

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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|------------------------------------|---|---------------------------------|
| ALBERT EL-ROEIY, M.D., |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | C.A. No. N14A-02-002 FWW |
| |) | |
| |) | |
| THE BOARD OF MEDICAL |) | |
| LICENSURE AND DISCIPLINE OF |) | |
| THE STATE OF DELAWARE, |) | |
| |) | |
| Appellee. |) | |

Upon Appellant’s Appeal of The Board of Medical Licensure and Discipline of the
State of Delaware’s Decision:
AFFIRMED.

OPINION AND ORDER

Submitted: August 22, 2014
Decided: November 25, 2014

Michele D. Allen, Esquire, Law Offices of Michele D. Allen, LLC, 724 Yorklyn Road, Suite 310, Hockessin, Delaware 19707; Attorney for Appellant.

Patricia Davis Oliva, Esquire, Delaware Department of Justice, 102 W. Water Street, Dover, Delaware 19904; Attorney for Appellee.

WHARTON, J.

I. INTRODUCTION

Dr. Albert El-Roeiy (“Appellant”) filed a Notice of Appeal on February 5, 2014 requesting judicial review of a decision of the Board of Medical Licensing and Discipline (“Board”) that became final on January 7, 2014. Appellant contends that the discipline imposed by the Board was in violation of his due process rights because he did not receive notice of the Rule to Show Cause hearing and, therefore, did not appear. Additionally, Appellant asserts that the evidence relied upon by the Board is insufficient to support its conclusion and that the Board erred as a matter of law in imposing disciplinary action.

In considering the appeal, the Court must determine whether the Board’s decision to impose disciplinary action against Appellant is supported by substantial evidence and free of legal error. Upon consideration of the pleadings before the Court and the record below, the Court finds that there is substantial evidence to support the Board’s ruling and the Board did not err in reaching its decision. Accordingly, the Board’s decision is **AFFIRMED**.

II. FACTUAL AND PROCEDURAL CONTEXT

On June 30, 2010, the Delaware General Assembly passed 24 *Del. C.* § 1720(i) which required that medical doctors licensed prior to 2007 submit fingerprints to the Board for a criminal background check before January 1, 2012

(“Fingerprint Statute”).¹ In a letter dated June 13, 2013 (“Letter”) from the Division of Professional Regulation (“Division”) to Appellant, which was sent via certified and first-class mail to the Appellant’s address of record, the Division indicated that the Board’s records showed that Appellant had not complied with the Fingerprint Statute by the statutory deadline.²

The Letter also provided that “[a] Rule to Show Cause hearing to address this non-compliance has been scheduled in this matter on July 31, 2013 at 10:00 a.m. in the Division’s offices in Conference Room C, 861 Silver Lake Blvd., Dover, DE”³ and that Appellant may explain his non-compliance, be represented by counsel, testify and call witnesses, introduce evidence and request that the Division issue subpoenas. The Letter explained that the presiding hearing officer may issue a recommendation for disciplinary action “up to and including revocation, against your license. If the Board agrees that discipline is in order, the Division will report such disciplinary action to the National Practitioner/Healthcare Integrity and Protection Data Bank.”⁴ The Letter concluded with a provision that gave Appellant until July 1, 2013 to comply with the Fingerprint Statute or to

¹ See 77 Del. Laws, c. 324, §§ 1,2.

² Appellant Opening Br., D.I. 8, Ex. 3.

³ *Id.*

⁴ *Id.*

relinquish his medical license by July 19, 2013 to conclude the matter without a hearing or further action.⁵ Appellant took no action with regard to the Letter.⁶

A. The Hearing and Hearing Officer's Recommendations

The Rule to Show Cause hearing was held on July 31, 2013 before a hearing officer and Appellant did not appear at the hearing.⁷ A paralegal from the Division testified that she had sent the Letter containing notice of the Rule to Show Cause hearing on June 13, 2013 by certified and first-class mail.⁸ She testified that she sent the Letter to Appellant's address of record contained in the Division's database, that the addresses are self-reported by the doctors and, for that reason, the Division presumes the addresses provided are the best point of contact.⁹ The paralegal testified that the certified mail green card was returned with "addressee unknown" printed on it but that the first-class mail was not returned.¹⁰ After accepting testimony from one witness from the Division, the hearing officer concluded the hearing.¹¹

In a letter dated August 13, 2013 ("Recommendation Letter"), which was sent via first-class mail to Appellant's address of record, the hearing officer recommended that the Board take disciplinary action against Appellant for his non-

⁵ *Id.*

⁶ *See id.* at Ex. 1.

