Professional Licensing Report

Licensing, testing, and discipline in the professions

May/June 2020
Vol. 31, Numbers 11/12

Highlights in this issue

Discipline

Board hid investigators' real caseload by giving fake data to auditor

Issue: State monitoring of investigative staff levels

The directive in a 2016 state audit of the California Board of Registered Nursing was clear: Investigators should not be handling more than 20 cases at a time; the board needed to get the investigators' caseload down to manageable levels.

So the board, which receives an average 8,500 complaints year, did as recommended. Or at least, the figures issued by the board showed that it was happening. In 2018, State Auditor staff followed up on the recommendation and reported the board had complied. But on June 30, 2020, the auditor announced that thanks to a whistleblower complaint, her office had discovered that the data received from the board was phony.

A board executive had directed two managers to deliberately change the caseload distribution information. The object was to convince the state auditor that the board had fully implemented the 2016 recommendations when it actually had not.

*See **Discipline**, page 4*

Licensing

Automatic expungement trend gives clean slate to license applicants facing criminal background checks

Issue: Criminal background checks

Obtaining expungement of a criminal record has long involved paying legal fees, filing a court petition, appearing in court, and undergoing a mandatory wait. Historically, studies have found, only about 5 percent of the public have found the process feasible.

Seventy million Americans have a criminal record, typically containing both arrests and convictions. But one in five jobs requires some form of occupational license. With criminal background checks frequently

a staple of licensing requirements, the difficulty of expungement has meant that many people with relatively minor offenses have been barred from obtaining a license to practice their occupations.

Enter the Clean Slate model, first developed by the Center for American Progress and Community Legal Services of Philadelphia. These progressive organizations developed a Clean Slate Toolkit in 2018 and gained support from conservative groups seeking to eliminate as many licensing entry restrictions as possible. The bipartisan initiative has been remarkably successful in winning passage of expungement laws.

"Almost every state now has at least some law aimed at limiting record-based discrimination in employment or licensure, or both," says a new report, "The Many Roads to Reintegration," by the Collateral Consequences Resource Center (CCRC), which conducts a Restoration of Rights project. CCRC says that states are increasingly restricting the power of occupational licensing agencies to reject applicants with criminal records based upon factors not directly related to their qualifications.

Automatic expungement or sealing of some convictions is now the law in eight states, CCRC reports: California (some misdemeanors and low-level felonies; marijuana offenses); Illinois (some marijuana offenses); New Jersey (some misdemeanors, low-level felonies); Pennsylvania (several misdemeanors); New York (minor marijuana offenses); South Dakota (minor misdemeanors); Utah (some misdemeanors); and Virginia (minor marijuana offenses). In recent months, several other state legislative houses have passed Clean Slate laws, including Michigan, Connecticut, Washington, and Louisiana.

The effects of automatic expungement can be striking. As of the end of June, one year after Pennsylvania's Clean Slate Act took effect, nearly 35 million criminal cases in the state have been sealed through an automatic process that occurs after the person has remained crime-free for a certain period of time. More than 1 million Pennsylvanians have thus been relieved of the stigma of a criminal record when applying for a job, housing, or an occupational license.

CCRC's 50-state comparison of laws on expunging, sealing, or setting aside convictions is available at https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/

Supreme Court of Georgia

Constitutional challenge of practice act may proceed

Issue: Constitutionality of licensure as limit on right to work in chosen profession

Reversing a trial court's dismissal of a suit challenging the constitutionality of a practice act, the Supreme Court of Georgia ruled May 18 that the state does recognize the right to work in one's chosen profession and two appellants could continue with their challenge of a licensing law (*Jackson et al. v. Raffensperger*).

The case was brought by Mary Jackson, a lactation consultant, and her non-profit organization, Reach Our Sisters Everywhere, Inc. Jackson alleged that she is ineligible for a license because she lacks a privately issued credential required by the Georgia Lactation Consultant Practice Act, even though she believes her other private credentials make her equally competent.

In Georgia, to provide lactation consulting a person must obtain certification as an International Board Certified Lactation Consultant (IBCLC) which requires

eight college-level health and science classes, six health-related continuing education courses, 300 supervised and unpaid clinical hours, and an exam.

A competitor organization offers certification as a Certified Lactation Counselor (CLC), which requires only a 45-hour course and passage of an examination. More than 800 CLCs offer services in Georgia while just 335 IBCLCs do so. In 2016 the legislature passed a bill authorizing only the IBCLC-certified persons (with some exceptions) to provide breastfeeding support.

The trial court ruled that the appellants had failed to state a claim upon which relief could be granted, in part because the Georgia Constitution does not recognize a right to work in one's chosen profession. The state supreme court held, however, that the state does recognize such a right.

"We have long recognized that the Georgia Constitution's Due Process Clause entitles Georgians to pursue a lawful occupation of their choosing free from unreasonable government interference," the court stated, noting that in 1939 it struck down a statute requiring anyone practicing photography to pay a licensing fee, sit for an exam, and provide proof of good moral character.

