

Professional Licensing *Report*

Licensing, testing, and discipline in the professions

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Licensing

Court vacates board's unexplained denial of reciprocal license for military spouse

Issue: Due process and reciprocal licensing for military spouses

The spouse of an active military member who sought admission to the Georgia Bar based on her

membership in the Louisiana Bar was improperly denied a military spouse waiver of the bar examination requirement, the Supreme Court of Georgia held September 10 (*In the Matter of Harriett O'Neal*).

The applicant, Harriett O'Neal, filed a waiver petition with the Georgia Board of Bar Examiners November 30, 2017, asking that she be allowed to practice law in Georgia without sitting for the bar exam there and without meeting the usual requirements for admission without examination based on her status as spouse of an active military member who had been transferred to Georgia. The board denied her request

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Discipline

Board wins appeal of malpractice ruling that undermined its 2016 revocation of doctor's license

Issue: Writ of error coram nobis in facts justifying revocation

A California appellate court, in a September 13 ruling, reversed a decision by a lower court to alter a 2010

malpractice and fraud judgment which the state's medical board had relied upon to revoke the license of the doctor accused of malpractice (*Ralli v. Shahinian*).

The disciplined doctor had convinced the lower court to alter the 2010 decision by introducing what he claimed was new evidence, unavailable at the earlier trial; the appellate court overturned that holding.

The case originated in 2006, when physician Hrayr Shahinian attempted to remove a benign tumor from a patient's head, but missed the tumor entirely and engaged in an attempt to cover up his mistake.

Although an MRI taken after the operation revealed that the tumor was still present in the patient, Shahinian told the patient that the radiologist who identified the tumor was mistaken and, when a pathology report on the material removed from the patient's head showed no tumor tissue present, Shahinian simply declined to share that information with the patient.

Compounding the situation, after the patient requested a copy of his surgical records, he received two separate envelopes: one containing the finding of the radiologist that no tumor tissue had been found in the removed material, and the other—apparently created by or at the direction of Shahinian—containing the same documents but with the word "no" whited out, so that the document now read that the removed tissue had been a tumor.

A different doctor ordered new MRIs of the patient and, after discovering the tumor still in the patient's head, operated to remove it. Unfortunately, the tumor's belated removal rendered the patient deaf; a medical expert later testified that, if the second doctor had successfully operated at the time of the original surgery, the patient would probably have lost his hearing.

Thus began a series of legal actions. Understandably, the patient filed suit against Shahinian, alleging malpractice and fraud. In 2010, after a bench trial, the judge ruled in favor of the patient and his wife, awarding them \$950,000 in compensatory and punitive damages. Six years later, the Medical Board of California revoked Shahinian's license on the grounds that he was a danger to the public.

Shahinian both appealed the revocation decision and filed for a writ of error *coram nobis*—a writ used to correct an error in fact after a judicial decision has been made—in the court that heard the 2010 damages lawsuit, whose factual findings the board had relied on when it revoked Shahinian's license. In that writ, Shahinian argued that the revocation of his license was based on inaccurate findings made in the 2010 lawsuit; he sought to alter that earlier decision.

The surgeon claimed to have newly-discovered evidence, in the form of a document known as the Maryland Operative Report, named for the doctor who later treated the patient. However, as was later revealed, that report had, in fact, been presented at the 2010 trial, and it was only a *new interpretation* of the report by Shahinian's expert witness that was new.

Despite the seemingly-flawed nature of this filing, the court hearing the motion agreed to alter the original ruling, holding that errors in the damages trial led "to a failure of a meaningful hearing on the full merits." The judge held that Shahinian's negligence had not been the cause of the patient's injuries and vacated that part of the earlier decision, although the judge oddly declined to address Shahinian's fraudulent and evasive conduct leading to that original judgment.

Although this decision did not affect the damage award collected by Shahinian's patient after the original trial—Shahinian had not sought to reverse that monetary award—the court's decision undermined the board's disciplinary case by invalidating several evidentiary findings from the original case on which the board had based Shahinian's discipline.

The board, which had attempted to intervene in that parallel suit but was denied by the judge, filed an appeal of that decision, arguing that Shahinian had not actually produced any new evidence for that court to rule on. The California Court of Appeal, Second Appellate District, Division Eight, has now overturned the lower court and reinstated the original judgment.

The appellate court agreed with the board that Shahinian had not produced any new evidence. "There was no newly discovered evidence here," wrote Justice Laurence Rubin. "Contrary to respondents' initial representations to the trial court in the petition, the parties now agree that the Maryland Operative Report was in fact admitted at the 2010 trial."

Shahinian argued that the new evidence was actually a new and "accurate interpretation" of the report which was not available to him during the original trial, but Justice Laurence disagreed. "That at the bench trial respondents designated experts . . . who were not helpful to their cause is not extrinsic fraud that prevented respondents from having a meaningful hearing on the issue in question," wrote Justice Laurence.

