IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JAMES L. SCHALLER, M.D.	)	
	)	
Appellant,	)	
	)	C.A. No. N14A-01-004 RRC
v.	)	
	)	
THE BOARD OF MEDICAL LICENSURE AND DISCIPLINE OF THE STATE OF DELAWARE	)	
	)	
Appellee.	)	
	)	

Submitted: March 16, 2015
Decided: June 8, 2015

On Appeal from a Decision of the Delaware Board of Medical Licensure and Discipline.
AFFIRMED.

MEMORANDUM OPINION

James L. Schaller, M.D., *pro se*, Appellant.

Patricia Davis-Oliva, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the Delaware Board of Medical Licensure and Discipline, Appellee.

COOCH, R. J.

I. INTRODUCTION

This appeal stems from a decision of January 7, 2014 by Appellee, the Board of Medical Licensure and Discipline of Delaware, to discipline James L. Schaller, M.D., a Board-licensed physician, for unprofessional conduct. Appellant has filed the instant

appeal and requests the disciplinary ruling be vacated. Appellant has failed to show that the regulation was improperly adopted or otherwise unlawful. Appellant's additional claims are similarly without merit. Accordingly, the decision of the Board is hereby **AFFIRMED**.

II. FACTUAL AND PROCEDURAL HISTORY

Appellant, previously a Delaware licensed physician, entered a plea of *nolo contendere* and was subsequently convicted of Aggravated Assault with a Deadly Weapon Without an Intent to Kill in the State of Florida.[1] Based on that conviction, the Delaware Department of Justice filed a disciplinary complaint with the Delaware Board of Medical Licensure and Discipline ("the Board") in September 2012, alleging that Appellant had engaged in "unprofessional conduct" pursuant to 24 *Del. C.* § 1731(b)(2).[2] Section 1731(b)(2) states that unprofessional conduct includes "conduct that would constitute a crime substantially related to the practice of medicine."[3] Crimes substantially related to the practice of medicine are enumerated in 24 *Del. Admin. C.* § 1700-15, or "Regulation 15."[4]

An evidentiary hearing was held on May 10, 2013 pursuant to 29 *Del. C.* § 8735(v)(1)(d), and following the hearing, the hearing officer submitted his written recommendation to the Board of Medical Licensure and Discipline. The hearing officer rejected the State's argument that Appellant only had thirty days to challenge the regulation under 29 *Del C.* § 10141 and found that because the instant matter was a "case decision" under the APA, "a challenge to the adoption of a regulation which now provides the vehicle whereby the State may seek to discipline an individual medical license is timely if brought within the context of such proceedings."[5] The officer declined to find Regulation 15 null and void,

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[1] Appellant's Supp. Br. on the Threshold Issue of the Validity of Bd. Reg. 28, App. at C-57, D.I. 34 (Aug. 27, 2014) (hereinafter "Appellant's Supp. Br. App.").

[2] Appellant's Supp. Br. at 1, D.I. 33 (Aug. 27, 2014); See also 24 *Del. C.* § 1731(b) (listing a number of acts or omissions constituting unprofessional conduct). Notably, the statute explicitly states that unprofessional conduct includes, but is not limited to the acts or omissions listed in 1731(b).

[3] 24 *Del C.* § 1731(b)(2).

[4] The regulations have since been renumbered, and as a result, what is referred to throughout briefing as Regulation 28 is now Regulation 15. *See* 24 *Del. Admin. C.* § 1700-15.2; *See also* Public Order of the Board of Medical Licensure and Discipline, R. and Tr. Section 1B at 2, D.I. 12 (Feb. 25, 2014) (hereinafter "Board Opinion") (noting the "overhaul" of the Board's regulations). For clarity and ease of reference to the current rule, the Court will refer to the challenged regulation as Regulation 15.

