Professional Licensing Report

Licensing, testing, and discipline in the profession

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Highlights in this issue

Licensing

Report: Restrictions on licensing of people with records may pose unfair burden to millions

Issue: Criminal background prohibitions in licensing statutes

Bipartisan momentum is building in support of "fair chance licensing" reforms that lift restrictions on granting licensure to people with records, according to a November 2018 report from the National Employment Law Project (NELP), a research organization that advocates broadly for wage, unemployment, and regulatory policies that benefit workers.

About one in four jobs in the U.S now require a license and, commonly, a background check, to practice, NELP notes. This is at a time when mass incarceration has been at its peak and there are now 70 million people in the U.S. who have an arrest or conviction record.

But the report, *Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions*, points to a recent trend: a surge in new laws that restrict licensing agencies to only consider convictions that are "substantially related" to the occupation and occurred within seven years of the application.

*See **Licensing**, page 10*

Discipline

NH Supreme Court: Board may impose discipline for acts that break other laws in addition to practice act

Issue: Adopting broad "obey all laws" requirements for licensees

The Supreme Court of New Hampshire, in a November 1 decision, upheld the authority of the state's veterinary board to discipline its licensees for violations of New Hampshire's Controlled Drug Act. The board had, through proper means, adopted a regulation that incorporated a set of ethical

principles requiring licensees to "obey all laws" in their practice jurisdiction, the court found (*Appeal of Brown*).

In 2016, veterinarian Sandra Brown was found guilty of using expired medications, ignoring the New Hampshire Veterinary Board's prior admonitions following an earlier disciplinary case, failing to keep her clinic in a sanitary condition, issuing prescriptions of improper length, and failing to keep adequate records of both the controlled drugs in her clinic and discussions with her clients about adverse treatment outcomes, including one case in which her error caused the death of an animal.

The board suspended Brown's license for six months and imposed a moratorium on her ability to keep and use controlled drugs in her clinic, although she was still authorized to issue prescriptions. Brown then began the appeals process, eventually reaching the Supreme Court of New Hampshire. She argued that the board lacked the authority to regulate her prescribing practices or to find that she violated provisions of the state's Controlled Drug Act because those statutes were exclusively within the jurisdiction of the state pharmacy board.

This argument did not succeed. To determine whether the veterinary board did, indeed, have the authority to discipline its licensee for violations of the Controlled Drug Act, the court turned to the board's empowering legislation, which, through a series of connecting steps, did grant that authority.

A New Hampshire statute authorizes the board to discipline licensees who engage in "unprofessional" or "dishonorable" conduct and, under its rulemaking authority, the board adopted a rule declaring that violations of the Principles of Veterinary Medical Ethics, promulgated by the American Veterinary Medical Association, constitute unprofessional or dishonorable conduct. That set of principles, in turn, requires veterinary licensees to "obey all laws" of the jurisdiction in which they practice.

Thus, wrote Justice Gary Hicks, that chain of laws empowers the board to discipline its licensees for violations of New Hampshire's Controlled Drug Act. "Even if we assume without deciding that the Board's jurisdiction is limited to disciplining licensed veterinarians for violating laws bearing a nexus to the Board's purpose of promoting 'public health, safety, and welfare" by protecting the public from 'incompetent, unscrupulous, and unauthorized persons' and from unprofessional or illegal practices by licensed veterinarians," the judge continued, "the violations of the Controlled Drug Act at issue plainly fall within that jurisdiction."

Having rejected Brown's jurisdiction argument, the court upheld the board's disciplinary decision.

Unfilled board member slot voids discipline in criminal assault case

Issue: Procedural errors and effect on disciplinary actions

A decision to suspend the license of a physical therapist convicted of criminal assault was reversed by a Louisiana appellate court November 14 because the board lacked a required physician board member, making its decisions invalid (*Bias v. Louisiana Physical Therapy Board*).

The physical therapist in the case, Kevin Bias, has licenses in both Texas and Louisiana. In 2016, he was charged with criminal assault while driving, pleaded not guilty, and was eventually sent to a diversion plan, after which his case was dismissed.

Despite that outcome, the Louisiana Physical Therapy Board opened a disciplinary case after receiving an anonymous complaint informing it of the assault. Following a hearing, the board suspended his license, Bias appealed, and the case eventually rose to the state Court of Appeals for the Third Circuit.

On appeal, Bias argued that the board was not properly comprised when it made the decision to suspend his license. Under Louisiana law, the physical therapy board must have at least one member who is licensed to practice medicine in the state and specializes in either orthopedic surgery or physical therapy. At the time of Bias's hearing, the board lacked a licensed physician as a member and was thus not legally constituted.

The court agreed. Although Bias and his attorney were informed, just prior to the start of the disciplinary hearing, that the board lacked a physician member and they did not initially object to that unlawful makeup, the Court of Appeals held that the failure to object was irrelevant.

"The board must be legally constituted regardless of whether a licensee objects," Judge Silvia Cook explained. "The fact that Bias's attorney did not attempt to stop the hearing from going forward when he was informed just prior to the start of the hearing that there was no physician member on the Board does not constitute a waiver of any sort. Bias cannot waive the mandatory lawful makeup of a duly constituted Board and any action taken by an administrative board not properly constituted under the enabling statute's mandatory requirements is void *ab initio* and must be vacated."