Other rulings have established that an individual's due process right to practice a healthcare profession is subject to reasonable regulation by the state.

The court remanded the case with direction to the trial court to reconsider the plaintiffs' motion to dismiss for failure to state a claim.

Pandemic prompts waivers, wider scopes of practice nationwide Could changes become permanent?

Issue: Temporary easing of licensing requirements

The inability to administer traditional licensing exams, the switch to online learning, telecommuting and telehealth, delayed graduations, and a shortage of critical health personnel —all side effects of the COVID-19 pandemic—have given increased leverage to occupational licensing critics who have long sought loosening of entry requirements and practice standards in the interest of increasing job mobility, expanding labor pools, and reducing restrictions on corporate practice, particularly in health care.

In March, as the pandemic picked up speed, the U.S. Secretary of Health and Human Services Alex Azar called for all states to relax scope-of-practice policies. And, although multiple states had already adopted sweeping occupational licensing rollbacks, the pandemic led legislatures and governors across the country to adopt additional measures, on an emergency basis, waiving some normal credentialing requirements for health care professionals.

Popular measures in recent months include removing physician oversight requirements for physician assistants and advanced nurse practitioners and allowing them to treat COVID-19 patients, give physical exams, and prescribe medications; accelerating graduation of health professional students; and expanding "hospital-at-home" and telehealth options.

In a policy brief, the pro-free market Mercatus Center at George Mason University compiled lists of states that had adopted emergency changes such as temporary licensing, waivee or reduced licensing requirements, extended license expirations, expansions of medical scope of practice, waived fees, and authorization for inactive or retired licensees to practice.

Bills passed in the first six months of 2020 include provisions to allow:

Out of state medical personnel temporary licenses
Georgia, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Oregon, South Carolina, Tennessee, Texas

Waived or modified licensing requirements
Idaho, Maine, Michigan (nurse aide examination, continuing education), Missouri, New Hampshire (modified clinical experience requirements), New York (several occupations), Pennsylvania (nursing exam), Texas (nurses).

Extended expiration
Iowa, Maryland, Oklahoma, Pennsylvania

Blanket expansion of medical scope of practice
Maryland, New York (select personnel)

Authorization for inactive or retired licensees to practice
Illinois, Iowa, Maryland, Massachusetts, New York, North Carolina, Texas

Waived fees
Georgia, Pennsylvania, South Carolina

Mercatus, the Brookings Institution, and the U.S. Department of Labor have expressed support for making many of these emergency measures permanent—including instant reciprocity for health professionals licensed in other states and broad suspension of telepractice restrictions.

Discipline

Board hid investigators' caseload with fake data *(from page 1)*

In reality, the average caseload was 24 per investigator. The scheme hid that fact by temporarily reassigning investigations from investigators who carried more than 10 cases to managers and another employee who did not carry a caseload at the time, then shortly afterward reshuffling the cases back to the original investigators.

It only took one day for nursing board staff to create fake caseload numbers after the plan was devised. On November 27, 2018, the auditor reported, "Executive A" sent an email to "Executive B" at 11:00 am: "[The auditor] said she needs us to provide any additional supporting documentation TODAY if we want to get the responses to Fully Implemented. Looks like we need to get busy."

Reassignment of 38 cases began—reportedly in hurried fashion with some quick reassignments required to make sure no one had more than 20 cases. By 6:29 pm that day, the final caseload report was sent to the state auditor. In the following 10 days, managers reassigned cases back to the original investigators.

Confronted by the auditor after the deception was discovered, the two managers who had created the manipulated report acknowledged producing "fudged" or "inaccurate" numbers but said they had only proceeded after "Executive B" disregarded their concerns and directed them to carry out the plan.

When interviewed, Executive B and Executive C expressed regret for having participated in the plan and said they knew it was problematic. But they said

Executive A, who was not interviewed by the auditor due to having become an ex-employee by that time, either devised the plan to reassign cases or pushed to implement the plan.

The auditor's verdict on the ruse was that executives committed gross misconduct, violating several laws including the obstruction statute by providing intentionally manipulated data to deceive the state auditor and ultimately the legislature. They were subjected to discipline for dishonesty and "other failure of good behavior."

Also recommended by the auditor, and agreed-to by the board, was a 90-day deadline for it to work with the audit team to develop a satisfactory approach to fully implement the 2016 audit recommendation.

Superior Court of New Jersey

$120,000 in legal fees against psychologist who gave patient mental health records to firm doing collections for him is upheld

Issue: Financial penalties for gross violation of confidentiality

An appellate court in New Jersey upheld, in a May 29 ruling, a suspension and massive legal fees imposed on a psychologist for exposing confidential patient records to a collections firm he used against patients with past-due bills. (*In re Suspension or Revocation of License of Helfmann*).