⁷ *Id.* at Tr. 2:8-13.

⁸ *Id.* at Tr. 3:11, 13.

⁹ *Id.* at Tr. 3:16-17, 22-24; 4:1-2.

¹⁰ *Id.* at Tr. 4:7-9.

¹¹ *See id.* at Ex. 1.

compliance with the Fingerprint Statute.¹² Specifically, in the Recommendation Letter, the hearing officer concluded that Appellant received proper notice of the hearing because the law presumes that mail properly addressed and stamped has been delivered to the intended recipient and the first-class mail was not returned to the Division.¹³ Additionally, the hearing officer found that Appellant engaged in “unprofessional conduct” pursuant to 24 *Del. C.* § 1731 (b)(11)¹⁴ and “general misconduct” under Board Regulation 17.5.1¹⁵ because the regulation includes “acts prohibited by policies expressed in legislation.”¹⁶

The hearing officer considered the aggravating and mitigating factors pursuant to Board Regulations 17.14¹⁷ and 17.15.¹⁸ The hearing officer considered as a mitigating factor that Appellant had no prior discipline against him and considered as aggravating factors that that the burden to comply with the Fingerprint Statute was minimal, that Appellant is charged with having knowledge of the law and regulations governing his medical license and that Appellant did not

¹² *See id.* at Ex. 4.

¹³ *Id.* at Ex. 4, p. 4.

¹⁴ 24 *Del. C.* § 1731 (b)(11) includes “[m]isconduct, including but not limited to sexual misconduct, incompetence, or gross negligence or pattern of negligence in the practice of medicine or other profession or occupation regulated under this chapter.”

¹⁵ 24 *Del. Admin. C.* § 1700-17.5.1.

¹⁶ Appellant’s Opening Br. at Ex. 4; 5.

¹⁷ 24 *Del. Admin. C.* § 1700-17.14.

¹⁸ 24 *Del. Admin. C.* § 1700-17.15.

appear for the hearing or have any communication with the Division prior to the hearing.¹⁹

In accordance with the guidelines set forth in Board Regulation 17.5.1 for the punishment for “General Misconduct,” the Hearing Officer recommended that the Board issue a letter of reprimand for failing to comply with the Fingerprint Statute; that the Board order Appellant to comply with the Fingerprint Statute within sixty (60) days of the Board’s final Order; that a \$1,000 civil fine be imposed made payable within sixty (60) days of the Board’s final order; that if Appellant fails to comply with the Board’s Order his license should be suspended until he complies; and that the Order of the Board constitute formal disciplinary action reportable to practitioner databases.²⁰ The Recommendation Letter directs that “[i]f you have any exceptions, comments or arguments regarding the enclosed recommendation, you must file them within twenty (20) days of the date of this letter pursuant to 29 *Del. C.* § 8735(v)(1)d.”²¹ After receiving the Recommendation Letter, Appellant completed the fingerprint requirement to comply with the Fingerprint Statute.²²

B. The Board’s Written Decision

¹⁹ Appellant’s Opening Br. at Ex. 4; 6.

²⁰ *Id.* at Ex. 4, p. 7.

²¹ *Id.* at Ex. 4, p. 1.

²² *Id.* at Ex. 6.

In a letter dated November 12, 2013 (“Board’s Order”), sent via certified and first-class mail to the Appellant’s address of record, the Board’s Order imposed disciplinary action against Appellant for his failure to timely comply with the Fingerprinting Statute.²³ In rendering a decision, the Board adopted the hearing officer’s findings of fact, conclusions and recommendations.²⁴ The Board Ordered the following:

1. Dr. El-Roeiy is issued a letter of reprimand for failing to comply with the clear mandate of 24 *Del. C.* § 1720(i) of the Medical Practice Act; and
2. Dr. El-Roeiy must pay a \$1000 fine within 30 days of the date of this Order ...and
3. Dr. El-Roeiy must come into compliance with 24 *Del. C.* § 1720(i) within sixty days of the date of this Order; and
4. If Dr. El-Roeiy fails or refuses to comply with paragraphs two and three above, his license to practice medicine will be suspended immediately and without further hearing, and such suspension will continue until such time as he demonstrates compliance with both paragraphs; and
- 5....This is a public disciplinary action reportable to the national practitioner databank pursuant to 24 *Del. C.* § 1734(i).”²⁵

²³ *Id.* at Ex. 7.