[5] Appellee's Answering Br. App. at B-143, D.I. 22 (Apr. 17, 2014).

submitting that Appellant failed provide a "compelling reason" for him to do so.[6] Moreover, the hearing officer noted that the authority to consider challenges was vested in this Court, and to assume that authority himself would likely run contrary to the intent of the General Assembly.[7]

The hearing officer further found that when Appellant was convicted in Florida for aggravated assault with a deadly weapon without the intent to kill, "he stood convicted of a crime substantially related to the practice of medicine as the Delaware Board has defined the term."[8] The hearing officer recommended that Appellant's medical license be placed on probation for eighteen months, that Appellant provide to the Board copies of the mental evaluations he was required to submit to the state of Florida, that Appellant complete six continuing education credits, three in the area of ethics and three in the area of anger management, and finally that Appellant pay a $2,500 fine to the State.[9]

The parties were given twenty days from the date of the hearing officer's proposed order to submit written exceptions, comments or arguments, but exceptions were not submitted by Appellant until approximately two months after the submission deadline had passed.[10] Appellant's exceptions were accepted by the Board, despite the fact that they were submitted out of time. The Board considered the findings of fact and recommendations of the Hearing Officer and the exceptions submitted by Appellant and issued a Public Order on January 7, 2014.

The Board found that Regulation 15 was enacted properly and that there had been no violation of the Delaware Administrative Procedures Act.[11] Further, the Board found that, pursuant to 24 *Del. C.* § 1731(b)(2) Appellant's conviction on the stated charge was "sufficient substantial evidence to find that Dr. Schaller engaged in conduct that constitutes a crime substantially related to the practice of medicine in Delaware."[12] The Board adopted all but one of the Hearing Officer's recommendations. Rather than have Appellant provide records of the Florida mental evaluations, the Board determined that "a formal assessment of professional competency [was] warranted to protect the health and safety of present or prospective patients."[13] Appellant filed the instant appeal on January 14, 2014.

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[6] Hearing Officer Recommendation, R. and Tr. Section 1A at 8, D.I. 12 (Feb. 25, 2014).
[7] *See id*.
[8] *Id*. at 25.
[9] *See id*. at 28-29.
[10] Bd. Opinion, R. and Tr. Section 1B at 1.
[11] *See id*. at 2.
[12] *Id*. at 3-4.
[13] *Id*. at 4.

On December 23, 2014, after briefing was complete and oral argument had been held, Counsel for Appellant moved to withdraw, citing irreconcilable differences between counsel and client.[14] The Court granted the Motion as unopposed on February 16, 2015 and gave Appellant an extension of time to file any supplemental brief.[15] Appellant filed his supplemental brief on March 16, 2015.[16]

III. THE PARTIES' CONTENTIONS

A. Appellant's Contentions[17]

i. The procedural restrictions of 29 *Del. C.* § 10141 do not bar Appellant's challenge of the validity of Regulation 15

Appellant argues that 29 *Del C.* § 10141(d) does not bar consideration of the validity of Regulation 15 because the instant action is an enforcement action under section 10141(c).[18] 29 *Del C.* § 10141(c) provides that "when any regulation is the subject of an enforcement action in the Court, the lawfulness of such regulation may be reviewed by the Court as a defense in the action."[19] Appellant further submits that when read together, sections 10141(c) and (e) "authorize this Court to consider Appellant's defense" and "either enforce it or declare it unlawful."[20] Section 10141(e) provides in pertinent part:

> Upon review of regulatory action, the agency action shall be presumed to be valid and the complaining party shall have the burden of proving . . . that the regulation, where required, was adopted without a reasonable basis on the record or is otherwise unlawful. The Court, when factual determinations are at issue, shall take due account

[14] *See* Mot. to Withdraw Counsel, D.I. 44 (Dec. 23, 2014).
[15] *See* Order Granting Mot. to Withdraw as Counsel, D.I. 62 (Feb. 16, 2015).
[16] Addendum Materials, D.I. 63 (Mar. 16, 2015). The Court notes that in the interim period between counsel's withdrawal and Appellant's pro se filing, Appellant's correspondence with the Court has been abundant and repetitive in nature.
[17] For the sake of completeness, arguments raised prior to counsel's withdrawal and arguments raised in Appellant's addendum materials are all addressed in this opinion.
[18] *See* 29 *Del. C.* § 10141(d) (requiring any complaint for declaratory relief to be brought within 30 days of regulation's publication in Register of Regulations).
[19] 29 *Del C.* § 10141(c).
[20] Ltr. from Mr. Battaglia to the Court at 2, D.I. 42 (Oct. 27, 2014).