The case began when the New Jersey Attorney General's office filed a complaint alleging that psychologist Barry Helfmann provided full patient bills—including diagnosis and treatment information for mental conditions—to attorneys whom he had hired to collect on delinquent patient accounts.

Over the 25 years Helfmann had been using this firm to collect bills, 81 collection complaints were filed against Helfmann's patients, all of which contained this confidential information, and all of which became public records.

Following the filing of the Attorney General's complaint, Helfmann engaged in, as the appellate court termed it, "intensive motion practice," seeking to have the case dismissed, challenging the board's subpoena authority, seeking to disqualify the state attorney prosecuting the case, and filing subpoenas on every member of the board and its executive director, among other things.

Eventually, an administrative law judge hearing the case found that Helfmann had unintentionally violated his patients' confidentiality and recommended a $10,000 penalty and no license restrictions. The board, unhappy with the lack of severity of the administrative judge's sanctions, increased them, suspending Helfmann's license for a year plus a second year of probation, and issuing a fine of $10,000 and $120,000 in legal fees and costs.

Helfmann appealed that decision, making two primary arguments. First, he claimed that the board's sanctions were unreasonably harsh. Second, he maintained he did not violate any professional rule by providing confidential patient documents to his attorneys. The case went up to the Appellate Division of the Superior Court of New Jersey, which issued a decision in favor of the board.

On the issue of whether Helfmann inappropriately breached his patients' confidentiality, the court agreed with the board. Citing the New Jersey Rules of Evidence and the state's professional regulatory code, the court noted that psychologist-patient communications are privileged information and that "Providing confidential information to a collection attorney does not fall within a statutory or other traditional exception to the privilege."

" . . . Dr. Helfmann's argument that there is no factual or legal basis for the alleged confidentiality violations is devoid of merit and appears to be based on a fundamental misunderstanding of the statutory and regulatory schemes prohibiting disclosure of confidential information," the court wrote.

Finally, addressing concerns that the holding would prevent psychologists from sharing necessary information with their attorneys in any context, the court noted that its decision in this case could not be broadly applied.

Key to the case was the fact that the disclosure of patients' diagnostic and treatment information was not necessary for Helfmann's attorneys to pursue collection of medical bills, and the psychologist did very little over the years to make sure his attorneys were safeguarding patient information. Presumably, other psychologists could stay within the boundaries of these possible exceptions and not be subject to discipline.

Finally, based on the duration of the practice and the seriousness of exposing patients' confidential mental health treatment, the court held that the financial penalties imposed on Helfmann were reasonable, and that the legal fees charged by the state were merited, especially given the time state attorneys spent battling his "scorched earth litigation" seeking dismissal of the administrative action.

Michigan Court of Appeals

Procedural error by judge does not reverse discipline decision

Issue: Procedural errors' impact upon disciplinary actions

The Michigan Court of Appeals, in a May 14 decision, affirmed discipline issued against a doctor for improper prescribing practices despite an administrative law judge's error in deciding to merge two of the disciplinary charges against him (*Department of Licensing & Regulatory Affairs vs. Adu-Beniako*). Although the administrative judge had erred, that error was not so significant as to require the reversal of the discipline.

The Michigan Bureau of Professional Licensing, acting on behalf of the state boards of pharmacy and medicine, filed complaints against physician Solomon Adu-Beniako after analyzing his prescription practices and determining that he was engaged in suspicious practices, including issuing opioid prescription without variation between patients, doing so without individualized treatment plans, and otherwise failing to tailor prescriptions to any diagnosed patient need.

One employee of Adu-Beniako's testified to several suspect practices on behalf of the physician, such as writing prescriptions before seeing patients and seeing multiple unrelated patients at the same time. In addition, several patients whose prescription records would have been available for Adu-Beniako to review for problems had had multiple prescriptions sent to 10 or more other pharmacies before they came to his office for prescription.

In addition, from late March to August 2018, following the dissolution of a summary suspension against his prescribing licenses, 87% of Adu-Beniako's prescriptions were for hydrocodone with acetaminophen, a number that a board witness and an investigator testified was unusually high.

Following a hearing, an administrative law judge issued mixed recommendations, finding no support for several of the more serious allegations—such as diversion of drugs for illegal use—but nevertheless concluding that Adu-Beniako issued several prescriptions without adequate justification.

In making that finding, the judge took the unusual step of collapsing charges of Adu-Beniako's breach of general duty and incompetence as "essentially the same breach-of-duty charge," and deciding to "treat[...] them as a single charge."

Following the administrative judges, the medical board suspended Adu-Beniako's medical license for six months, and the pharmacy board revoked his prescribing licenses.

Adu-Beniako appealed, arguing that the administrative judge had erred by collapsing the allegations of failure in general duty and of incompetence into a single charge. Although the appellate court agreed that the judge's decision to merge the two charges was indeed an error, it also found that error insubstantial and thus not useful to Adu-Beniako in a challenge to his disciplinary sanctions.