Reasonable misunderstanding or not? Light penalty okayed for failure to reveal expunged offense

Issue: Licensee failure to report expunged offense to board

A California appellate court, in a November 27 decision, affirmed a sanction imposed by the state's contractor's board on a licensee who failed to report a vacated conviction for sexual assault (*City Light Construction v. State of California*).

A lower court had overturned the decision on the grounds that the licensee reasonably misunderstood that the vacation of his conviction did not free him from reporting it in licensing contexts, but the appellate court held that, because the board imposed only the minimum sanctions, it could not be said to have abused its discretion.

Faramarz Taghilou had been licensed as a contractor for only two years when, in 1989, he pleaded no contest to sexually assaulting a child, a crime for which he received three years' criminal probation, a permanent prohibition on association with girls under 16, and registration as a sex offender.

However, in 1992, Taghilou obtained a court order vacating his no-contest plea and expunging his conviction, on the grounds that, during his original criminal proceedings, he had not been advised about the long-term consequences of pleading no contest to charges of sexual assault of a minor. In 1997, he received a certificate of rehabilitation from the state.

Despite the dismissal of the conviction, under California law, Taghilou was still required to disclose his conviction in licensure settings. Unfortunately, the court order vacating the conviction did not warn Taghilou of this fact and, apparently unaware of this obligation, Taghilou failed to report his criminal history when he applied for an additional license classification in 1994.

In 2015, after learning of the omission, the California's State Contractors License Board began disciplinary proceedings against Taghilou. In response, he pleaded ignorance of his reporting requirement, as well as innocence both in the reporting failure—he claimed that an assistant at a school where he was taking course work filled the application out for him—and on the substance of his now 26-year old criminal case.

Following a hearing, an administrative law judge held that Taghilou had violated statutory reporting requirements but, citing the significant mitigating evidence in his case, eventually recommended only a three-year license probation.

Taghilou challenged that decision in court, again arguing that he had not willfully violated the reporting requirement, and a state trial court held that, although Taghilou had, in fact, violated state law, the board had abused its discretion in imposing a penalty and vacated the decision. Taghilou, that court explained, reasonably believed that the expungement of his conviction freed him from reporting it in licensing processes. "Any reasonable person would interpret his or her status in this way," that court concluded.

Unfortunately for Taghilou, his success was short-lived. The board appealed the decision and the case went up to the Court of Appeal, California Second Appellate District, which re-imposed Taghilou's discipline.

The Court of Appeal, in an opinion written by Judge Dorothy Kim, ruled that the board had not abused its discretion in disciplining Taghilou despite his apparently reasonable error. Shenoted the lenient nature of the actual discipline issued. "It imposed the minimum penalty for a violation of [the reporting statute] recommended by its Disciplinary Guidelines: a stayed revocation with three years of probation," as well as other minimal monetary sanctions and costs, wrote Judge Kim.

Given those disciplinary minimums in the face of a finding of fault on the part of Taghilou, explained the judge, the board cannot be said to have abused its authority, and the lower court's ruling would be reversed.

"We find the Board did not abuse its discretion by imposing the minimum recommended penalty," she concluded.

Board may discipline licensees for actions underlying dismissed convictions

Issue: Status of dismissed convictions as grounds for discipline

In a December 10 ruling, a California appellate court held that, although state law prohibits licensing boards from disciplining licensees based on convictions that have been dismissed under a conviction rehabilitation law, boards may still base discipline on the actions underlying those convictions, at least until a new law prohibiting such reliance takes effect in 2020 (*Moustafa v. Board of Registered Nursing*).

Between 2006 and 2009, nurse Radwa Moustafa racked up a small collection of convictions for minor crimes, being convicted on two charges of petty theft after shoplifting from a Macy's, one charge of vandalism for forcibly removing and destroying a boot placed on her car for unpaid parking tickets, and one charge of driving without a license.

All of the convictions were dismissed in 2013 under a section of California's Penal Code which allows offenders to rehabilitate their criminal records.

Despite the dismissals, in 2015 the nursing board denied Moustafa's application for a nursing license based on those convictions. Moustafa appealed, giving evidence of her rehabilitation and good character, and, after a hearing, the board issued her a license but placed it on immediate probation for three years.

Moustafa appealed that decision as well, and a trial court reversed the board, holding that California law prevents the board from relying on convictions dismissed in the way of Moustafa's and adding that, in order to give practical effect to that law, the board was also prohibited from basing its decision on the conduct underlying the convictions.

The board appealed that ruling, and the case went up to the Court of Appeal, California First Appellate District. The board argued that the section of law that prohibits it from issuing discipline based on "a conviction that has been dismissed" applies only if an applicant has a single conviction, whereas Moustafa had four. In the alternative, the board also argued that the lower court had overstepped its bounds by preventing the board from relying on the actions underlying Moustafa's convictions to issue its discipline. These arguments met with mixed success, but the board's overall decision was affirmed by the court.