of the experience and specialized competence of the agency and of the purses of the basic law under which the agency acted.[21]

Appellant contends that Regulation 15 was adopted without the reasonable basis on the record that is required by 29 *Del. C.* § 10141(e).[22] Appellant further submits that lack of a reasonable basis on the record is "just one category of unlawfulness" under 10141(c).[23]

ii. The Board failed to adhere to the requirements of the Delaware Administrative Procedures Act when enacting Regulation 15

Appellant argues that the Board failed to follow the requirements of the Delaware APA when promulgating Regulation 15. Appellant contends that Regulation 15 was adopted without the reasonable basis on the record that is required by 29 *Del. C.* § 10141(e).[24] Appellant argues that the Board held a discretionary public hearing but failed to receive sufficient evidence upon which its findings pursuant to 29 *Del C.* § 10118(b)(3).[25]

To create the record needed to survive judicial review, Appellant suggests that at a minimum, a representative of the State would have had to call witnesses and take testimony at a public hearing, regarding each crime to be considered "substantially related to the practice of medicine.'[26] The alleged lack of a sufficient record renders the process used by the Board "informal" and, as a result, violative of the Delaware APA.[27]

iii. Other Contentions:

Appellant argued in his opening brief that his due process rights were violated during the administrative hearing phase of this matter.[28] More specifically, Appellant contends that the Board failed to provide notice and an opportunity for him to appear at their confidential deliberations, and failed to consider his exceptions to the hearing officer's recommendation. Appellant also

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[21] 29 *Del C.* § 10141(e).
[22] Appellant's Supp. Br. at 3, D.I. 33 (Aug. 27, 2014)
[23] *Id.*
[24] Appellant's Supp. Br. at 3, D.I. 33 (Aug. 27, 2014)
[25] Tr. of Oral Arg. at 3-10, D.I. 43 (Oct. 10, 2014).
[26] Tr. of Oral Arg. at 4-5, 8-10, D.I. 43 (Oct. 10, 2014); *See also* 29 *Del. C.* § 10118(b)(3).
[27] Appellant's Supp. Br. at 2-3, D.I. 33 (Aug. 27, 2014)
[28] Appellant's Opening Br. at 14-20, D.I. 15 (Mar. 14, 2014).

argues that his Florida conviction is insufficient evidence of unprofessional conduct pursuant to section 1731(b).

In the filing submitted *pro se* by Dr. Schaller on March 16, 2015, he sets forth the following additional contentions, which may be fairly summarized as follows:

1. No crime was committed to service the basis for the Board's disciplinary action;
2. Local law enforcement officers involved in the incident had demonstrated a bias against Appellant and his family;
3. The Board's suggestion that 911 should have been called was unreasonable under the circumstances;
4. Appellant's wife was "violently thrown into a wall" without justification during Appellant's arrest;
5. Local law enforcement officers were biased in who they selected for interview at the scene of the incident;
6. The Board incorrectly characterizes Appellant's mood and behavior in the time leading up to the incident;
7. Although Appellant entered a plea, he entered a plea for other reasons and was not guilty of the crime;
8. There are benefits to allowing private individuals to own and possess firearms, including preventing or escaping dangerous situations;
9. Certain members of the Board acted with haste and were biased in issuing a decision;
10. The Board ignored the fact that Florida declined to discipline Appellant and was biased;
11. The Deputy Attorney General maintained contradictory positions because she indicated that only minor penalty was needed, but then portrayed Appellant as a threatening individual;
12. Appellant has not been professional disciplined throughout his twenty-three year career until now;
13. Appellant's actions at the time of the incident were not questioned by any of the parties involved;
14. Appellant's arrest indicates to medical professionals that they should not engage in situations such as these in order to avoid professional discipline.[29]

[29] *See* Addendum Materials at 1-22, D.I. 63 (Mar. 16, 2015). The State was not required to file a response to this supplemental filing.