²⁴ *Id.* at Ex. 7, pp. 2-3.

²⁵ *Id.*

After receipt of the Board's Order, Appellant communicated with various Division staff members by letter and email throughout the months of November 2013 through January 2014 including making a request for reconsideration.²⁶ On January 7, 2014, the Board's Order became final when the Board denied Appellant's request for reconsideration. Appellant filed a Notice of Appeal on February 5, 2014.²⁷

III. THE PARTIES' CONTENTIONS

Appellant contends that the Board violated Appellant's constitutional right to due process when it failed to provide proper notice of the hearing.²⁸ Appellant asserts that proper notice of the Rule to Show Cause hearing was to be made in person or by certified mail pursuant to 24 *Del. C.* § 1733(d).²⁹ Appellant argues that because the certified letter was returned undeliverable, the Board committed legal error in determining that notice was properly served.³⁰ Appellant concedes that Delaware law presumes that a notice that is correctly addressed, stamped and

²⁶ *See id.* at Ex. 2 (letter from Michele Massey on behalf of Dr. El-Roeiy dated January 21, 2014 explaining she made a clerical error regarding the mail); Ex. 5 (letter from Dr. El-Roeiy dated November 22, 2013 requesting that the Board's disciplinary action be expunged); Ex. 8 (Letter from Dr. El-Roeiy dated December 13, 2013 requesting reconsideration at the next Board meeting); Ex. 9 (email from Executive Director of Delaware Division of Professional Regulation to Dr. El-Roeiy date December 19, 2013 acknowledging Appellant's request for reconsideration); Ex. 10 (email from Director dated January 14, 2014 informing Appellant that his request for reconsideration had been denied); Ex. 11 (Letter from Appellant dated December 3, 2013 requesting "additional consideration").

²⁷ D.I. 1.

²⁸ Appellant's Opening Br. at 8.

²⁹ *Id.* at 10.

³⁰ *Id.*

mailed has been received but asserts that the presumption can be overcome by evidence that the notice was never actually received.³¹ Appellant contends that he never received the notice of the Rule to Show Cause hearing.³²

Appellant also asserts that the Board's decision is not supported by substantial evidence and contains legal errors.³³ Appellant relies on 24 *Del. C.* § 1732 for the proposition that no disciplinary action can be taken without the issuance of a formal complaint and, because no formal complaint was issued, the Board cannot charge Appellant with misconduct.³⁴ Appellant contends that even if the Board could impose discipline without issuing a formal complaint the Board erred in determining that Appellant participated in "misconduct" because Appellant's conduct did not rise to the level of misconduct as defined by the Medical Practices Act.³⁵

Relying on 29 *Del. C.* § 8735(v)(1), Appellant argues that findings of fact and conclusions made by a hearing officer are binding on the Board only when a formal complaint has been issued.³⁶ Because no formal complaint was issued to Appellant, he claims that the Board is unable to rely upon and adopt any of the hearing officer's recommendations and that "the Board was required to establish its

³¹ *Id.*

³² *Id.*

³³ *Id.* at 11.

³⁴ *Id.* at 12.

³⁵ *Id.* at 13-14.

³⁶ *Id.* at 12.

own findings of fact and conclusions of law which it failed to do.”³⁷ Appellant asserts that, had the Board examined the facts independently of the hearing officer’s Recommendation Letter, the Board would have discovered that between the issuance of the Recommendation Letter and the Board’s decision Appellant had complied with the Fingerprint Statute.³⁸ Appellant argues that the Board’s failure to consider this information resulted in legal error because the evidence contradicts the Board’s findings such that the Board’s findings are not supported by substantial evidence.³⁹

Finally, Appellant asserts that the Board and the hearing officer erred when both failed to consider all of the mitigating factors pursuant to Board Regulation 17.15 and considered additional aggravating factors not set forth in Board Regulation 17.14.⁴⁰ Appellant asserts that the hearing officer only considered as a mitigating factor that Appellant had no prior discipline and

failed to consider that, *inter alia*, that[sic] this was a single act, minimal gravity of the allegation, absence of dishonest or selfish motives, that there was no patient safety issues, and that this was an isolated incident unlikely to reoccur. Moreover,...that there are no disciplines for Appellant in the National Practitioners Data Base that he has performed over nine thousand surgeries and has never had any judgment against him and no lawsuits ever filed against him.⁴¹

³⁷ *Id.*

³⁸ *Id.* at 13.