The court did not approve of the board's argument regarding the application of the dismissal law to persons with multiple versus single convictions. "We believe, to the contrary," wrote Justice James Humes, "that the plain and more natural reading of the provision is that the phrase 'a conviction that has been dismissed' applies to each dismissed conviction an applicant may have, regardless of whether the applicant has one individual dismissed conviction or a collection of such individual dismissed convictions. It makes sense for the phrase to be formulated in the singular, because every dismissal relates to a singular dismissed conviction."

To support his argument, Justice Humes noted the potential consequences of extending the logic of the board's reliance on the statute's use of the singular tense. "Would the board seriously contend that it cannot deny a license because an applicant was convicted of several crimes instead of 'a crime' . . . or take disciplinary action against a licensee because the licensee is guilty of several offenses rather than 'a felony'?

" . . . We think it is clear that in all of these instances, the Board has the authority to take action against an applicant or licensee who has engaged in a number of these acts, just as it has the ability to take action against such a person who has engaged in one of these acts."

Unfortunately for Moustafa, although the board was prohibited from using her convictions to discipline her license, the court held that the board nevertheless had the authority to issue that discipline based on the actions underlying those convictions.

The lower court had ruled that giving the board the ability to discipline for underlying action where it was denied the power to discipline based on the convictions themselves would make the latter prohibition meaningless. But Justice Humes noted that, in order to base discipline on the underlying actions, the board would have to present evidence of those acts, and the court saw "no obvious inconsistency in precluding conduct underlying those convictions that a board can actually prove."

Oddly, the new law, Assembly Bill No. 2138, while preventing boards from relying on conduct underlying dismissed convictions to discipline a licensee, does not prevent the board from relying on otherwise identical conduct that did not result in a conviction that was then dismissed. Recognizing this "anomalous effect," Justice Humes wrote that "we expect that when the Board considers appropriate sanctions based on applicants' conduct, it will assess the circumstances of the conduct thoughtfully, reject categorical assumptions, and take to heart the Legislature's clear intent in enacting Assembly Bill No. 2138 to reduce licensing and employment barriers for people who are rehabilitated."

Interestingly, the state legislature had actually moved to address the apparent inconsistency, having passed a bill denying licensing boards the right to base discipline on events underlying dismissed convictions. However, the bill does not take effect until 2020, and the court held that the board was not subject to the new law's restriction in the meantime.

Turning to the substance of whether Moustafa's crimes actually qualified as conduct punishable by the board, the court held that, although her two instances of theft were punishable, her act of vandalism was not. Licensees are subject to discipline for actions that are unprofessional and substantially related to the practice of nursing, explained Justice Humes, and, although the board had held that Moustafa's thefts and vandalism substantially related to her practice, the board had seemingly just assumed that such actions also qualified as unprofessional.

While the court agreed that Moustafa's thefts "reflected her present or potential unfitness to practice nursing," it rejected any attempt to make thefts a categorical source of discipline. "We conclude that Moustafa's shoplifting activity was, if only barely, substantially related to her fitness to practice nursing so as to justify a restricted license . . . We recognize that nurses hold positions of extreme trust and have access to the property of others, including property of vulnerable patients. "

"Even though Moustafa shoplifted while still in college, did not take anything of significant value, and did not steal from a patient or entity she would encounter as a nurse, we cannot say as a matter of law that the conduct did not justify restricting a license."

Regarding her act of vandalism, Justice Humes wrote that "In our view, removing and damaging a vehicle boot cannot reasonably be considered to constitute unprofessional conduct substantially related to nursing, and it was therefore not conduct that independently qualified as a basis for the license restriction."

Single offense—an $8,300 embezzlement—does not warrant discipline under plural "dishonest practices" standard

Issue: Single incidence of prohibited action versus multiple incidences

An Indiana appellate court, in a December 31 decision, upheld the reversal of a decision by the state's insurance commissioner not to renew the license of an insurance producer who had stolen thousands of dollars from a homeowners association, ruling that the single instance of theft did not amount to "fraudulent, coercive, or dishonest *practices*," as the relevant statutory language reads, which requires more than one dishonest act to be applicable (*Commissioner of Indiana Department of Insurance v. Schumaker*).

In 2011, Jeffrey Schumaker, an Indiana-licensed insurance producer, embezzled $8,300 as treasurer of his homeowners association. When the association needed to pay its bills, Schumaker confessed his theft to his fellow members, resigned his treasurer position and, at the advice of a member who was a fellow insurance licensee, self-reported the incident to the Financial Industry Regulatory Authority, the private regulatory authority with which Schumaker was licensed.

As a result, the Authority suspended his license in 2014, and, after learning of that suspension, the Commissioner of the Indiana Department of Insurance denied Schumaker's 2016 license renewal application. Schumaker requested a

hearing on the matter, but following the hearing, the Commissioner stayed with its original decision to deny the renewal application.

Schumaker appealed, and a trial court reversed the Commissioner's decision in a surprisingly-reasoned decision, finding that the section of Indiana code under which the Commissioner disciplined Schumaker requires that a licensee have engaged in "fraudulent, coercive, or dishonest *practices*," with an emphasis of that last, plural word. Because, in stealing $8,300, Schumaker had only engaged in "a single instance of dishonesty," the court held that he had only engaged in a dishonest "practice," as opposed to "*practices*," which would require, it seems, stealing at least twice.