"The concepts of breach of duty and incompetence are similar but legally distinct," wrote Judge Mark Cavanagh. "Accordingly, the ALJ erred by stating that they were indistinguishable from each other. However, the ALJ's statement is better understood to mean that the facts supporting both charges are the same and therefore it does not reflect a substantial and material legal error."

Despite the incorrect decision to merge the charges, the court held that the administrative judge's analysis of Adu-Beniako's prescribing practices nevertheless established his violations of the state's professional conduct rules and prescribing guidelines.

Adu-Beniako also challenged the sufficiency of the board's evidence regarding his failure to maintain controls against diversion of his prescriptions and his failure to prescribe controlled substances in good faith, but the court, analyzing the evidence against him, rejected that argument as well, and upheld the discipline.

Supreme Court of North Carolina

Boards must pay licensee's attorney fees in discipline case over deadly pool heating installation

Issue: Required payment of discipline appellants' attorney fees

State law allows attorney fees against professional licensing boards, the Supreme Court of North Carolina held June 5. The court overruled a lower court's textual analysis that had determined the relevant statutory clause made an exception for disciplinary actions. (*Winkler v. North Carolina State Board of Plumbing, Heating and Fire Sprinkler Contractors*).

In 2013, heating and ventilation licensee Dale Winkler was hired by a hotel despite the fact that Winkler was only licensed for residential work. As a result of this work, three guests died of carbon monoxide poisoning in the room over the gas supply of the pool heating system on which Winkler had worked.

An investigation by the board determined the guests were killed by a gas leak from the pool heater and suspended Winkler's license for a year. Winkler appealed that decision, challenging the board's jurisdiction to discipline him for work exceeding the scope of his license.

Surprisingly, a state court of appeals agreed that the board did not have jurisdiction to discipline a licensee for unlicensed practice that killed three people and remanded the case to the board.

Adding insult to injury, Winkler filed for attorney's fees, arguing that the board should have known it did not have authority to discipline him for the deaths. A trial court agreed and awarded Winkler $30,000.

The board appealed that award, and a state Court of Appeals reversed, holding that the relevant section of North Carolina statutory law excludes licensing boards from attorney fees resulting from disciplinary cases. That decision involved a complicated analysis of the text—down to the placement of commas—of the controlling laws.

Winkler appealed up to the Supreme Court of North Carolina, which issued a decision affirming the lower court's decision to allow fee awards against licensing the board, but denying Winkler's fees, in particular.

The textual analysis centered around an awkward clause in section 6-19.1 of the North Carolina general statutes. That clause allows attorney fee awards "In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State . . ."

The board argued that this clause excludes disciplinary actions from fees, while Winkler argued that the commas found in the sentence meant the clause should be read to include such cases.

The court, in a long grammatical analysis by Chief Justice Cheri Beasley, noted that the clause actually contains a punctuation error regardless of which of the two interpretations it supports. Thus, no plain meaning could be discerned from the text alone, and a deeper analysis of the text through the mechanism of legislative intent was in order.

That analysis favored the allowance of attorney fee awards against licensing boards. Justice Beasley, wrote that "the General Assembly could not have intended to except disciplinary actions by a licensing board from the category of civil actions because such disciplinary actions are not civil in nature."

> "In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action . . . unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case."
>
> --Section 6-19.1, North Carolina General Statutes.

Under North Carolina law, "civil actions" are defined in part as being prosecuted in a *court*, while disciplinary proceedings are administrative procedures adjudicated by a government *agency*. "Indeed," she continued, "a disciplinary action does not become a civil action until either party petitions for judicial review."

In addition, later clauses in the relevant sections of law refer to attorney's fees incurred in the "administrative review" portions of cases, indicating that the legislature had intended fees to be awarded in administrative cases like disciplinary actions.

As bad as that section of the decision was for licensing boards across the board, the rest was squarely in the board's favor. Although the Court ruled that disciplinary actions are subject to legal fees, it also held that, in Winkler's case, no award was justified.

The section of law that authorizes fees also restricts them to matters in which an agency acted "without substantial justification," Justice Beasley noted. That was not the case here.

Although Winkler was ultimately not subject to discipline because a lower court determined that his actions did not meet the technical definition necessary to authorize board action, she wrote, "We cannot agree . . . that the Board's arguments were irrational or illegitimate in light of the facts." Winkler's actions in

the course of his work had killed three people, and the board was justified in thinking that it was authorized to discipline him.

California Court of Appeals

Brief suspension while mental evaluation was pending cannot be expunged from public records

Issue: Public records policy for disciplinary actions

A stipulated agreement that led to a very short suspension which was lifted after the licensee physician passed a mental examination cannot be expunged from the board's website, a California appellate court ruled June 23 (*Goodrich vs. Medical Board of California*).