³⁹ *Id.* at 13-14.

⁴⁰ *Id.* at 14.

⁴¹ *Id.*

Appellant argues that the hearing officer became aware that the certified mail had been returned undelivered and, therefore, should not have considered Appellant's absence at the hearing as an aggravating factor.⁴² Appellant also argues that the remaining aggravating factors should not have been considered by the hearing officer because they are not specifically enumerated in Board Regulation 17.14.⁴³ For the foregoing reasons, Appellant asserts that the Board's Order should be reversed.

Appellee contends that Appellant received proper notice of the hearing and, therefore, his due process rights were not violated because 24 *Del. C.* § 1733(d) is not applicable to this case and, instead, notice must only comply with the requirements set forth in the Delaware Administrative Procedures Act ("APA").⁴⁴ Appellee argues that 24 *Del. C.* § 1733(d) only applies where a formal written complaint is issued and no formal complaint was issued here.⁴⁵ Because there no formal complaint was issued, Appellee asserts that notice must only comply with the requirements set forth in the relevant provision of the APA, 29 *Del. C.* § 10122, and that the Letter meets those requirements.⁴⁶

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Appellee's Resp. Br., D.I. 9, at 9.

⁴⁵ *Id.*

⁴⁶ *Id.* at 10.

Appellee contends that Appellant cannot rebut the presumption that notice was properly effectuated and that additional facts strengthen the presumption of receipt of notice; specifically, that the first-class mail was not returned to the Division, that the Letter regarding the Rule to Show Cause hearing was sent to the exact address as the Recommendation Letter which Appellant received, and that the address the Letter was sent to was the same address Appellant provided during every licensure renewal.⁴⁷

Appellee contends that the Board's Order is supported by substantial evidence and is free of legal error because Appellant did not comply with the Fingerprint Statute by the statutorily mandated deadline.⁴⁸ Appellee asserts that the Board may not even consider the late submission of fingerprints because "evidence submitted to a licensing board after a hearing officer's recommendation has issued – evidence that did not exist at the time of the hearing...may not be considered by this Court in rendering its decision."⁴⁹ Therefore, the Board's Order based on the record before the hearing officer was appropriate.⁵⁰

Appellee also asserts that a Rule to Show Cause hearing may occur without filing a formal complaint and that the Board may use a hearing officer to conduct

⁴⁷ *Id.* at 13.

⁴⁸ *Id.* at 15.

⁴⁹ *Id.* at 15 (citing *Decker v. Del. Bd. of Nursing*, 2013 WL 5952103, *7 (Del. Super. Oct. 8, 2013)).

⁵⁰ *Id.*

the hearing.⁵¹ Appellee argues that no legal authority requires that the Board independently review the record and, therefore, it was permissible for the Board to adopt the hearing officer's recommendations.⁵² Additionally, Appellee contends that the Board properly charged Appellant with misconduct because the definition of misconduct "includes, but is not limited to, general conduct that is dishonorable or unprofessional and that is not addressed in other categories within these guidelines, and *includes acts prohibited by policies expressed in legislation.*" (emphasis added)."⁵³

Appellee asserts that Appellant waived his right to submit evidence of additional mitigating factors because he did not appear before the Board to make the argument.⁵⁴ Therefore, the Court may not consider the additional mitigating factors promulgated by Appellant in its brief to the Court.⁵⁵ Similarly, Appellee argues that the Court may not consider correspondence after the Board's decision became final and, therefore, the Court may not consider Appellant's attached *curriculum vitae*⁵⁶ or the letter from Ms. Massey⁵⁷ explaining that she is responsible for Appellant not receiving the Letter because neither document was

⁵¹ Appellee's Resp. Br. at 20.