Possibly this holding was driven by the court's sympathetic portrayal of what it considered the mitigating facts of the case, citing Schumaker's otherwise clean record, a recent trauma in which he had struck a girl who had run out in front of his car—an incident which resulted in both emotional tolls and an actual lawsuit—and Schumaker's assertion that he "always intended to pay the money back" and that the theft was out of character.

"If any dishonest 'practice' were a sufficient basis for the Commissioner to take action against a licensee," the trial judge, Patrick Dietrick, wrote, in a bit of tortured reasoning, "then the statute would also sweep in a wide variety of socially and personally 'dishonest' conduct, such as cheating at golf or in card games." The judge ordered the case remanded to the Commissioner, to decide on a lesser punishment of probation or a civil penalty.

The Commissioner appealed that decision, but to no avail, as the Court of Appeals of Indiana agreed with the lower court's interpretation of the plural requirement of the law. Judge Elaine Brown wrote that "the evidence supports the conclusion that Schumaker's action of taking money from his homeowners association, under the specific circumstances of this case . . . did not constitute 'practices' . . . which warrant the severe sanction of refusal to renew his insurance license."

Having dismissed that argument, as well as another concerning the length of time Schumaker took to report his license suspension to the Commissioner, the Court upheld the reversal of the disciplinary decision.

> Under state law, "The commissioner may reprimand, levy a civil penalty, place an insurance producer on probation, suspend an insurance producer's license, revoke an insurance producer's license for a period of years, permanently revoke an insurance producer's license, or refuse to issue or renew an insurance producer license, or take any combination of these actions, for any of the following causes: (1) Providing incorrect, misleading, incomplete, or materially untrue information in a license application. (2) Violating: (A) an insurance law; (B) a regulation; (C) a subpoena of an insurance commissioner; or (D) an order of an insurance commissioner; of Indiana or of another state.
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> (4) Improperly withholding, misappropriating, or converting any monies or properties received in the course of doing insurance business.
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> (8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in Indiana or elsewhere. Ind. Code § 27-1-15.6-12(b).

Refusal to accept complaint sent by certified mail is no ticket to denial-of-due-process finding

Issue: Due process requirements for notification of disciplinary complaints

An appellate court in Michigan rejected the due process claims of a physician who argued that, because a certified mailing of a disciplinary complaint against him was returned unclaimed—despite being sent to the correct address—the board could not assume that he had received it (*In re Ahsan*). In its December 18 decision, the court also held that, while a disciplinary committee of the state's licensing body had failed to

include required findings of fact and law in its final decision, that error did not cause harm to the physician and would thus not invalidate the decision.

After an expert reviewer found several problems while reviewing physician Muhammed Ahsan's practice files, the Michigan Department of Licensing and Regulatory Affairs filed a disciplinary complaint against him. Although the Department mailed a certified copy of the complaint to Ahsan, the mailing was returned unclaimed. As a result, the physician never responded, and the board moved for a default judgment, fining Ahsan $20,000, suspending his medical license, and voiding his controlled substance license.

Ahsan appealed, claiming that, although the complaint had been sent to the correct address, he never actually received a copy, and thus was denied a chance to respond to the Department's allegations, a violation of his rights to due process. The case went to the Court of Appeals of Michigan, which issued a decision in favor of the board.

Unfortunately for Ahsan, the court noted that Michigan law does require that delivery of the complaint occur "if the nondelivery was caused by the refusal of the applicant, licensee, or registrant to accept service." Two notices of the certified mailing were left weeks apart at Ahsan's address. That, together with other evidence of service was sufficient to show that the complaint had been mailed out and made available to Ahsan. "Respondent's own failure to claim the envelope, after two notices," the court wrote, "does not affect the validity of the service."

And, although Ahsan argued that the Department cannot have assumed that he had the chance to receive the complaint, the court noted that both Michigan judicial precedent and the statute state that delivery is to be assumed three days after the date of mailing. Ahsan was adamant in his claims that he never received the notice, but, because he was unable to provide any evidence to rebut the presumption that the letter had been properly delivered, the presumption stood.

Ahsan argued that the Department, unsure of whether Ahsan had actually received notice of the complaint, should have attempted another form of communication—either in person, over the phone, or through email—to inform him of the pending action. However, state law mandates service by mail only, and the Department "was not required to service respondent by multiple methods simply because he did not claim his mail."

Last, separately, and with some success, Ahsan challenged the Department's final order, claiming that the Disciplinary Subcommittee handling his case improperly failed to include required findings of fact and conclusion of law. That final order, "is deficient in several respects," the court agreed, noting that the order was lacking a "findings of fact" section.

"In such a case as this, where the respondent fails to respond to the complaint," the judges wrote, "the Disciplinary Subcommittee is entitled to accept the factual allegations of the complaint as true. This does not mean, however, that the Disciplinary Subcommittee is excluded from its responsibility to make factual findings and present those findings in a final order; rather, the focus of those findings merely shifts from the actual allegations of the complaint to the adequacy of service and response."

Despite that requirement, the Department's final order did not include any factual findings regarding Ahsan's apparent refusal of service or any legal conclusions about whether the Department's mailing was sufficient to show service.