Without new evidence, the lower court had no legitimate reason to alter the 2010 decision. The Court of Appeals thus reversed that decision and reinstated the original judgment.

Federal court allows suit over lifetime monitoring of licensee with psychiatric condition to proceed

Issue: Disciplinary sanctions based on psychiatric conditions

A physician's discrimination claim based on a lifetime monitoring requirement, imposed on her by the state medical board over her diagnosis of bipolar disorder, may proceed, the U.S. District Court for the Eastern District of Louisiana decided October 12 (*Ford v. La. State Bd. Of Med. Examiners*). The court rejected the state medical board's motions to dismiss the suit.

The long history of osteopathic physician Robin Ford with the Louisiana State Board of Medical Examiners began in 1994, just three years after she began practicing, when the board discovered she was prescribing herself controlled substances. In 1995, Ford willingly entered a Consent Order: her license would be suspended, she would begin probation, and she would join a Physicians Health Program (PHP). In 1997, the board reinstated her medical license but maintained many restrictions.

As the year turned to 1998, Ford was diagnosed with manic depressive bipolar disorder. The consent agreement between the board and Ford was modified to accommodate her change in mental health; for several years, she remained stable.

In 2006, Ford relapsed and was subsequently diagnosed with opiate dependence. Ford willingly removed herself from medicine by allowing her license to expire. In 2010, after successful treatment, Ford requested to renew her license and enter the re-admission process. The board allowed her to enter the re-admission process on the condition she sign a 2011 Second Superseding Consent Order; this order included a five-year monitoring contract provided by the PHP.

Since 2010, Ford has not relapsed. Accordingly, the board issued a 2014 revised order allowing her to prescribe Schedule IV and V controlled substances. The PHP released Ford from her original monitoring contract in January of 2017 and began a less restrictive nine-month monitoring contract.

In April 2017, Ford requested that the board reinstate her ability to prescribe Schedule II and III controlled substances. In response, she received a letter stating that: "The board believes that licensees currently practicing with diagnosed psychiatric conditions should continue monitoring with HPFL-PHP by

signing a lifetime monitoring contract." An official with the Physician Health Program, in fact, threatened to take away her license if she did not sign onto a lifetime-monitoring contract.

Ford filed a discrimination claim against the board under Title II of the Americans with Disabilities Act (ADA) over this threat.

The present opinion concerns four of the board's motions in response to Ford's claim: a motion that the court lacks subject matter jurisdiction, a motion to dismiss the claim because Ford is precluded from bringing her present claim, a motion to dismiss for failure to state a claim upon which relief can be granted, and a motion that Ford is barred from relief due to the doctrine of Sovereign Immunity.

As to subject matter jurisdiction, the board argued that the *Younger* abstention doctrine should be adhered to: a federal court should relinquish jurisdiction when it is interfering with state civil proceedings, e.g. the board's consent orders.

The court denied this claim on the grounds that, "the proceedings before the board have morphed from being disciplinary in nature into an effort to regulate Ford's practice of medicine." A court may proceed with proper subject matter jurisdiction if the board merely has a contract regulating an individual's behavior, rather than a disciplinary contract.

The board also argued that the second consent order, continued by the 2017 nine-month monitoring contract, contained a provision requiring a state administrative court proceeding instead of a federal district court trial. Ford, as the plaintiff, contends that her ADA claim arises out of the April 2017 letter and that the second consent order was only valid for five years.

The court accepted Ford's argument that her claim arose from a separate transaction than the second consent order and consequently denied the board's motion to dismiss.

A sufficient claim under Title II ADA requires three elements: that Ford has a disability, that Ford was qualified for a job, and that Ford was subject to an adverse employment decision on account of her disability. The first two elements were not in dispute, since Ford suffers from a disability due to her bipolar disorder, and at the time of the claim, was qualified to practice medicine.

The board argued that it did not violate the third element because Title II of the ADA permits it to drug-test individuals who formerly used illegal drugs. Ford argued that the new demand for lifetime monitoring arose from her mental health diagnosis, not her previous drug use, and the April 2017 letter supported this argument. The court held that the Ford pled enough facts to move forward with her claim and denied the board's motion to dismiss.

The final argument for dismissal offered by the board related to sovereign immunity. The 11th amendment grants state judicial proceedings immunity from federal judicial interference, except when the 11th amendment may be abrogated by 14th amendment constitutional rights to due process.

Here, the District Court held that Ford's claim survived the judicial test of whether the court may abrogate the 11th amendment; Title II language provides that states shall not be immune from ADA claims. The appeals court therefore denied the board's motion to dismiss under the 11th amendment.

Revocation and \$430,000 in fines and legal costs upheld for "massive" fraud by doctor

Issue: Severity of sanctions where criminal conduct involved

An appellate court upheld a decision by New Jersey Board of Medical Examiners to revoke the license of a physician who engaged in a "massive, fraudulent billing scheme" (*In the Matter of Hessein*). The October 18 decision also upheld fines and costs of over \$430,000 issued by the board against anesthesiologist Amgad Hessein.