⁵² *Id.* at 20.

⁵³ *Id.* at 22 (citing 24 Del. Admin. C. § 1700-17.5).

⁵⁴ *Id.* at 23.

⁵⁵ *Id.* at 23-24.

⁵⁶ D.I. 8, Ex. 12.

⁵⁷ *Id.* at Ex. 2.

properly before the Board at the time of the Board's Order.⁵⁸ For the reasons stated above, the Appellee requests that the Court affirm the Board's Order.

IV. STANDARD OF REVIEW

A person against whom a decision from the Board has been rendered may appeal to the Superior Court the decision within 30 days.⁵⁹ The Court does not review the decision *de novo* but rather based upon the evidence contained in the record at the time of the Board's decision.⁶⁰ The Court must review the proceedings of the Board to determine if the Board's findings and conclusions are supported by substantial evidence based upon the record before the Board and to determine whether or not the Board committed legal error.⁶¹ The Court cannot weigh the evidence, make factual findings or assess witness credibility.⁶² If the Board's findings of fact and conclusions of law are based upon substantial evidence and the decision is free from legal error, the Court gives deference to the Board's decision.⁶³

IV. DISCUSSION

Appellant's right to procedural due process regarding the disciplinary action imposed is not violated where the Court finds that proper notice was given.

⁵⁸ Appellee's Opening Br. at 24.

⁵⁹ 24 *Del. C.* § 1736(a),(b).

⁶⁰ 24 *Del. C.* § 1736(c).

⁶¹ *Sokoloff v. Board of Medical Practice*, 2010 WL 5550692, at *5 (Del. Super. Aug. 25, 2010).

⁶² *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

⁶³ *See Sokoloff*, 2010 WL 5550692 at *5; 29 *Del. C.* § 10142 (“[t]he Court...shall take due account of the experience and specialized competence of the agency”).

Additionally, where the Court finds that the Board's decision is supported by substantial evidence and is free of legal error, the Court affirms the Board's Order.

A. The Letter Provided Adequate Notice to Appellant Such That He Was Not Denied Due Process.

Procedural due process requires that parties must be adequately notified of agency actions that will impact their rights, privileges and immunities.⁶⁴

Additionally, notice must be given in both meaningful time and manner.⁶⁵ Notice for administrative proceedings held by the Board is governed by both the Medical Practices Act and the Delaware APA. Under the Medical Practices Act, "if the Executive Director elects to file a formal complaint against respondent, the person must be served personally or by certified mail, return receipt requested."⁶⁶

However, absent a formal complaint, notice for all other hearings must comply with the APA which requires that the notice contain the following:

- (1) A description of the subject matter of the proceedings;
- (2) Notice of the opportunity, if permitted by law, to elect to proceed by informal fact-finding and of the date by which such election must be made;
- (3) The date, time and place the formal hearing will be held if informal fact-finding is not elected;

⁶⁴ See *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

⁶⁵ *Id.*

⁶⁶ 24 Del. C. § 1733(d).

- (4) The law or regulation giving the agency authority to act;
- (5) Notice of the right to present evidence, to be represented by counsel and to appear personally or by other representative; and
- (6) The agency's obligation to reach its decision based upon the evidence received.⁶⁷

In Delaware, the law presumes that notice that is correctly stamped, addressed and mailed has been received by the party to whom it was addressed.⁶⁸ The presumption of receipt may be rebutted where the party asserting lack of notice can show that the mail was never in fact received.⁶⁹ “Mere denial of receipt is insufficient to rebut the presumption.”⁷⁰ Additionally, “[c]ertain evidence can bolster the presumption that notice was received, such as: receiving other mail sent by the Department to that address...and the notice not being returned by the U.S. Post Office.”⁷¹ Due process is denied only when the Board is at fault for the undeliverable mail.⁷²

The Board did not issue a formal complaint against Appellant but, instead, held a Rule to Show Cause hearing to determine why Appellant had not complied

⁶⁷ 29 Del. C. § 10122.

⁶⁸ *Windom v. Ungerer*, 903 A.2d 276, 282 (Del. 2006).

⁶⁹ *Hall v. Camper*, 347 A.2d 137, 139 (Del. Super. 1975).

⁷⁰ *Straley v. Advance Staffing, Inc.*, 2009 WL 3451913, at *2 (Del.).