Unfortunately for Ahsan, although he was correct that the Department had erred in drafting his disciplinary order, the court found that the error was harmless, and would not invalidate the Department's decision. The case record shows that Ahsan was afforded sufficient process, that the Disciplinary Subcommittee was entitled to assume the allegations against him were true, and thus, the court was "constrained to conclude that there was substantial compliance with the statute."

Having rejected Ahsan's argument, the court affirmed the Department's disciplinary decision.

Licensee loses argument that drug limits were arbitrarily set

Issue: Establishment of illicit drug levels creating grounds for discipline

A Kentucky appellate court, in a December 21 decision, affirmed a decision by the state's horse racing commission to discipline the license of a trainer whose horse had tested positive for illegal levels of a drug used to treat muscle cramps. The court upheld the regulatory limits of the drug in response to a challenge by the trainer who claimed the levels were set arbitrarily (*Kentucky Horse Racing Commission v. Motion*).

In 2015, a horse trained by H. Graham Motion, a licensee of Kentucky's Horse Racing Commission, tested for illegally high levels of methocarbamol, a drug used to deal with muscle cramps, with the result that Commission officials entered an order finding that Motion and George Strawbridge, Jr., the horse's owner, violated Kentucky racing regulations.

During Commission disciplinary proceedings, Motion argued both that the horse had likely acquired the illegally high levels of the drug through environmental contamination and that the legal level for methocarbamol, 1 nanogram per milliliter, was not supported by any scientific basis and thus set arbitrarily. After a hearing, the Commission fined Motion $500, disqualified the horse from the tainted race, and required Strawbridge to return the $90,000 purse it had won, but declined to suspend or otherwise impair Motion's trainer license.

Motion and Strawbridge successfully appealed the Commission's decision, with a court agreeing with their arguments that the allowed methocarbamol level set by the state's racing regulations was arbitrarily set, thus unenforceable, and that a racing regulation that makes trainers strictly liable for any drug violation by a horse was unconstitutional because it violated licensees' due process protections.

The Commission appealed that ruling, and the case went up to the Court of Appeals of Kentucky, which reversed the lower court in favor of the Commission.

On appeal, aside from substantively defending the regulation setting the legal level of methocarbamol in horses, the Commission also tried to get the case dismissed on procedural grounds, arguing that the state court system did not have jurisdiction to hear Motion's appeal. Kentucky civil procedure rules require that appellants of Commission decisions issue a summons in the name of the state's attorney general, and Motion had failed to do so until after the board had pointed out the error, a fact that the board argued was fatal to his appeal.

Although the court agreed that Motion was required to issue the summons, it nevertheless held that the lower court had been correct in allowing the case to proceed because the error had been committed in good faith. The court noted that Motion had issued summonses to the wrong individuals and corrected the error when notified of it.

The summons rule "does not require that a summons be flawlessly issued, only that it be issued in good faith," wrote Judge Gene Smallwood, Jr. "This means that errors or flaws in the issuance and service of a summons are not fatal to a cause of action . . . There is no evidence that Appellees attempted to deceive the court or the Commission."

Addressing Motion's substantive claim that the legal levels of methocarbamol were arbitrary because they were set without sufficient scientific evidence, the court noted that whether a rational basis exists for such a regulation depends only on whether there *is* scientific evidence to indicate that the regulation furthers a legitimate public purpose, not whether that evidence is sufficient.

Because methocarbamol given to a horse in large amounts produces a noticeable impairment of the animal, and an expert witness for the Commission testified that there was little evidence of the effects of the drug given in smaller doses, the Commission had reason to set legal limits of the drug, and was not required to find the optimal limit. "Limiting the amount of a drug in a horse's system that is not fully understood is a rational reason for the low threshold," wrote the judge.

In addition, noting the importance of legalized gambling to the continued existence of horse racing and the need to keep the results of races "as far above suspicion as possible," Judge Smallwood wrote that "by limiting the amount of medications and drugs given to horses, the Commission is protecting the health of horses and ensuring the integrity of racing itself. There are significant rational reasons to uphold the regulation as constitutional."

Addressing the due process argument, the court again found in favor of the Commission, upholding the strict liability rule as constitutional. "To protect the integrity of this unique industry, it is really immaterial whether 'guilt' should be ascribed either directly or indirectly to the trainer," Judge Smallwood wrote.

"The rules were designed, and reasonably so, to condition the grant of a trainer's license on the trainer's acceptance of an absolute duty to ensure compliance with reasonable regulation governing the areas over which the trainer has responsibility."

"Whether a violation occurs as a result of the personal acts of the trainer, of persons under his supervision, or even of unknown third parties, the condition of licensure has been violated by the failure to provide adequate control, and the consequence of the default is a possible suspension of the trainer's license or a fine."

"We have no doubt that a rule which both conditions a license and establishes with specificity reasonable precautionary duties within the competence of the licensee to perform is both reasonable and constitutional."

North Dakota Supreme Court restores board's sanctions for improper use of confidential information

Issue: Disciplinary implications of violating confidentiality

The Supreme Court of North Dakota, in a December 11 ruling, reversed a decision by a state district court to reject several disciplinary sanctions imposed by the state engineering board on a group of engineers who had used the confidential information of a former employer for their own benefit (*Berg v. North Dakota State Board of Registration for Professional Engineers and Land Surveyors*). The disciplined licensees were employees of a firm called Ulteig Engineers until 2010, when they left and formed

a new firm, Apex Engineering Group; it was irregularities with this transition that led to their troubles.