In 2013, the Medical Board of California moved to discipline physician Karen Goodrich for refusing to undergo a board-ordered medical examination. The board had been informed that, due to an apparent mental impairment and a similar refusal to submit to an evaluation, Goodrich had lost her medical privileges at a hospital where she worked.

Goodrich, who informed the board that she was having difficulty after a head injury and who showed signs of paranoia, eventually entered into a stipulated settlement in which she agreed to the suspension of her license pending an examination. Later that same month, Goodrich completed that evaluation and was declared safe to practice, causing the board to lift her suspension and drop the case.

In 2018, Goodrich filed a series of complaints seeking to mitigate the effects that the public existence of the agreement had on her career. The public record of the agreement, available on the board's website, and its implication of mental illness had made acquiring insurance or employment impossible, she explained.

Unfortunately for Goodrich, a trial court held that the time for her to challenge the agreement was within 30 days of its March 2014 origin. As such, the deadline for appeal of that decision had long since passed. Goodrich then filed a second claim, seeking to force the board to post an explanatory statement accompanying her records stating she was safe to practice, and she sought the removal of the records of her mental health and the record of her discipline from the National Practitioners Databank.

Following the failure of her suits, Goodrich appealed, and the case went up to the California Court of Appeals for the First District, First Division.

On appeal, Goodrich argued that the agreement she had entered into with the board had been, for several reasons, illegitimate, but the Court of Appeals agreed with the lower court that Goodrich's stipulated agreement and short suspension was no longer subject to review. Regardless of the merits of Goodrich's claims, they were no longer relevant.

Although Goodrich tried to get around the time bar by claiming that the board had fraudulently altered the agreement from the one that she had originally signed—specifically, by adding a statement that Goodrich was acknowledging and waiving her rights—the court held that such an allegation was insufficient to give cause for rescission of the agreement.

"The allegation that the Board added terms to the stipulated settlement after Goodrich signed it does not support the settlement's rescission, because it does not call into question her consent at the time of signing or any other aspect of the validity of the contract she signed," wrote Justice Jim Humes. "Rather, if

anything, this allegation supports a cause of action to *reform* the stipulated settlement to remove the terms she claims were fraudulently added."

Regarding her demand that the board add a disclaimer to her record, the Court held that the language of the section of regulatory code provides the board with the discretion to include a disclaimer and did not mandate that the board take such an action.

Last, Goodrich argued that, because she passed her evaluation and the board declined to pursue her case further, the board, under the state's regulatory code, was required to expunge the public records of her disciplinary process. Unfortunately, the trial court had dismissed this portion of her complaint on the grounds that she had not specified which records she wanted expunged, even when given a chance by that court to amend her complaint.

Although Goodrich now specified that she wanted information about herself on the board's website to be removed, the justices dismissed the case, agreeing with the trial court, which had ruled that the information she wanted removed was required by law to be publicly posted.

Court of Appeals of Ohio

Board must hear MD's appeal of order to submit to three-day impairment evaluation

Issue: Licensee right to contest decisions ordering evaluation

The Ohio medical board erred by denying a doctor, accused of impairment after he admitted to the occasional use of marijuana, a hearing to determine whether a lengthy impairment evaluation was justified, a state appellate court ruled May 12. (*Garber v. State Medical Board of Ohio*).

In October 2015, while discussing a different matter with investigators from the State Medical Board of Ohio, physician Michael Garber informed them that he intermittently used marijuana. Based on that admission, in May 2016 the board began a disciplinary process against Garber, claiming that his admitted use of marijuana gave it reason to believe him impaired in his practice.

The board ordered Garber, against whom no external complaint had been submitted, to submit to a three-day in-patient evaluation at a hospital, for which he would be required to pay $5,000 in costs.

Unhappy with this order, Garber sued to block it, and when that failed, declined to report for his three-day evaluation. His absence triggered a letter from the board stating that it was entitled to conclude that its allegations of impairment were true unless Garber could prove that he missed the evaluation due to circumstances beyond his control.

Garber requested a hearing, apparently hoping to contest the board's authority to order the evaluation in the first place, but the hearing examiner conducting the case declared that the hearing was limited to the question of why Garber was unable to attend his evaluation. At the hearing's conclusion, having determined that Garber could have submitted to the evaluation, the hearing examiner declared him impaired.

During the board proceeding that followed, at least one member publicly questioned the wisdom of ordering Garber into the evaluation, given a lack of complaints that he had been impaired in the first place, while other members debated the board's authority in the matter. In the end, the board adopted the hearing examiner's conclusions and suspended Garber's license indefinitely.

He appealed and the case eventually reached the Court of Appeals of Ohio for the Tenth District. On appeal, Garber challenged the board's order on the grounds that the board did not have the authority, given the evidence and circumstances of the case, to order him to an evaluation, and that it had erred by not providing him with a chance to contest the decision to order the evaluation.