Hessein was the sole practitioner at a chain of pain clinics with offices in several New Jersey cities when, in 2009, a police detective who had received a tip concerning the theft of insurance payments sent a wire-wearing patient to see the doctor. Only two minutes into that undercover appointment, Hessein gave the patient an injection which would normally require a lengthy exam, then later created fictitious progress notes and billed the patient's insurance for that lengthy, non-existent, exam.

Thus began Hessein's legal troubles. In November 2010, an investigating detective entered Hessein's home with a warrant at 9:00 in the morning and found a stack of completed bills for several patients dated for later that day.

Looking at a representative sample of just six patients, investigators found more than 250 incidences of visits billed when a patient had either not been scheduled for an appointment or where a patient stated that an appointment had not occurred. Hessein eventually pled guilty to criminal charges and was sentenced to eight years in prison, required to forfeit \$2 million, and ordered to pay \$235,000 in restitution.

New Jersey's medical board opened its own disciplinary proceeding, adding many more charges of negligent and improper behavior, and eventually revoked Hessein's license, fined him \$130,000, and imposed legal costs of \$308,000. Noting the extraordinary depth and breadth of Hessein's fraudulent behavior, the board noted in its revocation decision that Hessein's "patients do not have a medical record; they have documentation supporting [Hessein's] massive, fraudulent billing scheme."

Justifying the enormous fees and costs imposed on the doctor, the board said that, if it had prosecuted each instance of unprofessional, negligent, or fraudulent behavior separately, the fine would have amounted to more than \$2 million. Hessein appealed, and the case went up to a state Superior Court, which issued a decision affirming the board.

On appeal, Hessein argued that the administrative law judge hearing his case should have given more weight to witnesses who testified in his favor about the charge of billing for non-existent appointments. But the court deferred to the administrative judge's factual and credibility findings, noting that ample evidence supported that judge's recommendation and the board's ultimate decision.

In addition, the court noted, even if the administrative judge had placed more weight on the testimony of those witnesses, Hessein was still not able to provide adequate documentation for the services he supposedly provided, which placed his patients at risk of serious harm and indicated that he failed to provide sufficient information in order for his patients to provide informed consent.

The court also cited Hessein's many breaches of the standard of care, noting that, "Among other things, appellant directed unlicensed employees to render

physical therapy; performed conscious sedation procedures without having a certified person present to monitor the patient; prescribed opiates to a patient without any documentation that the medication was medically necessary; and failed to perform alcohol and substance abuse counseling when required."

Lastly, the court rejected Hessein's claim that the administrative judge was biased against him, noting that the substance of that bias claim was simply that the judge had made rulings adverse to Hessein, something that cannot be evidence of bias by itself.

Having rejected Hessein's arguments, the court affirmed the revocation and fines issued by the board.

Court overturns revocation for 2007 child sexual assault conviction

Issue: Discipline based on criminal convictions and served sentences

An appellate court in Pennsylvania, in an October 4 decision, overturned a decision by the state's Board of Barber Examiners to revoke the barber licenses of a man convicted of sexually assaulting a child, holding that the board had improperly ignored evidence of the licensee's rehabilitation following a prison sentence and the long passage of time between his crimes and the board's discipline case (*King v. State Board of Barber Examiners*).

In 2007, David King was convicted of sexually assaulting a child, a crime for which he served approximately five years in prison, was required to register as a sex-offender registration, and prohibited from unsupervised contact with minor girls.

During his incarceration, King, who had been licensed as a barber since 1986, earned a barber teacher license. After his 2012 release on probation—which required that he maintain full-time employment—he began working at a barbering school as a teacher and barber.

In January of 2016, the Pennsylvania Board of Barber Examiners moved to discipline King based on his 2007 conviction. The board's disciplinary prosecution was authorized by Pennsylvania's Criminal History Record Information Act, which allows boards to discipline licensees convicted of crimes related to their profession.

Despite the severity of the crimes leading to his 2006 conviction, King's hearing before an administrative law judge produced a significant amount of mitigating evidence. King seems to have been a model parolee: compliant, employed, and participating in sex offender treatment programs, and his crimes—though especially heinous—were now 15 years in the past. In addition, his current job at the barbering school did not bring him into unsupervised contact with minors.

The administrative judge held that King was not a threat to the public and—although holding that King's conviction technically subjected him to disciplinary action—did not recommend sanctions against his license.

Despite that recommendation, the board revoked King's barber, barber manager, and barber teacher licenses, holding that the severity of King's crimes meant that—even a decade later—he was still a risk to minor clients or barbering students.

King appealed that decision to the state's Commonwealth Court, arguing that the board's revocation of his license was not reasonably related to a legitimate state purpose. The court agreed, reversing the board's revocation decision.

The court was skeptical of the board's concerns about the danger King would pose to the public were he to maintain his barber licenses. "While public safety is of considerable importance," wrote Judge Wojcik, "the Board's decision rests largely on speculative concerns."