B. Appellee's Contentions

i. 29 Del C. § 10141 bars Appellant's challenge of the validity of Regulation 15

Appellee argues that because Appellant did not file a complaint for declaratory relief pursuant to § 10141(d) within thirty days of the regulation's publication in the Register of Regulations, judicial review is unavailable.[30] Appellee argues that the instant action is also not an enforcement action, and as a result the validity of Regulation 15 cannot permissibly come under judicial review as part of the defense in the instant appeal.[31] Further, the State maintains that because this is an appeal of a case decision, Appellant has no right to appellate review under 29 Del. C. § 10141.[32]

Appellee further argues that even if the Court were to find that the instant action is an enforcement action, Appellant's challenge is beyond the scope of 10141(c), which only allows review of the "lawfulness" of a regulation. Specifically, Appellee asserts that Appellant is not challenging the lawfulness of the regulation under § 10141(c), but instead is "challenging the procedure used by the Board almost a decade ago in adopting the regulation . . . ."[33] The State argues that the language in § 10141(e) is instructive, particularly the phrase "where required, was adopted without a reasonable basis on the record or is otherwise unlawful."[34] Appellee argues that "adopted without a reasonable basis on the record" and "or is otherwise unlawful" are alternatives, and thus by challenging the procedures by which a regulation is adopted, the appellant cannot be challenging the regulation's "unlawfulness." Thus, Appellee submits, because Appellant is not challenging the "unlawfulness" of the regulation, he should not be permitted to proceed under 10141(c).

ii. The Board complied with the Delaware APA in its promulgation of Regulation 15

Appellee argues that the Board followed the proper procedures under the Delaware APA in enacting Regulation 15. Appellee further argues that "there is no requirement under Delaware law that any agency such as the Board call witness or take testimony in order to comply with the APA's requirements for rule

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[30] Ltr. from Ms. Davis-Oliva to the Court at 2-3, D.I. 41 (Oct. 22, 2014).
[31] *Id.*
[32] *Id*. at 3-4 (citing *Pitcavage v. Del. State Personnel Comm'n*, 1993 WL 93458 (Del. Super. Mar. 25, 1993).
[33] Ltr. from Ms. Davis-Oliva to the Court at 2.
[34] 29 *Del. C.* § 10141(e).

promulgation[.]"[35] In this case, Appellee argues, no error of law was committed when Regulation 15 was promulgated without public hearing.

iii. Other Contentions:

The crux of Appellee's remaining argument is that Appellant engaged in unprofessional conduct *per se* because the Florida offense for which Appellant was convicted is equivalent to "Menacing," a crime substantially related to the practice of medicine in the State of Delaware.[36] Appellee maintains that Appellant's Florida conviction is substantial evidence of unprofessional conduct sufficient to uphold the Board's decision. Additionally, Appellee contends that Appellant's due process rights were not violated. In particular, Appellee points out that the Board allowed Appellant to submit exceptions to the hearing officer's recommendations well past the deadline to do so. Upon submission of the exceptions, the Board reconsidered the penalty to impose on Appellant.[37]

IV. STANDARD OF REVIEW

The Medical Practice Act and the Delaware Administrative Procedures Act give this Court jurisdiction to review decisions of the Board of Medical Licensure and Discipline on appeal.[38] This Court must review the proceedings below to determine whether the Board's decision is supported by substantial evidence and free from legal error.[39] Substantial evidence requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[40] Errors of law are reviewed *de novo*, but "absent an error of law, this Court will not disturb the Board's decision where substantial evidence exists to support its conclusions."[41]

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[35] Appellee's Supp. Br. at 5-6, D.I. 36 (Sept. 12, 2014).
[36] *See* Appellee's Answering Br., App. at B-25, D.I. 22 (Apr. 17, 2014); *see also* Appellant's Supp. Br. at 1, D.I. 33 (Aug. 27, 2014)
[37] Appellee's Answering Br. at 16-17, D.I. 22 (Apr. 17, 2014)
[38] *See* 24 *Del. C.* § 1736(a) ("A person against whom a decision of the Board has been rendered may appeal the decision to the Superior Court in the county in which the offense occurred."); *See also* 29 *Del. C.* § 10142 (setting forth process for review of case decisions).
[39] *See, e.g. Sokoloff v. Board of Medical Practice,* 2010 WL 5550692, at *5 (Del. Super. Aug. 25, 2010) (internal citations omitted).
[40] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892, 899 (Del. 1994) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).
[41] *See Dellachiesa v. General Motors Corp*., 140 A.2d 137 (Del. Super. 1958).