The appellate court agreed, holding that the board was required to provide Garber with a hearing. Under Ohio law, the board may order an impairment evaluation only "if it has reason to believe" that a licensee is impaired. Garber thus was entitled to have the hearing examiner examine the question of what the board had reason to believe, and the hearing examiner had erred in not hearing the question of whether Garber was able to attend his skipped evaluation.

"Dr. Garber does not appear to seek more than the law and our precedents provide," wrote Judge Frederick Nelson. "The record is clear that the board itself never afforded Dr. Garber the opportunity to be heard on whether the order to submit to a three-day examination was supported by a good faith 'reason to believe' that his ability to practice was impaired by the habitual or excessive use of drugs."

Having held that the board improperly failed to allow Garber to challenge its evaluation order, the Court of Appeals remanded the case to the board for further proceedings.

Court of Appeals of Minnesota

Discipline of licensee for showing patient records to wife upheld

Issue: Role of evaluation order in finding of impairment

Mandatory language in state licensing law did not actually require a board to order a mental evaluation of a licensee before it disciplined him for impairment, a Minnesota court held May 4. The court upheld board discipline imposed on a chiropractor who shared with his wife emails—including medical information—of a patient with whom he was romantically involved (*In the Matter of Woggon*).

The licensee in the case, a chiropractor named Alan Woggon, began to cross the professional boundary line with one of his patients in early 2018, informing her via email that he was in love and asking to pursue a romantic relationship. The patient seems to have reciprocated to some extent, and, although the two never engaged in sexual intercourse, the evidence of the relationship, consisting of nude photos, hundreds of sexually explicit texts, and emails, established its sexual nature.

When the patient asked Woggon about the rules regarding romantic relationships between chiropractors and patients, Woggon told her that there was a two-year buffer period, and that he had destroyed all the records of their conversations on the matter and taken other actions to hide their relationship.

In June 2018, Woggon's wife discovered the relationship. Outed, Woggon sent his wife copies of his correspondence with the patient, including emails containing the patient's medical information, even one the patient had sent Woggon with a link to all of her other medical records. In July, Woggon ended the relationship with the patient and referred her to another chiropractor. In October, the patient filed a complaint with the board.

Following a hearing, the board found that Woggon had improperly engaged in a relationship of a sexual nature with the patient, that substance abuse had impaired his ability to practice, and that he had improperly exposed the patient's

medical information to his wife. The board suspended his license for a minimum of four years and ordered him to pay $50,000 in restitution.

Woggon appealed to the Court of Appeals of Minnesota. He claimed that the board had exceeded its authority by disciplining him for his alcohol abuse, personal conduct that he argued was not related to his practice. The court quickly disposed of this argument, with Judge Louise Bjorkman writing that evidence of Woggon's substance abuse could help explain his professional boundary violations.

The chiropractor argued that the board had violated his due process right by not requiring a mental examination before it made its decision, a process seemingly mandated by state law, which states that, when the board wants to suspend a licensee for impairment, it "shall direct the person to submit to a mental or physical examination." The board had not done this, instead hiring an expert to review Woggon's records.

The court held that the board was not actually required to have Woggon undergo an examination. Despite the use of the mandatory "shall," the statute in question does not specify a consequence if the board fails to comply, the judge noted. Thus, such a law "is merely directory and not mandatory" and no consequences would follow from its violation.

In any case, Judge Bjorkman noted, Woggon's own expert concluded that Woggon suffered from impaired judgment due to long-term mental illness.

Woggon also claimed that the lack of physical sex with the patient meant that the board had not established the existence of an improper sexual relationship, but the court, affirming the board's disciplinary actions, again disagreed. State law prohibiting sexual relationships between chiropractors and patients prohibits more than just a physical sexual relationship, Judge Bjorkman wrote, noting that the statute forbids "verbal behavior that is seductive."

Illinois Court of Appeals

Discipline of agent who defrauded clients & skipped hearing upheld

Issue: Default findings where licensee misses hearing

Default findings entered following a disciplinary hearing were appropriate given the licensee's absence, an Illinois appellate court held May 13. The court upheld a suspension and fine against a real estate licensee who defrauded rental-seeking clients and then skipped his disciplinary hearing. The court ruled that the state licensing agency did not violate the licensee's due process rights by proceeding with a hearing and imposing discipline in his absence (*Shaw v. Illinois Department of Financial and Professional Regulation*).

The Department filed administrative complaints against Shaw and his real estate brokerage in 2013, alleging that the he had entered into predatory rental-finding agreements with clients that did not meet the information standards set by Department regulations. The agreements included such information as a detailed description of the services being contracted for and descriptions of the rental units, but then failed to adequately provide the contracted services, and denied refunds to clients for whom Shaw had not performed adequate services.

The clients preyed-on by Shaw were those who had difficulty finding rentals due to bad credit, criminal history, or past evictions. Additionally, the Department alleged that Shaw and another licensee held themselves out as managing brokers of the company, a status beyond their actual licensure.