The court noted that Pennsylvania's Barber License Law neither prohibits licensure based on prior convictions nor requires that licensees be of good moral character. In fact, Pennsylvania's Department of Corrections created a barber training program to allow inmates to obtain a license in order to be more employable after their release.

In addition, the court stated that the state's Board of Probation and Parole is the proper authority to determine whether a prison inmate is a danger to the public and should not be paroled, and that the profession of barbering would not place King in closer proximity to children than many other types of commercial establishments.

Last, the court noted that the board's decision seemed to simply assume King's bad moral character despite the great length of time between his crimes and the present day, despite state supreme court precedent requiring consideration of the passage of time in such cases, and despite evidence that he was rehabilitated during his incarceration.

The court also held that the Criminal History Records Information Act was generally intended to control the collection and dissemination of criminal records and provided no standards for the discretionary discipline authority it grants licensing boards, while the Barber License Law, a "specific, and more relevant statute," contained no authorization to discipline a barber for actions unrelated to the profession.

"In sum," Judge Wojcik concluded, "where the statutes delegate discretionary authority to revoke a professional license without establishing standards; our Supreme Court mandates consideration of the passage of time; the General Assembly has enacted other statutes that are specifically aimed at addressing the Board's concerns; and Pennsylvania law recognizes an individual's right to lawful employment, we concluded that the Board's imposition of the maximum sanction under [the Criminal History Record Information Act] exceeds what is reasonable with respect to the state interest it asserts."

Court upholds RNs' discipline for fishing pills from waste container

Issue: Whether disciplinary action requires actual harm to patient

Rejecting a lower court's no-harm-no-foul decision, the Supreme Court of Delaware October 2 upheld discipline imposed by the state's board of nursing on two nurses in a state correctional facility who retrieved several expensive pills out of a medical disposal container and administered them to an unknowing patient (*Delaware Board of Nursing v. Francis*).

The court's ruling overturned a decision by a lower appellate court that the board could not discipline the nurses if they had not caused the patient actual harm.

This case is the latest, and perhaps the last, chapter in a somewhat sensational case involving the reclamation of expensive hepatitis C medication—dropped in a medical sharps disposal container and fished out again before being administered to a patient—in a Delaware correctional facility.

In March 2015, two nurses at the James T. Vaughn Correctional Center in Smyrna, Delaware, spilled twelve pills of sofosbuvir, a hepatitis C medication costing \$1,000 per pill. The nurses discarded the spilled pills into a medical sharps disposal container, which contained medical waste like syringes and blades.

When the nurses asked the prison's pharmacist to order a refill of the expensive medication as part of an inmate patient's prescription, the pharmacist contacted her supervisor, who contacted the head physician of the company that provided the prison's medical care, who called Christine Francis, a licensed nurse serving as the prison's health services administrator, and told her to retrieve the pills from the disposal container for further use.

Francis and Angela DeBenedictis, the prison's director of nursing, found the container, turned it upside down, and shook it until all twelve pills—plus assorted syringes, lancets, and diabetic testing strips—tumbled out of the container.

Importantly, additional waste which had contacted the pills remained inside the container and was never identified.

The reclaimed pills were eventually administered to the patient, who was not informed of the adventure they had taken through medical waste disposal. The patient did not experience any ill effects from taken the potentially-contaminated pills, but upon learning that the discarded medication had been reclaimed and administered, one of the two nurses who had done the initial discarding filed a complaint with Delaware's Division of Professional Regulation. Disciplinary proceedings against the two supervising nurses who retrieved the pills followed.

The nurses' defense was based on two primary arguments. First, they argued that, because the patient had not suffered any ill effects, they could not be disciplined. Second, they argued that, even if reusing the pills was unprofessional, they were acting on the direction of both a physician and a pharmacist, and were not required to question those others' judgment.

During an administrative hearing, the nurses enlisted expert witnesses who opined that the pills' contact with various disposed items could not cause harm to the patient. However, the testimony of those experts was premised on the mistaken premise that *all* of the contents of the disposal container had been known, as well as what, if anything, had been on the surface of the floor where the pills were originally spilled.

In the eventual ruling by the Supreme Court of Delaware, Justice Gary Traynor noted that, other than the sharp objects which were known, other typical contents of such a container include "wound dressings, items soiled with more than five milliliters of blood or other bodily fluids, items from patients on strict isolation, skin-piercing objects such as needles, disposable scissors, scalpels, and catheters, and other disposable equipment for other internal use."

Thus began a series of decision which eventually sent the case up to the state Supreme Court. After a hearing officer found the nurses culpable for unprofessional behavior, the board placed them on probation for ninety days and ordered them to undergo ethics and pharmacology training.

The nurses appealed this decision, and a state superior court found in their favor, holding that the state had failed to present evidence that the standards of the nursing profession require licensees to disobey instructions from a doctor or a pharmacist—in this case, the physician who told the nurses to retrieve the pills and the prison pharmacist, who the nurses claimed had okayed the use of the pills.