V. DISCUSSION

A. Appellant can properly challenge the validity of Regulation 15

There is no dispute that this is an appeal from a case decision of the Board. Rather, the dispute centers on whether, as part of the appeal, Appellant can challenge the validity of the regulation that serves as the basis for a portion of the Board's decision. Pursuant to 29 *Del C*. § 10141, a regulation can be challenged either a) by bringing an action for declaratory relief within thirty days of its publication in the Register of Regulations or b) as part of a defense to "an enforcement action in the Court."[42] If the review of a regulation is conducted as part of a defense to an enforcement action, review is limited to the lawfulness of that regulation.[43] As discussed above, this Court finds that the instant action was commenced as an appeal, not an action for declaratory relief under 10141(d). Moreover, even if Appellant might choose to file an action for declaratory relief at some later time, Regulation 15 was published in the Register of Regulations on December 1, 2004.[44] Thirty days had long since passed for Appellant to properly bring such an action under section 10141(d).[45]

This Court further finds that the instant appeal is part of the continued defense to an enforcement action. Though the instant appeal is not itself an enforcement action in the traditional sense, the underlying action from which this appeal was taken was an enforcement action. Appellant challenged the lawfulness of Regulation 15 as part of his defense to the original enforcement action, and continues to do so in his appeal. Moreover, the Board on appeal has renewed its effort to enforce the statute and accompanying regulation under which Appellant is to be disciplined. These facts taken together weigh in favor of finding that this appeal just part of the defense to an enforcement action.

Where, like here, review of a regulation proceeds under 10141(c), review of the regulation is limited to its "lawfulness."[46] Appellee argues that Appellant is not challenging the lawfulness of the regulation, but is rather challenging the procedures used to enact the regulation, specifically, the adoption of Regulation 15 without a reasonable basis on the record. This Court finds Appellee's

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[42] *See* 29 *Del. C.* §§ 10141(c)-(d).
[43] *See* 29 *Del. C.* § 10141(c).
[44] 8 Del. Reg. 740, 750 (Dec. 2004).
[45] *See Powers v. Del Bd. of Chiropractic*, 2006 WL 3545143, at *1 (Del Super. Oct. 25, 2006).
[46] 29 *Del. C.* §10141(c) ("When any regulation is the subject of an enforcement action in the Court, the lawfulness of such regulation may be reviewed by the Court as a defense in the action.").

argument unpersuasive, and agrees with Appellant's contention that adoption of a regulation without a reasonable basis on the record is just one category of unlawfulness. Cases decided by the Superior Court regarding similar regulatory challenges are instructive here. Where other judges of this Court have found no reasonable basis on the record for adoption, the challenged regulation was declared unlawful and remanded back to the respective agency for reformation.[47] "Unlawfulness" includes violation of the proper procedures required for the adoption of a regulation.

B. The Board followed the proper procedures under the Delaware APA in enacting Regulation 15.

This Court finds that Regulation 15 was properly enacted, and agrees with the Board's opinion that Appellant's argument "demonstrates a fundamental misunderstanding of the Delaware Administrative Procedures Act requirements for promulgating regulations and the Federal system's dual processes for adopting regulations."[48] The Board in its Order explained:

> [W]hile the Federal Administrative Procedures Act contemplates both formal rulemaking—rulemaking for which the enabling statute requires that rules be supported by substantial evidence produced at an adjudicatory hearing – and informal rulemaking—rulemaking for which no procedural requirements are prescribed in the organic statute, and for which the Federal Administrative Procedures Act requires only notice and comment, the Delaware Administrative Procedures Act contemplates only informal–or, notice and comment–rulemaking.[49]

The Delaware Administrative Procedures Act, which applies to the Board of Medical Licensure and Discipline, mandates that all regulations must be adopted in a uniform manner, unless specifically exempted from the requirements.[50] The agency must first "file a notice and full text of [the proposed regulation], together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication, in full or as a summary, in the Register of Regulations . .