Following the exodus of its employees, Ulteig sued Apex and filed ethics complaints against its former employees with the state's engineering board. Ulteig alleged that, in the process of setting up their new business, the group of engineers had used Ulteig's confidential information, created a conflict of interest by failing to inform the firm of their decision to start a new firm while maintaining access to that confidential information, and made preparations to seek to take projects that Ulteig had already been contracted for while still employed by the firm.

The board took up the complaints and, after a hearing, found that several members of the new firm had committed at least one ethics violation during the course of the transition. Apex principal Thomas Welle was suspended for six months, Michael Berg, Scott Olson, and Dain Miller for 60 days. Both Timothy Paustian and the new firm itself received letters of reprimand.

The engineers appealed, and a state district court, while upholding the findings of a conflict of interest, reversed several other of the board's findings of ethics violations, remanded the case, and awarded attorney fees to the group. The board appealed that decision, and the case went up to the Supreme Court of North Dakota, which issued a decision reinstating the board's discipline.

On cross appeals, the board argued that the trial court wrongly overturned the disciplinary decision on the faulty ground that the board lacked sufficient evidence, and the licensees challenged the court's affirmation of the board's conflicts-of-interests findings.

Several regulatory prohibitions played a role in the case. North Dakota engineering regulations prohibit licensees from disclosing the confidential information of their clients or employers without consent. They also prohibit conflicts of interest that could influence licensees work for clients or employers, as well as the solicitation of work another licensee is also contracted to perform.

Reviewing the factual findings, the Supreme Court held that the engineering board had presented sufficient evidence to prove to a reasonable mind that Apex employees had taken and used confidential information from Ulteig while forming their business plans and structure, as well as information regarding Ulteig projects that the new firm hoped to either take over or use to secure additional business.

When making the jump to Apex, one engineer, Welle, secured Ulteig's 2008 business plan, as well as contract, salary, and financial information, for a template in setting up the new firm, and at least one engineer downloaded the contents of an Ulteig laptop before leaving.

While employed by Ulteig on a contract for water services for the city of Fargo, putative Apex employees prepared a proposal for a water consulting contract with the city using the information from the contracted project, which Apex submitted after the creation of the firm. And the board found that several of the departing engineers created conflicts of interest by failing to notify Ulteig that they were creating a competing firm while still employed at the first, while retaining access to confidential information there and meeting with existing and potential clients of the old firm.

The Supreme Court, deferring to these factual findings of the board, affirmed the discipline it had imposed, reversing the lower court and voiding the legal fees that court had awarded.

Licensing

"Fair Chance Licensing" reforms embraced in many states (from page 1)

State policy reforms to reduce disqualifications for people with records

Ten state policy reforms would promote greater transparency and accountability and help achieve fairer, more consistently applied licensing laws, the NELP report concludes.

1. **Eliminate blanket bans** that automatically disqualify workers with certain records through "mandatory" or "permanent" licensing disqualifications.

2. Limit the **types of record information** requested in a background check. Including less relevant information such as offenses that are old, minor, or unrelated to the occupation can cloud opinions of licensing boards even when they intend to consider only recent, occupation-related offenses.

3. Require licensing boards to assess candidates **case by case**, examining both whether a conviction is occupation-related and how much time has passed since the offense.

4. Mandate consideration of applicants' **rehabilitation** and any **mitigating circumstances**, which may provide context that reveals the insignificance of a serious-sounding record.

5. Provide applicants with **notice** of potential disqualification and an **opportunity to respond** before the application is rejected, since background reports may be inaccurate and the applicant should be allowed to point out errors.

6. **"Ban the box"** by removing questions about conviction records from the application, and stop asking applicants to self-report their records at any time during the application process.

7. **Remove "good moral character" requirements**, restrictions against "moral turpitude" offenses, and other vague legal standards. "When the law lacks clear limits on licensing board discretion, opaque statutory language affords cover to automatically reject applicants with virtually any record," NELP points out.

8. Evaluate state occupational licensing restrictions and mandate **ongoing data collection** by licensing boards so that lawmakers can better understand current barriers and ensure that any attempted reforms make headway toward addressing them.

9. Promote transparency by providing **clear guidance** to applicants regarding potential disqualifications for the occupation.

10. Create more uniform standards by incorporating these recommendations into a **broadly applicable state licensing law** that expressly supersedes any conviction record restrictions contained in other laws governing specific professions.

The trend started with Illinois and Georgia in 2016. It expanded to Arizona, Kentucky, and Louisiana in 2017, and to seven other states in 2018: California, Delaware, Indiana, Kansas, Maryland, Massachusetts, and Tennessee.

More jobs in the economy require a license or "permission to work," as both NELP and the Heritage Foundation term it, than ever before—an estimated 25% of workers, steeply higher than about 5% in the 1950s. About two thirds of the growth is from significant expansion of licensing into new sectors, the report notes.