In addition, the court held that, in order to discipline the nurses, the state had to have shown that their actions had caused harm to a patient, which the state had not done. The board appealed, and the case went up to the Supreme Court, which reversed the superior court.

The justices of the high court did not agree that the nurses would have needed to cause actual harm to their patient in order to be disciplined for unprofessional behavior. "While the Superior Court thought that requiring nurses to protect patients from conduct that falls below professional standards—but may not pose a risk—would be an 'unnecessary redundancy,' we think it would be entirely consistent with the State's special interest in upholding the integrity of the profession," wrote Justice Gary F. Traynor.

Justice Traynor explained that, in making its decision, the lower court had incorrectly interpreted the state's nursing regulations. The rule defining "unprofessional conduct" states that "nurses whose behavior fails to conform to legal and accepted standards of the nursing profession and who thus may adversely affect the health and welfare of the public may be found guilty of unprofessional conduct," and the superior court incorrectly read that language as requiring both that licensees fail to conform to legal and accepted standards of behavior *and* that that behavior adversely affected the health and the welfare of the public before the state can issue discipline.

However, Justice Traynor wrote, "the Board may have rightfully concluded that a nurse who engages in standard-breaching behavior is, for that very reason, a nurse who 'may adversely affect the health and welfare of the public,' regardless of whether the nurse's unprofessional behavior in fact caused specific harm to the patient. The use of the word 'may' has the clear intent of addressing improper behavior that may cause harm; the rule does not exempt from sanction improper behavior that creates a risk to a patient simply because the harm does not come to pass."

The justices rejected the nurses' other arguments. First, the court ruled that the board reasonably believed that the nurses' actions put their patient at real risk of harm, due to the risk of contamination from the floor and the medical waste contained in the sharps container. And the nurses could find no excuse in the claim that they were simply following the orders of a doctor and a pharmacist.

"This is not a case where a nurse found herself in a good-faith disagreement with another professional about how to best care for a patient, which might excuse a violation of her own profession's standards in deference to another professional who the nurse believes has higher decision-making authority or subject matter expertise," wrote Justice Traynor.

"The directive the nurses received to retrieve pills from a sharps container was not born of a divided judgment about how best to care for the inmate's condition and administering pills that had come into contact with the floor—let alone the medical waste container—was so basic a misstep that the two on-duty nurses who originally discarded the pills . . . both knew it was wrong. . . . Worse still, the record reflects that medical staff planned to keep their actions quiet and keep the patients in the dark."

"The only urgency here was economic, and, while conserving resources is not an improper motive, we see no error in the Board's conclusion that a desire to save money did not excuse the professional breach these nurses committed."

Board erred in ruling licensee who missed appeal deadline defaulted

Issue: Compliance with discipline appeal deadlines

An appellate court in Indiana, in an October 1 decision, reversed a decision by the state's Horse Racing Commission to issue a default judgment against a veterinarian who missed a deadline to request a hearing on the merits of the Commission's case against him (*Baliga vs. Indiana Horse Racing Commission*).

The court held that statements and actions made by Commission officials created confusion on the part of the licensee, such that the missed deadline could not be considered his fault.

The licensee in the case was Joseph Baliga, a racehorse veterinarian separately licensed by both the Indiana Board of Veterinary Medical Examiners and the Racing Commission.

In 2016, after a security guard claimed to have seen Baliga giving a banned substance to a horse, Racing Commission officials at Hoosier Park, the racetrack where the incident occurred, imposed a summary suspension of Baliga's racing license. The Commission held a hearing soon after to determine whether Baliga's license should remain suspended until a final decision was made in his case.

At that hearing, the Commission's attorney objected when Baliga started to argue the substance of his case, noting that the hearing was intended to focus only on whether the summary suspension should continue, not on the substantive merits of the case, and further stating that a merits hearing would come later.

After Baliga received a formal administrative complaint from the Commission, he mistakenly filed an appeal only of the summary suspension, failing to request a hearing to address the substance of the charges. After the deadline for requesting such a substantive hearing had passed, a Commission attorney filed for a default judgment against Baliga, which was granted by the administrative law judge hearing the case.

The board affirmed the decision of the administrative judge, suspending Baliga's racing license for five years, permanently banning him from administering certain medications, and issuing a \$20,000 fine.

Baliga appealed, but a trial court dismissed the case agreeing with the Commission that the court had no jurisdiction over the case because Baliga had failed to exhaust his administrative remedies. Baliga appealed that decision, and the case went up to the Court of Appeals of Indiana which issued a decision overturning the board and the trial court.

Strangely, on appeal, the Commission made a different argument than it had before the trial court. Instead of claiming that the court had no jurisdiction because Baliga had failed to exhaust his administrative remedies, the Commission now argued that Indiana's Administrative Orders and Procedures Act, which governs judicial review of agency adjudicative proceedings, simply did not give the court the authority to review a licensee's default in a disciplinary case.