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[47] *See, e.g. Delmarva Power & Light Co. v. Tulou*, 729 A.2d 868, 874 (Del. Super. 1998)
[48] Bd. Opinion, R. and Tr. Section 1B at 2-3, D.I. 12 (Feb. 25, 2014)
[49] *Id*. at C-58.
[50] 29 *Del. C.* § 10113(a); *See also* 29 *Del. C.* § 10161(22) (listing Delaware Board of Medical Licensure and Discipline an agency to which Delaware APA applies).

. .”[51] If the agency is required by law or decides, in its discretion, to schedule and hold a public hearing, the agency must give advance notice pursuant to section 10115(b).[52] The agency must then provide the opportunity for public comment and must hold the comment period open for at least thirty days after the proposal is published in the Register of Regulations.[53] After any hearing and after all public comments are received, the agency must make a determination regarding whether to proceed with adopting the regulation, and must issue its conclusion in an order.[54] The order must include, among other things, a summary of the evidence and information received, a summary of findings of fact with respect to the evidence and information, and a decision to adopt, amend, or appeal the regulation.[55]

Finally, pursuant to 10141(e), “the agency action shall be presumed to be valid and the complaining party shall have the burden of proving . . . that the regulation, where required, was adopted without a reasonable basis on the record or is otherwise unlawful.”[56] Moreover, 10141(e) mandates that this Court, where there are factual determinations at issue, “take due account of the experience and specialized competence of the agency and of the purses of the basic law under which the agency acted.”[57]

This Court finds that Appellant has simply not met the burden of showing that Regulation 15 was adopted without a reasonable basis on the record or was otherwise adopted unlawfully. Nothing in the Medical Practice Act required the Board to hold a public hearing prior to the adoption of Regulation 15, and the procedural rules for *how* a public hearing must be conducted found in the Delaware APA only apply where an agency is required by law to hold a hearing, or if an agency decides to hold a hearing its discretion.[58] This Court agrees with the Board

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[51] 29 *Del. C.* § 10115(a).
[52] *See* 29 *Del. C.* § 10115(b) (describing method by which notice must be published).
[53] *See* 29 *Del. C.* § 10118(a).
[54] *See* 29 *Del. C.* § 10118(b).
[55] *See* 29 *Del. C.* § 10118(b)(1)-(3).
[56] 29 Del. C. §10141(e). The “reasonable basis on the record” standard has been held to be equivalent to the “substantial evidence” standard, which is the standard under which this Court evaluates decisions of the Board. See *Bernie's Conchs, LLC v. State, Div. of Natural Res. & Envtl. Control*, 2007 WL 1732833, at *5, n. 3 (Del. Super. June 8, 2007) (discussing standard of review).
[57] 29 *Del C.* § 10141(e).
[58] *See generally* 24 *Del. C.* § 1701 *et seq*; *See also* 29 *Del. C.* § 10117 (setting forth requirements for a public hearing). Section 10117 only applies “when an agency is required by law to hold public hearings before adopting, amending, or repealing a regulation . . .” or “if an agency in its discretion determines to hold public hearings . . . .” *Id.*

and finds that no error of law occurred when Regulation 15 was adopted without public hearing.[59]

This Court finds unpersuasive Appellant's contention that more of a record than was established in this case is needed to survive judicial review. Appellant argues that some record need to be developed that includes submission of evidence and testimony that explains the basis for consideration of each crime as "substantially related to the practice of medicine." This Court does not believe that the Legislature intended to place such an affirmative burden on the agencies of this State.

