occupations are more likely in states with Republican legislative majorities in the state House or Senate, states with lower percentages of minority populations, and states having lower percentages of low-income occupations currently licensed, a study in the April 2017 *Labor Law Journal* reports.

"Licensure or License? Prospects for Occupational Regulation" reports the findings of the study, which looked at the 12 states that have formulated legislative proposals dealing with occupational deregulation since 2011.

The authors tested 12 variables in these states to find correlations with deregulatory efforts: state per capita income, urbanization rate, number of low-income occupations currently licensed, unemployment rate, percentage of minority population, percentage of population with a bachelor's degree or higher, union density, existence of "right-to-work" law, number of constituents per legislator, Republican majority in the state senate or house, and percentage of state legislators who are Republican.

Some relationship to deregulatory efforts was found with several of the variables (e.g. low union density, right-to-work laws, and higher unemployment). But only a few correlations were considered statistically significant: States with higher proportions of minority populations and low-income licensed occupations are less likely to have put forward de-licensing proposals (DLPs). States with more constituents per legislator are nearly 30% more likely to have DLPs.

The strongest correlations related to political party: Ninety-three percent of states with DLPs had a Republican majority in the state senate, and the overall proportion of legislators in a given state who are Republican is significantly higher in DLPs states.

Despite the attempts, the authors note, most deregulatory bills have either not been acted upon, died in committee, or been withdrawn under political pressure.

There have only been eight cases of an occupation licensed at the state level being de-licensed by legislative action over the last 40 years, the study finds: barbers in Alabama (983), morticians in Colorado (1971), naturopaths in Virginia (1972), private investigators in Colorado (1977), egg candlers in Colorado (1994), interior designers in Alabama (2004), and watchmakers in Minnesota (1993) and in Wisconsin (1979). Some other occupations such as hypnotists in Indiana and opticians in Texas have been deregulated but had been subject only to registration or certification, not licensure.

As a side issue of interest, the researchers found that the news media have "not been reluctant" to print criticism of some licensed occupations including allegations that they pose excessive costs and restrictions. Examples: "Does a 'Shampooer' Really Need 70 Days of Training?" (*New Republic* 2014); "Anti-

Licensing Movement Scores a Victory" (*Wall Street Journal* 2015); and "So You Think You Can Be a Hair Braider?" (*New York Times* 2012).

Reciprocity does not require similar training programs, court finds

Issue: Reciprocal licensing standards in practice

The Court of Appeals of Minnesota overturned a decision by the state's teaching board to deny the reciprocal license application of an Iowa-licensed teacher January 8, holding that the board's requirement that the teacher's out-of-state licensure be the product of a similar training program to that required in Minnesota was an incorrect interpretation of state law (*Matter of Baker*).

In 2013, after teacher Kimberly Baker, who was already licensed in Iowa, applied for three Minnesota teaching licenses through a reciprocity rule, Minnesota's Board of Teaching granted her applications for early-childhood and elementary education licenses, but denied a third application for an early-childhood special education license.

While Baker's Iowa licensure allowed her to teach children up to age eight, including students with disabilities, the board explained the training required for her Iowa licensure was not equivalent to the training required to obtain a Minnesota early-childhood special education license.

Baker appealed the denial and, in 2015, while that appeal was pending, the Minnesota legislature made changes to the state's teacher licensing law mandating that the board issue field-specific licenses to applicants who meet basic education requirements, hold an out-of-state license for a similar field, and have completed field-specific training or have at least two years of in-field experience.

After considering the new legislation, the board upheld its denial, stating that the Iowa and Minnesota licenses were not similar because they did not require similar training. Baker appealed again and the case went up to the Court of Appeals of Minnesota.

The court found in favor of Baker, holding that the board's requirement that similar licenses must have similar training programs was incorrect. "The plain language of [the two-years' work experience provision] does not require training programs underlying out-of-state licenses to be similar to the training programs underlying Minnesota licenses," wrote Chief Judge Edward Cleary for the court.

When Baker originally applied in 2013, she was subject to the requirement that her Iowa license be similar to the Minnesota licenses for which she applied. But when the legislature altered the law in 2015, it had struck the word "similar" from that particular clause, requiring only that an applicant have a license from another state.

The altered legislation now only requires similarity of the subject matter of the licenses. "In other words," wrote Judge Cleary, "Baker's Iowa license qualifies her to teach the same content field . . . to the same ages as the [early-childhood special education] license."