The court disagreed with this argument. Although the statute cited by the Commission "bars judicial review of agency actions taken before or after an entry of default, at least where the entry of default goes unchallenged or is found to be proper . . . the IHRC seems to take the position that that an agency's finding of default is non-reviewable," wrote Judge Nancy Vaidik.

"We think it is incorrect." A court on judicial review is authorized to grant relief from agency actions that run afoul of the law, the judge continued. "An agency's entry of default is certainly an 'agency action,' and we see no reason why such an action should be immune from judicial review."

The court went further, holding that a Commission regulation requiring the entry of default when a licensee fails to meet the deadline for filing a response to Commission charges impermissibly expanded on the statute that it was intended to implement, which only provided *discretion* to an administrative law judge to issue a default, and did not *require* a default entry. Because the regulation conflicted with the statute, the regulation was invalid.

The court also disagreed with the board's default judgment on the merits. "First, while it is true that Dr. Baliga did not file a direct response to the administrative complaint, it is also true that the IHRC was well aware that Dr. Baliga denied the accusation underlying the complaint," wrote Judge Vaidik.

In addition, the Commission's attorney had told Baliga that a hearing on the merits of his case would come later, and there was no evidence that the Commission would have suffered any prejudice if the administrative law judge had denied the request for default.

Last, Judge Vaidik noted that Commission officials had seemingly gotten confused by their own disciplinary system. The system has two separate types of disciplinary procedures—one available at the racetrack at the time of an incident, and one before the Commission after the fact—mixing up responsibilities and procedures.

Under Indiana law, racing licenses can be disciplined by officials of the Indiana Horse Racing Commission either at the time of an alleged offense through a penalty of up to \$5,000 and licensee suspension, or through proceedings which can lead to further sanctions including suspension or revocation.

Unfortunately, the Commission judges who issued the summary suspension at Hoosier Park appear to have commingled the two types of proceedings into what became a confusing procedural jumble.

"Taken together, these events created the distinct impression that the Hoosier Park disciplinary proceeding and any IHRC disciplinary proceeding would, for all intents and purposes, be consolidated," concluded Judge Vaidik.

"Certainly, better practice would have been for Dr. Baliga and his attorney to submit a written request for a hearing after receiving the administrative complaint, even if they thought doing so would be redundant." However, because they had already been told that a merits hearing would come later, "they should not be faulted—or defaulted—for thinking that another hearing request was unnecessary."

Licensee's continuing to practice after revocation is not defensible as 'delegation'

Issue: Performance of licensed procedures by revoked practitioners

A revoked veterinarian was barred from using a delegation defense against charges of unauthorized practice for continuing to practice veterinary surgery while contracting with another licensee as attending veterinarian, in a July 12 ruling by the Michigan Court of Appeals (*People v. Langlois*).

In November 2015, Bruce Philip Langlois's license to practice veterinary surgery was revoked. That action was upheld in 2017 by the Michigan Court of Appeals. Nonetheless, Langlois continued to own a practice called "Spay and Neuter Express," a mobile veterinary surgical clinic that employed Duane Fitzgerald as an independent contractor and attending veterinarian.

When charged by the state with unauthorized practice of veterinary surgery, Langlois claimed that he performed the surgery as delegated by Fitzgerald. However, Fitzgerald testified that in December 2016, he worked alongside Langlois within the mobile surgical unit, that he and Langlois both had their own separate patients, that he did not supervise Langlois, and that he was aware that Langlois's license to practice had been revoked.

Langlois asserted that he was in fact supervised by Fitzgerald and argued an affirmative defense by delegation: i.e., because Fitzgerald oversaw Langlois, it was a legal surgery by Michigan state law. The prosecution filed a motion to preclude this defense as a matter of law. The trial court denied the motion on the grounds that there was not any law stating Langlois could not perform the surgery, and that the question should be presented to the jury.

The Court of Appeals considered the question de novo of whether a licensed veterinarian could delegate supervised surgical duties to an unlicensed veterinary surgeon, allowing Langlois to claim the affirmative defense of delegation.

However, state law also provides an exception to this rule, where a licensee may delegate a task to an unlicensed individual who is otherwise qualified by education, training, or experience, provided the act falls within the licensee's scope of practice and is supervised by the licensee. Langlois based his defense upon this provision. As a trained surgeon, albeit unlicensed, he possessed the education and training to legally perform a surgery provided he was supervised by a licensed veterinary surgeon, he argued.

The Court of Appeals rejected Langlois's argument on the basis of expert testimony and the legislative intent of the statutory exception. McNally, a veterinarian and member of the state veterinary board, testified that "the 'acceptable and prevailing practice' for veterinary medicine does not allow for the delegation of surgery to an individual who is not licensed at the time."

Moreover, the Court held that the legislative intent of the exception is to legalize the practice of veterinary technicians, who are explicitly barred by state law from using their training to perform surgery.