About 27,000 state occupational licensing restrictions are on the books for people with records, according to the American Bar Association. "Of those, 6,000 can be based on misdemeanors, 19,000 are permanent disqualifications, and 11,000 are mandatory disqualifications."

The stigma of a prison record falls harder on Hispanic women and blacks, who are much less likely than whites with prison

Even misdemeanor convictions can scotch a licensure application. The NELP report relates the story of a child care provider who lost her day-care-owner certification and license to work in caregiving facilities. The offense: a 30-year-old

overpayment of public assistance imposed for mistakenly failing to report gifts from a boyfriend. That led to a misdemeanor conviction and, three decades later, permanent revocation of her licenses.

Fair chance licensing would help workers, employers, and the economy, NELP argues. The report quotes Pennsylvania Governor Tom Wolf 's call, in June 2018, for repeal of the automatic 10-year ban on licensing for those convicted of a drug felony: "Pennsylvania must be a place where people can put their skills, experience, and education to work. Requiring a government license to work in certain jobs helps to make all of us safe, but those requirements should be fair."

NELP's report includes a table listing, for each state and the District of Columbia, estimated numbers of people with arrest or conviction records, percent of adult population with arrest or conviction records, number of people with felony convictions, number of people with prison records, percent of the workforce licensed by the state, percent of occupations with lower incomes requiring a license, and the number of disqualifications for a record in state occupational licensing laws.

Applicant must provide SSN, despite religious objection

Issue: Religious objections to licensure requirements

A contractor applying for licensure in Idaho is not exempt from a requirement that he provide his social security number, a state appellate court ruled December 3 (*Ricks v. State of Idaho Contractors Board*).

When contractor George Ricks filed for registration with the Idaho Bureau of Occupational Licenses in 2014, he refused to supply his social security number, although it was required by law, on the grounds that social security numbers are "a form of the mark, and in substance . . . the number of the 2-horned beast written of in the Holy Bible," and instead filed an affidavit explaining his religious objection. His registration application was subsequently denied.

Two years later, Ricks filed a complaint against the both the Bureau and Idaho's Contractor Board, claiming constitutional and statutory violations of his rights to religious freedom, freedom from discrimination, and freedom to contract, and arguing that the section of the law requiring contractors to provide social security numbers was unconstitutionally vague. A district court granted a state motion to dismiss Ricks's claims, and Ricks appealed to the Court of Appeals of Idaho.

The requirement that Idaho contractor licensees supply a social security number originates with the 1996 federal Personal Responsibility and Work Opportunity Reconciliation Act. Intended to facilitate the tracking of individuals who are obligated to provide child support payments, the Act provides monetary grants to states that, among other things, require professional licensee applicants to provide their social security numbers. Idaho opted in by passing legislation to bring the state into accord.

Ricks's claims under federal and state religious freedom statutes placed him in a sort of legal lacuna, where neither Idaho's Free Exercise of Religion Protected Act nor the federal Religious Freedom Restoration Act exempted him from compliance with the social security number requirement.

The Court of Appeals held that, because the provision of the Idaho Act that would potentially protect Ricks from providing his social security number was in direct conflict with the Personal Responsibility Act, it was preempted by that federal statute.

Ricks's attempt to use the Religious Freedom Restoration Act claim also failed, as suits under that act are applicable to federal entities, and not the state bodies relevant to his case.

His First Amendment argument was unsuccessful as well. Assessing his claims under the First Amendment's protections of religious practice, appeals court Judge Molly Huskey noted that the Personal Responsibility Act was generally applicable to all people and was not specifically targeted at a class of religious people who object to social security numbers, making it religiously neutral. Because it was religiously neutral, the law would only need a rational basis to withstand a constitutional challenge.

That basis was the statute's stated purpose of enforcing parental support obligation. "Thus," Judge Huskey concluded, "even if the statutes burden the free exercise of Ricks' religion, that burden does not amount to a violation of Ricks' First Amendment Rights."

Last, the court denied Ricks's right-to-contract claim. "The requirement that a social security number be listed on an application for an Idaho contractor license does qualify Ricks's right to contract," wrote Judge Huskey. "But because that requirement pursues legitimate state objectives, it does not violate Ricks' contract right, nor does it amount to a due process violation."

Having rejected Rick's arguments, the Court of Appeals affirmed the decision of the lower court dismissing the case.

Testing

U.S. Court of Appeals: Applicant who won test accommodations loses bid for legal costs

Issue: Penalties for failure to accommodate disabilities under ADA

The First Circuit U.S. Court of Appeals, in a December 11 decision, overturned a decision by a federal circuit court to award attorneys' fee to a license applicant who had successfully obtained a temporary restraining order requiring the board to provide him with disability accommodations (*Sinapi v. Rhode Island Board of Bar Examiners*).

Anthony Sinapi has attention deficit/hyperactivity disorder, a condition for which he received accommodations—in the form of extra time to take exams and a distraction-free environment in which to do so—in college and law school. When he sought similar accommodations of 50% more time and a quiet room to take the Rhode Island bar exam, the Board of Bar Examiners denied his requests after submitting his medical paperwork to an impartial medical examiner. Sinapi filed an emergency petition with the Rhode Island Supreme Court, but the court upheld the denial.