During the disciplinary proceedings that followed, three different attorneys represented the defendants. At one point, one of the attorneys ceased representation of all but one party, Anne Shaw, who entered into a consent order with the Department and agreed to testify against her compatriots, while the other defendants continued on.

Jack Shaw and his counsel, which by now was solely Shaw Legal Services, failed to appear for an administrative hearing in March 2016. Present was one of the former attorneys for the defendants, who claimed that Shaw had later retained him to represent Shaw alone.

However, the attorney, realizing that his former representation of all of the disciplinary defendants would create a conflict of interest, stated that he could not represent Shaw at the hearing unless the other licensee defendant, a broker named Robert Sher, agreed to waive the conflict. That did not happen at the hearing, and so the attorney left.

Shaw's failure to appear was then entered as a default. The administrative law judge hearing the case found that Shaw failed to provide his clients with most of the information required in rental-finding agreements under Department regulations, that in so doing he attempted to deceive clients, that he improperly denied refunds when the brokerage failed to find apartments for those clients, that he had acted against the best interests of his clients, and that he had failed to cooperate with board investigators.

The Department's director suspended both Shaw and his brokerage's licenses for three years, fining him and the brokerage each $18,000, and denying an application that Shaw had filed for a managing broker's license.

Shaw appealed, arguing that the administrative judge had been wrong to issue a default after he skipped his administrative hearing, saying that he had no reasonable way to know that the lawyer he had attempted to retain and who had left the hearing would not represent him. He also argued that the Department had improperly issued a double fine by fining both him and the brokerage, which he owned, and that the fines against him were unreasonable when compared with those of his co-defendants.

A state circuit court upheld the findings of the administrative judge but agreed with Shaw that the Department's fine were unreasonably harsh, noting that Sher, the last co-defendant, had received only a single $5,000 penalty. Both Shaw and the Department appealed to a state Court of Appeals for the 1st District, which ruled in favor of the Department.

Regarding Shaw's argument that the lower court improperly made default findings, the Court of Appeals found that the Department had not committed a due process violation. Shaw had an opportunity to participate at the hearing, noted Judge Margaret McBride, writing for the court, but he simply chose not to show up.

Although the attorney Shaw claimed to have hired had seemingly backed out of that representation at the hearing, Judge McBride pointed out both that "there is no constitutional right to be adequately represented by counsel in a civil matter or an administrative hearing," and that Shaw, himself, should have been present, where he could have advocated for himself or asked for a postponement.

Regarding the fines imposed on Shaw, the court held that the original $18,000 fines were not unreasonable. Judge McBride noted that the other disciplinary defendants in the case were more cooperative than Shaw and stood

to benefit less from the unprofessional actions at issue in the case, behavior that reasonably merited lesser penalties.

Testing

U.S. District Court of New Jersey

Physician seeking exam exemption from national specialty certifying body must bring suit in Texas, where certifier is located

Issue: Venue of certification litigation; exam exemption for person with disability

Forcing a New Jersey doctor to litigate claims against a national specialty certifying body in Texas was not unreasonable, a federal judge in New Jersey held June 9, dismissing the doctor's complaint. The court upheld a jurisdiction clause contained in an application for certification by the American Board of Obstetrics and Gynecology (*Hage v. American Board of Obstetrics and Gynecology*).

Charles Hage, an OB-GYN in New Jersey, maintained certification with the board, even maintaining it after 2002, when he developed an eye condition that prevented him from surgical or intrusive examinations, forcing him to move into medical administration.

Applications for renewal of certification with the board contain a clause requiring any dispute to be adjudicated in Dallas. This clause became relevant in 2013, when Hage applied for an exemption from the periodic examination necessary for maintenance of certification with the board, citing his visual impairment.

The board granted his first exemption request, but denied any further ones, and Hage fell out of compliance with certification requirements. In 2015, Hage applied for retired status with the board, and was told that, while the retired status was granted, the board's site would simply display that his certification had expired.

In 2017, Hage claims that he lost a job opportunity as the medical director of an insurance company because the board would not explain his retired status to his prospective employer. In 2019, he filed suit against the board in New Jersey, arguing that it was unreasonable for the board to require regular maintenance of certification for physicians with disabilities such as his.

In response, the board first moved to change the venue of the case to a federal district court, and then filed to dismiss on the grounds that Hage had brought the case in the wrong jurisdiction. Judge Anne Thompson, of the U.S. District Court in New Jersey, issued a decision in favor of the board.

In response, Hage argued that the venue clause in the recertification application simply did not apply to the particular issues in his suit. Judge Thompson rejected that claim, holding that the language in the recertification application did, indeed, encompass Hage's claims, and likely any other claims one could bring against the board regarding certification.