Thus, the Court of Appeals rejected Langlois's assertion that he could legally be delegated to perform surgery via supervision by a licensed veterinary surgeon. The Court of Appeals further held that, as a matter of law, Langlois is precluded from presenting this defense to the jury; the court reversed the trial court's denial and remanded the case for reconsideration in a manner consistent with this holding.

Revocation for double-stacking human bodies valid under general ban on showing disrespect

Issue: Discipline for specific acts under general grounds

An appellate court in Arizona, in an October ruling, upheld a decision by the state's funerary board to revoke the licenses of three crematory employees who improperly stacked human remains waiting for cremation and stored those remains outside of refrigeration units. The court held that, although no specific statute or rule prevents stacking, the board was within its authority to discipline the licensees for showing disrespect to human remains (*Welsh-Alexis vs. Board of Funeral Directors and Embalmers*).

The licensees in this case operated a crematory, Saguaro Valley Cremation Services, in Mesa, Arizona, which received remains for cremation from local funeral homes. The human remains were sent to the crematorium in individual cardboard containers, accompanied by identifying information and cremation instructions.

In 2015, the director of a funeral home that used Saguaro Valley's crematory services filed a complaint with Arizona's Board of Funeral Directors and Embalmers, reporting that he had seen human remains—transported to the crematory from funeral homes for disposal in specialized cardboard containers, accompanied by transport permits—being stored double-stacked and outside of refrigeration units, on more than one occasion.

A second complaint, filed by an owner of that same funeral home, also reported double-stacked bodies, this time in the back of a transportation van that Saguaro Valley employees used to transport the remains. The containers can only hold about 250 pounds—racks are commonly used if multiple containers are being transported—and the complaint filers stated they were worried about both the integrity of the containers and the disrespect they believed is entailed by stacking human remains.

A board investigator following up on the complaints observed the same practices. In addition, after inspecting the crematory's records, the investigator concluded that, on several days, Saguaro Valley accepted more remains than it could cremate or store in refrigeration during the summer months of 2015, and found that Saguaro Valley had cremated approximately 200 remains whose transport permits specified a different crematory, a practice that resulted in 138 inaccurate death records.

The investigator's discoveries triggered a disciplinary complaint against three licensees at the crematorium: Jessie Welsh-Alexis, the Saguaro Valley's supervising cremationist, Phillip Warner, another cremationist, and Franklin Lambert, the crematory's business director. Following a hearing, the board revoked the funeral director licenses of Welsh-Alexis and Lambert, imposed probation on their embalmer licenses, revoked the cremationist license of Warner, and imposed a one-year probation on the facility itself.

The licensees appealed, and the case eventually rose to the state Court of Appeals, Division One, which issued a decision in favor of the board October 30.

On appeal, the licensees argued that, because no Arizona statute or regulation specifically prohibits the stacking of human remains waiting for cremation, the board had no legitimate reason to discipline them. However, although the court acknowledged the lack of express prohibition of body stacking, it noted that Arizona regulations authorize the board to impose discipline for

"disrespect for the deceased person . . . [that is] contrary to the prevailing standards and practices of the profession."

"Here," wrote Judge Kent Cattani, "ample evidence supports the board's finding that prevailing standards in the funeral profession do not allow stacking containers. Witnesses from funeral industry trade associations, a funeral-industry consumer advocacy organization, and a mortuary science degree program uniformly testified that stacking containers was disrespectful to the deceased and thus unacceptable under professional norms."

Although the licensees had supplied witnesses who—the licensees claimed—testified that stacking was not improper, the court noted that those witnesses described seeing stacking no less than eight years prior to the current case, and that several of the witnesses nonetheless described the practice as distasteful and one they would not engage in.

The licensees also argued that a regulatory prohibition on disrespecting human remains was unconstitutionally vague, but Judge Cattani held that the regulation's reference to prevailing industry standards provided an objective baseline and removed any question of vagueness.

Last, regarding Saguaro Valley's practice of cremating remains whose transportation permits destined them for other facilities, Judge Cattani noted that each permit requires a responsible licensee to sign and certify that the remains were disposed of at the facility listed on the permit. By cremating remains destined for other facilities and then signing a permit that falsely stated those remains were cremated at those other facilities, Welsh-Alexis had committed professional negligence.

Having rejected the Saguaro Valley licensee's arguments, the court upheld the board's revocations and other discipline.

Licensing

Board must explain denial of reciprocal license to military spouse (from page 1)

O'Neal passed the Louisiana bar exam and was admitted in Louisiana in 2014. Louisiana does not offer reciprocal licensing with Georgia or any other state and O'Neal failed to meet the requirement of being primarily engaged in the active practice of law for the preceding five years. But the Board offers a waiver to military spouses with the goal of "accommodat[ing] the bar admission needs of attorney spouses of military personnel while still maintaining the integrity of the bar admission process."

This policy necessarily implies that some military spouses will receive a waiver, while others may not, the Supreme Court of Georgia pointed out. While the applicant has the burden of establishing fitness to practice law, the board "may waive any of the rules for good cause shown by clear and convincing evidence," which is "a factual question that must be judged according to the circumstances of the case."