"The landscape of [the reciprocity provision], especially in light of its recent amendments, establishes that the legislature did not intend to require comparison of the training programs underlying licenses: the requirements focus exclusively on the resulting licenses and their similarities in terms of what they allow license holders to do," concluded the judge. As such, the board's decision was an error of law and was reversed.

Administration

$368K in board's licensing fees "stuffed in drawers and filing cabinets" and never deposited, auditor finds

Issue: Audits and reviews of state board procedures and practices

In 2017, the Mississippi Board of Cosmetology began adopting a no-cash-accepted policy, a daily-deposits-required policy, and a raft of tighter procedures, after the state auditor discovered that nine months' worth of cash, checks, and money orders the board received—totaling $368,000—were never deposited.

The amount was almost equal to half of the board's annual budget of about $750,000. When the stray income was eventually deposited and reported to the state, the board estimates, it lost about $21,000 due to the mishandling of cash receipts.

Board members had expressed concern about complaints of a growing backlog of unprocessed cosmetology license applications in spring 2017. Pressed by the board for an explanation, the board's executive director, David Derrick, cited a new computer system and staff turnover but resigned in May, a few weeks before the end of the 2016-2017 fiscal year. It was then that investigators from the state auditor visited the cosmetology board offices.

In an audit of internal controls over the board's bank acccounts and cash receipts, released January 9, the state auditor reported its findings: chaotic office conditions and numerous procedural irregularities. Among the problems:

• Cash, money orders, checks, etc., undeposited by employees for nine months, were found stuffed in drawers and filing cabinets. Receipts, with money attached, were left unsecured in desks and were not logged or accounted for when received. Many of the uncashed checks had expired months before and would be subject to fees if deposited. Employees questioned by auditors about the undeposited cash said that no employee knew how to enter receipts in the new system.

• Cash appeared to be missing from several receipts. "Staple holes indicated that money had been initially stapled to the receipt and removed subsequently." Employees were unable to account for the whereabouts of the missing funds.

• Receipt log books were lost or destroyed and cash receipts that arrived through the mail were not logged at all by employees of the board. No internal controls were in place, so no audit trail was maintained and cash was not timely deposited.

• The same employee who opened the mail was responsible for the bank reconciliations and preparation of deposit slips.

• There was a "complete absence of board oversight" of daily operations of the board's employees, inadequate monitoring of the executive director,and no active role by the board in reviewing financial information, purchases, travel, etc.

• Lax controls over travel and travel reimbursements were cited by the auditor as an additional problem. During the fiscal year under audit, the board reimbursed $141,000 in travel expenditures, representing more than 18% of the board's annual budget. Reimbursements to the board's executive director for

travel expenses were approved by the executive director himself, with apparently no additional approval required from board members.

• Twenty percent of a sample of travel vouchers examined could not be justified with proper support or documentation, and in some cases items that should have been purchased using standard procurement methods were bought and reimbursed via a travel voucher.

Alluding to possible criminal prosecution, the auditor recommended that its Investigations Division review cash receipt activity at the board to determine if theft of funds occurred. The director of the state auditor's Financial and Compliance Audit office commented: "The amount of loss of cash receipts and license revenue due to fraud, waste, abuse, and additional potential criminal activity is unquantifiable without a detailed, exhaustive forensic audit of Cosmetology."

The board responded to the audit January 29 with a report of the corrective action plan it had implemented beginning in July 2017, which includes

•. Completion of 7,000 backlogged licenses by August 2017 and up-to-date processing since that date, with licenses processed and printed within three days of receipt at the office.

• An end to the policy of accepting cash payments and a new requirement that deposits of receipts must be taken daily to the bank.

• Complete separation of duties for opening the mail, copying mail, processing deposits, and making deposits.

• Routine spot checks by the executive director to assure that payments are never left in the processor's work station, filing cabinet, or desk drawer.

• A request for bids to secure the services of a forensic auditor.

• A centralized booking system with a minimum of three staff members trained to process licenses.

• Provision of copies of reconciled bank statements to board members, and regular updates on staff issues, license processing, reciprocity, and all other issues that arise in the office.

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 $228 per year, $447 for two years, $617 for three years, $798 for four years. Online access to PLR content is included in the subscription price; online-only subscriptions are $199 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 person. Licenses to distribute extra PDF copies only, to individuals within the same physical office or state licensing board, are $20 per recipient per year.