Sinapi then filed suit in federal court, seeking monetary damages and reduced versions of his accommodation requests. The judge hearing the case granted Sinapi's request for a temporary restraining order requiring the board to provide accommodations for the upcoming exam, which was scheduled to take place the day after the order was issued.

The court held that Sinapi was likely to succeed on the merits of his case, and that, because he was registered to take the multi-state portion of the test in Rhode Island, a denial of his accommodations request would negatively impact

his performance in Massachusetts, where the board had granted his accommodation requests after he had also applied to take the bar. Sinapi took the test as scheduled.

The next month, the Rhode Island board filed for a dismissal of the case. Sinapi declined to reply to the motion for dismissal and the district court granted it, rejecting Sinapi's monetary claims and noting that the question of accommodations was moot now that Sinapi had completed the test. However, Sinapi successfully filed for and received $20,000 in legal fees and costs, based on his success in obtaining the restraining order, under a section of the Americans with Disabilities Act that allows prevailing litigants to recover expenses.

The board appealed that costs award and the case went up to the U.S. Court of Appeals for the First Circuit, which issued a decision in the board's favor.

The circuit court judges did not agree that Sinapi was entitled to legal costs. Although he had successfully obtained the temporary restraining order, which allowed him to sit for the exam, because Sinapi had not followed through to obtain a final decision on the substance of his accommodations claim, he could not be termed a "prevailing party" because the quickly-decided restraining order had not required the district court to make a thorough examination of the merits of his case.

"Since the substance of Sinapi's claim for injunctive relief was never addressed in any depth, despite the Board's vigorous argument that the claim was fatally flawed, and no merits-based decision ever entered in his favor," Judge Michael Ponsor wrote for the court, "Sinapi never achieved prevailing party status, and the award of fees was unsupported."

Judge Posnor wrote that, although the board had opposed Sinapi's claims, it "never received in-depth assessment of its substantive arguments. It would be unfair to deem Sinapi a 'prevailing' party in these circumstances and slap the Board with a fee bill based on a finding it never received a fair opportunity to contest on a properly developed record."

Sinapi had cross-appealed the lower court's rejection of his monetary damages claim, but the circuit court found in favor of the board on that issue as well. The board, the court explained, is a state agency and protected from suit by the Eleventh Amendment's prohibition on suits against the states.

While the board would be vulnerable to a claimed violation of the Fourteenth Amendment equal protection guarantees, Sinapi's claims against the board did not rise to the level of constitutional violations. Thus the board was immune from claims of monetary damages.

Additionally, the monetary claims against individual board members were invalid, as the members were protected by quasi-judicial immunity, which protects officials who are acting as adjudicators in administrative cases from litigation by losing parties.

"Few people would serve on the Board knowing that any negative accommodation decision would likely trigger a lawsuit aimed at their personal checking accounts," wrote Judge Ponsor. "Even if someone had the brass to join the Board in these circumstances, denials of accommodations, however well founded, would likely be few and reluctant. Quasi-judicial protection is simply essential if the Board is to function objectively."

Scope of Practice

Last round in acupuncture case: "Dry needling" not off limits for PT

Issue: Regulatory implications of overlapping scopes of practice

Providing a final decision after nearly a decade of legal wrangling, the Supreme Court of North Carolina held December 7 that the state physical therapy board was authorized to regulate the practice of dry needling, a therapy similar to traditional acupuncture (*North Carolina Acupuncture Licensing Board v. North Carolina Board of Physical Therapy*). The acupuncture board had sought to have a court declare the use of therapeutic needles off limits to physical therapists.

The conflict began in earnest when the North Carolina Board of Physical Therapy issued a 2010 position statement on the procedure, holding that the needle-based therapy was within the allowable services provided by physical therapists. The state attorney general took the position that dry needling is distinct from acupuncture. But the PT board was unsuccessful in adopting a formal rule allowing it to regulate the practice

North Carolina's definition of physical therapy practice states, in part: "Physical therapy includes the performance of specialized tests of neuromuscular function, administration of specialized therapeutic procedures, interpretation and implementation of referrals from licensed medical doctors or dentists, and establishment and modification of physical therapy programs for patients. Evaluation and treatment of patients may involve physical measures, methods, or procedures as are found commensurate with physical therapy education and training and generally or specifically authorized by regulations of the Board." N.C. G.S. §90.270.90(4)

The acupuncturists claimed that dry needling is a form of acupuncture and therefore properly provided only by licensed acupuncturists. But in affirming the PT board, the court cited the expansive definition of "physical therapy" in state law."

"It is clear the intent of the legislature was to allow for the evolution in the definition of treatments used in the practice of physical therapy," the state supreme court wrote. "Specifically, the language in the definition encompasses what is taught in the educational programs and training as appropriate for regulation by the Board. This language does not limit the Board's authority to adopt rules to accomplish this purpose."

"Given the Physical Therapy Board's extensive review of a variety of substantial studies and other evidence in conjunction with the involvement of technical and specialized terms specific to physical therapy, we conclude that the Board's reasoning is sound." The only statutory prohibitions on the breadth of physical therapy practices to be regulated by the board were explicit, the court added: a prohibition on the use of radiation, manipulation of the spine, or medical diagnoses of disease.

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