C. Appellant's Remaining Claims Are Without Merit

Appellant makes a number of other claims in support of his argument that the Board's decision should be reversed. The Court does not find any of Appellant's arguments persuasive. First, Appellant disputes that his conviction can be substantial evidence to support the Board's ruling. The Court disagrees and finds that Appellant's conviction is substantial evidence that Appellant engaged in conduct that constitutes a crime substantially related to the practice of medicine under 24 *Del. C.* § 1731(b)(2).[60] Regulation 15 and the House Bill amending section 1731(b)(2) are instructive on this point.

House Bill No. 459 of the 145th General Assembly, amended 24 *Del C.* § 1731(b), changing section (b)(2) from "conviction of or admission under oath to having committed a crime substantially related to the practice of medicine" to "conduct that would constitute a crime substantially related to the practice of medicine."[61] According to the Bill's synopsis, the change was made to clarify "that the obligation of law enforcement to report unprofessional conduct by a physician is not limited to situations in which a conviction or admission has been obtained."[62] It is evident to this Court that the Legislature intended to broaden the scope of conduct covered by that particular section of the statute. This Court finds it reasonable to assume that by its amendment to 1731(b)(2), the Legislature intended to include as "unprofessional conduct" both conduct for which a person has been convicted and conduct for which a person has yet to be convicted. Regulation 15 is further evidence of that intention.

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[59] Bd. Opinion, R. and Tr. Section 1B at 2-3, D.I. 12 (Feb. 25, 2014)

[60] *See Fisher v. Beckles*, 2012 WL 3550497, at *2 (Del. Super. Jul. 2, 2012) (explaining that courts have allowed evidence of *nolo contendere* pleas to be admitted in some situations, one of which is for use in administrative proceedings) (internal citation omitted).

[61] 2010 Del. Laws ch. 325, § 4 (2010) (amending 24 *Del. C.* § 1731(b)(2)).

[62] 2010 Del. Laws ch. 325 (2010).

Regulation 15 states that "for purposes of licensing, renewal, reinstatement and discipline, the conviction of any of the following crimes . . . or substantially similar crimes in another state or jurisdiction, is deemed to be substantially related to the practice of Medicine . . . in the State of Delaware without regard to the place of conviction . . . ."[63] Aggravated Menacing, the Delaware equivalent to the Florida crime of Aggravated Assault with a Deadly Weapon without Intent to Kill, is listed among the crimes substantially related to the practice of Medicine.[64]

Based on the apparent Legislative intent and Regulation 15, this Court finds that the Board properly found that Appellant's Florida conviction is sufficient substantial evidence that he engaged in conduct constituting a crime substantially related to the practice of medicine in Delaware.

The Court further finds that Appellant's claims related to due process to be unavailing. "A professional license is a protected property interest, and to comport with due process the licensee has a right to be heard at a meaningful time and in a meaningful manner."[65] Due process "is not a technical notion with a fixed content but a flexible concept which calls for such procedural protections as the situation demands."[66] Counsel for Appellant or Appellant himself received notice and attended all hearings called by the Board. Moreover, both Appellant and his spouse testified at length regarding the events leading to his conviction. Appellant suggests that he had a right to be present at the Board's deliberations at the July 2013 and November 2013 executive sessions.[67] Nothing in the Medical Practice Act nor the Delaware APA requires that Appellant be present for the Board's otherwise confidential executive sessions.[68]

Appellant also argues that the Board failed to consider his exceptions. This Court disagrees. Appellant submitted his exceptions in August 2013 (about two months after the deadline for submission had passed). The previous month, in July 2013, the Board had already held a meeting at which they had preliminarily agreed on a resolution to Appellant's case. Nonetheless, the Board agreed to accept Appellant's exceptions out of time and reconsidered the penalty to give Appellant at a meeting in November 2013. As a result of the Board's reconsideration of Appellant's exceptions