The clause stated that venue would be in Dallas "with regard to any dispute that may arise with regard to the conduct of the examination or . . . qualification for, and any entitlement . . . to continue to qualify for, a Certificate or Diploma."

Hage's claims, Judge Thompson wrote, arose from just such disputes, and were encompassed by the clause's language.

Hage next argued that the clause was unreasonable, but the judge disagreed, stating that litigating the case in Dallas "would not unduly inconvenience" Hage, at least under legal precedent governing forum clauses which only invalidate a clause if the plaintiff "for all practical purposes be deprived" of a day in court. The court also rejected an argument that requiring him to litigate in Texas would be contrary to public policy.

Scope of Practice

Superior Court of New Jersey

Board upheld in denying practice exclusivity to licensees based on *FTC v. North Carolina Dental Examiners*

Issue: Exclusive versus non-exclusive scopes of practice

The practice of installing laboratory fume hoods was not within the exclusive practice of the state's Board of HVACR Contractors' own licensees, a New Jersey appellate court held June 2 (*In re New Jersey State Board of Examiners of Heating, Ventilating, Air Conditioning and Refrigeration Contractors*).

The case is part of a years-long dispute between the trade and labor groups representing sheet metal workers and carpenters in New Jersey. In 2016, the named party, a board licensee, asked the board to state whether a HVACR contractor license is required for the installation of laboratory fume hoods.

The board returned a cagey answer, saying only that such installations "remain[] within the scope of practice for the Licensed Master HVACR Contractors," which many people seemed to take as an affirmative.

Then, in 2017, an HVACR licensee named James Harper emailed the board, asking for a probe of unlicensed hood installations performed by a company called ScientifiX. The board's executive director contacted the company, which responded by claiming that laboratory fume hoods are not, in fact, specified in the state's regulatory code as being within the sole practice of HVACR licensees.

The company also noted that fume hoods are essentially just a metal box and a fan attached to laboratory furniture. While the eventual connection of the hoods to a building's HVACR systems would require a licensee, the mere attachment of the hoods to laboratory furniture did not.

The board decided in favor of inclusiveness, stating in October 2017 that the attachment of fume hoods was within the *non-exclusive* scope of practice of HVACR licensees and following up with two formal decisions holding that a HVACR license is not required for the job.

In issuing that decision, the board cited *North Carolina State Board of Dental Examiners v. FTC*, a U.S. Supreme Court decision on antitrust issues in the context of licensing boards, and noted that the skills necessary to install the hoods are not exclusive to HVACR licensees.

The Sheet Workers Association appealed that decision, arguing that the board should have held an evidentiary hearing on the issue of fume hood installation before issuing its ruling, that the decision was more akin to a formal

administrative rulemaking and required the board to adhere to processes laid out in the state's Administrative Procedure Act, and that the question of fume hood installation was actually a labor dispute, meaning that a decision by the board was pre-empted by a federal statute prohibiting agencies from deciding jurisdiction disputes between competing labor unions.

Although state law defines the practice of HVACR contracting to include the installation of ventilation and exhaust systems—which would seem to include fume hoods—the Superior Court judges noted that the board, in rejecting exclusivity for its licensees, made a considered decision that the simple attachment of the metal hoods to lab furniture did not rise to the level of the installation of systems.

"We will not substitute our judgment for that of the Board, whose decision was not arbitrary, capricious or unreasonable, was based on considered evaluation of the substantial evidence before it and did not violate the statutory or regulatory scheme under the Act," the judges wrote.

Regarding the licensees' argument that the board had improperly engaged in an informal rulemaking to make an exception to its regulations, the court again disagreed, noting that the question answered by the court was brought by the licensees themselves.

"The Board did not create a statutory exception to the licensure requirements," the court wrote. "Instead, it interpreted the Act and the duly promulgated regulations thereunder that defined HVACR. It did so in the context of responding directly to a complaint brought by the Sheet Metal Workers as to specific construction projects."

The court rejected the licensees' argument that the board was required to hold an evidentiary hearing before issuing a decision. "In this case, neither side disputed before the board what fume hoods were, how they were installed, whether the Carpenters had been doing so for decades, or that HVACR-licensed contractors were required to make the actual ventilation connections." The only question for the board was one of statutory and regulatory interpretation and did not require an evidentiary hearing.

Last, the court rejected the federal pre-emption argument, holding that the board did not decide which union was entitled to install fume hoods for a particular employer; the board was simply responding to an interpretive question prompted, again, by the licensees themselves.

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

Subscriptions, which include both printed and PDF copies of each issue, are $228 per year, $447 for two years, $617 for three years, $798 for four years. Online access to PLR content is included in the subscription price; online-only subscriptions are $199 per year. Additional print subscriptions for individuals (within the same physical office or board only) are $40 each per year and include a license to distribute a PDF copy to a single person. Licenses to distribute extra PDF copies only, to individuals within the same physical office or state licensing board, are $20 per recipient per year.