⁷¹ *Id.*

⁷² *See, e.g., McGonigle v. George H. Burns, Inc.*, 2001 WL 1079036, at *2 (Del. Super. Sept. 4, 2001)(holding that the Board is at fault where notice was addressed to a substantially different address than that which was provided).

with the Fingerprint Statute. Therefore, the notice requirements set forth in 24 *Del. C.* § 1733(d) do not apply to the Board's actions. Instead, the notice must comply with the six requirements set forth in the APA. The Court finds that the Letter complied with the requirements of the APA because it described the subject matter of the Rule to Show Cause hearing, gave a date by which Appellant could elect informal fact-finding, noted the date, time and place of the hearing, provided the law pursuant to which the Board had authority to act, and notified Appellant that he could be represented, present evidence and subpoena witnesses and stated that the Board would reach its decision on the outcome of the hearing.⁷³

Additionally, Appellant has not rebutted the presumption that notice was received in the mail. The Board, through its paralegal, acknowledged that it sent notice of the hearing via certified and first-class mail to the address of record and conceded that the certified mail was returned undelivered. However, the first-class mail was not returned. Additionally, following the hearing, the hearing officer mailed the Recommendation Letter to Appellant via first-class mail at the address of record and Appellant admitted that he received this notice. The unreturned Letter mailed to the address of record and the receipt of the Recommendation Letter two months later bolster the presumption that Appellant received the Letter

⁷³ See Appellant's Opening Br., at Ex. 3.

and, therefore, received notice of the Rule to Show Cause hearing. Therefore, the Court cannot find that Appellant was deprived procedural due process.

B. The Board’s Decision is Supported by Substantial Evidence Because A Reasonable Mind Might Accept Appellant’s Non-Compliance with the Fingerprint Statute as Adequate to Support the Decision.

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”⁷⁴ and is greater than a scintilla but less than a preponderance.⁷⁵ The Board relied on the following facts to reach the decision to impose disciplinary action: Appellant had not complied with the Fingerprint Statute by the relevant date; Appellant did not appear at the Rule to Show Cause hearing; a paralegal from the Division testified that she had sent out a proper notice to the address provided by Appellant to the Division; the mitigating factor was that Appellant had no prior disciplinary violations; and aggravating factors included the minimal burden of compliance, Appellant is charged with knowing the laws regarding his licensing status and Appellant’s failure to appear at the hearing or communicate with the Board. Additionally, Appellant did not make any exceptions to the Board within the twenty day time period. Therefore, the Board accepted the hearing officer’s recommendation to impose disciplinary action for misconduct resulting from non-compliance with the Fingerprint Statute. Based on those facts, the Court finds that there is substantial evidence to conclude that

⁷⁴ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

⁷⁵ *Id.*

Appellant did not comply with the Fingerprint Statute and that disciplinary action was appropriate. However, the Court must still consider Appellant's argument that the Board committed legal error in determining the relevant facts to consider.

C. The Board Committed No Legal Error in Reaching Its Decision Because It Was Appropriate to Accept the Hearing Officer's Recommendation, to Conclude That Appellant's Actions Were "Misconduct" and to Consider Specific Aggravating and Mitigating Factors.

Appellant asserts that the following decisions made by the Board constitute legal error: 1.) The Board erred in not considering Appellant's compliance with the statute after the Rule to Show Cause hearing but before the Board's final Order was issued and merely accepting the hearing officer's recommendation; 2.) The Board erroneously charged Appellant with "general misconduct" because Appellant's conduct did not rise to the level of misconduct as defined in the Medical Practices Act or Board Regulations; and 3.) The Board erred by improperly applying Board Regulations 17.14 and 17.15 regarding aggravating and mitigating factors.

1. The Board Was Not Required to Consider Appellant's Subsequent Compliance and Could Adopt the Hearing Officer's Facts, Conclusions and Recommendations.