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[63] 24 *Del. Admin. C.* § 1700-15.
[64] *See id*. at § 15.2.2.
[65] *Bilski v. Bd. of Med. Licensure & Discipline*, 2014 WL 3032703, at *6 (Del. Super. June 30, 2014), *reargument denied*, 2014 WL 5282115 (Del. Super. Oct. 16, 2014), *aff'd*, 2015 WL 2452821 (Del. May 20, 2015).
[66] *Cook v. Oberly*, 459 A.2d 535, 538 (Del. Ch. 1983) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).
[67] Appellant's Opening Br. at 16, D.I. 15 (Mar. 14, 2014).
[68] *See, e.g.*, 24 *Del. C.* §1734(g) (requiring the Board to conduct deliberations). It is of note that section 1734(f) does not give Appellant the right to be present for those deliberations.

at that meeting, the discipline suggested by the hearing officer was modified in the Board's final opinion issued in January 2014.[69] Appellant's argument that the Board violated his rights by failing to consider his exceptions fails. In sum, the Court has concluded that no due process violations have occurred.

Turning to the list of claims set forth in Appellant's addendum materials, the Court finds that the first, second, fourth, fifth, seventh, and thirteenth claims in Appellant's addendum materials are without merit. It is well established in the record that Appellant entered a plea of *nolo contendere* in the Florida matter and was found guilty, and this Court does not intend to analyze the merits of that case. The conviction stands as entered and the Court declines to consider these claims further.

Appellant's third and sixth arguments are equally unavailing. Appellant's third argument is that The Board and the Delaware Attorney General suggested that Appellant should have used 911 to stop the events in question from escalating. Appellant's sixth argument is that the Board incorrectly characterizes Appellant's mood and behavior in the time leading up to the incident. The Hearing Officer explicitly declined to make findings of fact regarding the incident.[70] The Board did not comment on Appellant's use or lack thereof of 911, nor did the Board comment on Appellant's demeanor around the time of incident. No record was made on either of these points and thus the Court will not indulge Appellant's arguments further.

Appellant's eighth and fourteenth arguments express his feelings and opinions on the use of personal firearms and civilian intervention in familial disputes.[71] These opinions are irrelevant to the disposition of this matter and the Court declines to consider them further.

Appellant's ninth and tenth arguments can be considered together. Appellant argues that some members of the Board were hasty and biased in issuing a decision to discipline him. In support of that argument, Appellant contends that the Board either ignored or rejected the fact that the Florida Board of Medicine declined to discipline Appellant based on the same conduct for which he is now subject to discipline in Delaware. It is within the province of the Board, not this Court, to weigh evidence or make determinations based on credibility or facts.[72] As discussed *supra*, there was substantial evidence on the record to conclude the Appellant engaged in "unprofessional conduct" in violation of 1731(b). Accordingly, the Court declines to examine Appellant's claims of haste, bias, or failure to appropriately weigh evidence.

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[69] Notably, no written opinion was issued as a result of the Board's preliminary agreement at the July 2013 meeting on how to resolve Appellant's case.

[70] *See* R. and Tr. Section 1A at 19 ("The facts of the January 2 incident remain clouded, and it is not possible to make findings on them.").

[71] Appellant's fourteenth argument is that "this case sends the message to the community to leave protecting to the 'professionals' because you could be arrested or sued." Addendum Materials at 18.

[72] *See Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del 1965).

Next, Appellant contends that the Deputy Attorney General maintained contradictory positions because she indicated that only a minor penalty was needed, but then portrayed Appellant as a threatening individual. The case strategy employed by the State, so long as it is within the bounds of the law, is not for this Court to control. Notably, Appellant does not contend that the State exceeded the bounds of the law in its plea negotiations or during argument and briefing in the instant appeal. Appellant's contention warrants no further comment by this Court.

As to Appellant's twelfth argument that he has not subject to professional discipline throughout his twenty-three year career until the instant action, the Court again notes that it is the Board that is tasked with weighing the evidence in this matter. The Board was within its sound discretion to give whatever weight it felt appropriate to the fact that Appellant had a blemish-free professional record until this point. In sum, Appellant has failed to set forth any claim in his briefs or addendum materials sufficient to convince this Court that the Board made an improper ruling.

VI. CONCLUSION

For the reasons stated above, the Decision of the Delaware Board of Medical Licensure and Discipline is **AFFIRMED**.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary
cc: Delaware Board of Medical Licensure and Procedure