While O'Neal sent information to the board in an attempt to comply with this policy, the board denied her request for a waiver without providing her any specific reasons supporting its decision; the board's letter to her merely stated "there was insufficient evidence of good cause for waiver."

Only in its briefs to the court did the board list, for the first time, its specific reasons for denial of the request: "1) O'Neal had only taken the Louisiana Bar examination which covers state civil law and not common law and does not have a performance test comparable to the Multistate Performance Test; 2) She had limited experience in law practice, having only been admitted in 2014; and 3) She had low grades in law school."

The uncertain language of the board's military spouse waiver policy "makes it difficult to ascertain what criteria the Board must consider in determining whether a military spouse has shown good cause for a waiver," the court found. "The board should provide a military spouse with written reasons."

The court vacated the board decision and remanded the case to the board to clearly apply the military waiver policy and explain why its denial has or has not met the waiver requirements.

"Alarming management practices" found in state audit of Mississippi board

Issue: Licensing board administration, accountability

A compliance audit of the Mississippi State Board of Dental Examiners revealed "many alarming management practices," the state auditor said September 18, in releasing a report on questionable behavior by current board members, the board's former executive director, and several other employees.

"What we found at the dental board is an example of particularly bad management," the auditor stated. "The staff. . . failed to follow proper procedures when making purchases, failed to separate purchasing duties (which can lead to fraud), held cash that should have been deposited for too long, failed to follow proper bookkeeping procedures, and accumulated excessive [compensatory Leave] time. "

"We also found some evidence that the staff was allowed to consume alcohol during work hours. This is not acceptable. My understanding is that the dental board is searching for new leadership, as the previous two executive directors have been fired or resigned. Going forward, the board needs to choose its director carefully and then engage in closer oversight of the staff."

The audit found:

- Effectively no oversight by the board of directors over the executive director of the agency who "operates with nearly complete autonomy"
- Noncompliance with state law related to travel card purchases and reimbursements for travel
 - Improper approval, signing, or posting of board minutes
 - Incorrect processing of payments for contracted services and commodities
 - Failure to timely deposit cash and check payments received for licenses, in some cases allowing cash to remain unattended in the office for three months
 - Several instances of unauthorized and excessive amounts of compensatory leave awarded to the former executive director and deputy executive director

The auditor suggested that board members act to strengthen oversight over the agency and improve procedures to increase accountability and ensure compliance with state law.

The boards of other small agencies, the auditor added, should also " take a closer look at how those agencies are being run and to engage in closer oversight if necessary."

Cities cannot employ unlicensed building inspectors, Oklahoma AG opines

Issue: Application of state licensing requirements to political subdivisions

The Oklahoma Attorney General's office issued a September 17 opinion on four questions submitted by the state's Construction Industries Board, focused primarily on whether government subdivisions are allowed to employ unlicensed inspectors to enforce local building codes (*Question Submitted by Boevers, Oklahoma Construction Industries Board*).

With some exception for small communities, the Oklahoma Inspectors Act requires applicants for an inspector license in the state to have passed an inspection approved by the state's Inspector Examiners Committee and to be employed or contracted by a political subdivision of the state.

The Oklahoma Construction Industries Board requested an opinion from the Attorney General on four questions related to licensed building inspectors in the state. First, the board wanted the Attorney General's office to declare whether the Oklahoma Inspectors Act—the state law governing building and construction inspectors—authorizes the board to enforce compliance with building codes adopted by a local political subdivision. Second, the board wanted an opinion on whether the Act authorizes such local political entities to use inspectors who are not licensed by the state. Third, the board asked the Attorney General to declare what authority the board has to penalize a political subdivision for using such an unauthorized inspector. Fourth, and seemingly unrelated to the first three questions, the board wanted to know whether it had the authority to discipline its licensees who perform inspections of types for which they are not licensed.

The Attorney General's office shot down the idea of the board enforcing compliance with building codes, stating that the Inspectors Act neither explicitly nor impliedly authorizes the CIB to enforce building code compliance within political subdivisions."

Local government entities may only employ board licensees as inspectors who are permitted to perform inspections in a political subdivision, the AG said.

"An unlicensed person who conducts building and construction inspections would be in violation of the Act and subject to criminal prosecution and local governments that employ unlicensed inspectors are subject to fines" from the board, the opinion noted.

Regarding the unrelated fourth question, the AG's office stated that the Board is authorized to discipline licensees who perform inspections outside of their specific area of licensure. The board, the AG's office explained, has promulgated rules delineating unique license categories—

e.g. building, electrical, construction, mechanical, or plumbing—for the different types of inspectors.

Any licensee who practices outside of their specifically delineated license is in violation of those rules and, thus, subject to discipline. "So, for instance, an individual who performs the work of a plumbing inspector but is licensed only as an electrical inspector would be in violation of a CIB-promulgated rule," the AG stated.

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