29 *Del. C.* § 10125(a) provides that a "hearing may be conducted by the agency or by a subordinate designated for that purpose." Pursuant to 29 *Del. C.* § 8735(v)(1)(a), hearing officers shall have "[a]ll powers and duties conferred or imposed upon such hearing officers by law." In rendering a case decision, hearing

officers retain “[t]he power to conduct hearings...[t]he testimony or evidence so taken or received shall have the same force and effect as if taken or received by the board or commission.”⁷⁶ Additionally, “[t]he findings of fact made by a hearing officer on a complaint are binding upon the board or commission. The board or commission may not consider additional evidence.”⁷⁷

Although the statute specifically addresses the binding effect of the hearing officer’s findings of facts on a hearing based on a complaint, it is silent as to the effect of a hearing officer’s findings of facts with regard to a Rule to Show Cause hearing except that the statute provides that, in rendering a case decision, any evidence received by the hearing officer shall have the same force and effect as if it were provided to the Board. The statute neither prevents the Board from accepting the hearing officer’s recommendation nor precludes the Board from barring additional evidence. Therefore, the Court cannot find that the Board committed legal error by accepting the hearing officer’s facts and conclusions and by not considering evidence of Appellant’s subsequent compliance with the statute.

2. The Board Did Not Err in Determining that Appellant’s Failure to Comply with the Fingerprint Statute was Misconduct.

⁷⁶ 29 Del. C. § 8735(v)(1)(d).

⁷⁷ 29 Del. C. § 8735(v)(1)(d).

The Board may issue disciplinary rulings for findings of “unprofessional conduct.”⁷⁸ 24 *Del. C.* § 1731(b)(11) defines “unprofessional conduct” as “[m]isconduct, including but not limited to sexual misconduct, incompetence, or gross negligence or pattern of negligence in the practice of medicine or other profession or occupation regulated under this chapter.” Additionally, Board Regulation 17.5 provides the disciplinary guidelines for specific types of misconduct which includes “general conduct that is dishonorable and unprofessional and that is not addressed in other categories within these guidelines, and includes acts prohibited by policies expressed in legislation.”

The Board determined that Appellant’s failure to comply with the Fingerprint Statute fell under the definition of misconduct as defined by the Medical Practices Act and the Board’s Regulations. This is a factual question to which it appears Appellant disagrees with the Board’s determination. Because a factual determination is at issue the Court will take “due account of the experience and specialized competence of the agency”⁷⁹ and cannot find that the Board erred in characterizing Appellant’s lack of compliance with the Fingerprint Statute as misconduct.

3. The Board Did Not Err in Its Application of Board Regulations 17.14 and 17.15.

⁷⁸ 24 *Del. C.* § 1731(a).

⁷⁹ 29 *Del. C.* § 10142(d)

Pursuant to 24 *Del. C.* § 1713(f), the Board “shall promulgate rules and regulations establishing guidelines for the imposition of disciplinary sanctions against persons certified or licensed to practice medicine or other professions or occupations regulated by this chapter.” Board Regulations provide that “when determining the degree of discipline, the board may consider certain factors, including but not limited to” those listed in Board Regulations 17.14 and 17.15.

Appellant argues that the Board erred by failing to consider certain mitigating factors including that

this was a single act, minimal gravity of the allegation, absence of dishonest or selfish motives, that there was no patient safety issues, and that this was an isolated incident unlikely to reoccur. Moreover,...that there are no disciplines for Appellant in the National Practitioners Data Base that he has performed over nine thousand surgeries and has never had any judgment against him and no lawsuits ever filed against him.⁸⁰

However, the language contained in Regulation 17.15 is permissive language and, therefore, the Board is not required to consider all mitigating factors. Furthermore, even if the language mandated that the Board consider all relevant mitigating factors, because Appellant failed to appear at the hearing and did not submit exceptions to the hearing officer’s recommendation, the record is void of evidence of those alleged mitigating factors.

⁸⁰ *Id.*

Appellant also argues that the Board erred when it impermissibly weighed some aggravating factors not enumerated in Regulation 17.14. However, the “including but not limited to” language contained in the Regulation is clear that the list is not an all-encompassing compilation of possible factors to be considered. Instead, the Board may consider any other relevant factor. Therefore, the Court cannot find that the Board erred in its application of aggravating and mitigating factors.

V. CONCLUSION

The Court finds that the Appellant received proper notice of the Rule to Show Cause hearing and the Board’s decision was supported by substantial evidence and free from legal error. Therefore, the decision of the Board is hereby **AFFIRMED.**

IT IS SO ORDERED.

/s/Ferris W. Wharton, Judge