**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| MAIA KATHRYN MICHAEL, | : | |
| | : | No.: 368, 2017 |
| Appellant Below, | : | |
| Appellant, | : | On Appeal from the |
| | : | Superior Court of the |
| v. | : | State of Delaware |
| | : | C.A. No. N17A-02-003-JRJ |
| DELAWARE BOARD OF NURSING, | : | |
| | : | |
| Appellee Below, | : | |
| Appellee. | : | |

# REPLY BRIEF OF APPELLANT MAIA KATHRYN MICHAEL

**ELZUFON AUSTIN & MONDELL, P.A.**

*/s/ Gary W. Alderson*
GARY W. ALDERSON – I.D. #3895
300 Delaware Avenue, Suite 1700
P.O. Box 1630
Wilmington, DE 19899-1630
(302) 428-3181
*Attorney for Appellant Below/Appellant*

Dated: December 11, 2017

## TABLE OF CONTENTS

TABLE OF CITATIONS ..... iii

ARGUMENT ..... 1

I. THE BOARD OF NURSING AND THE SUPERIOR COURT FAILED TO APPRECIATE THE BASES OF THE ARGUMENTS THAT MICHAEL WAS DENIED DUE PROCESS ..... 1

II. THE BOARD OF NURSING AND THE SUPERIOR COURT MISAPPREHENDED MICHAEL'S CONSTITUTIONAL ARGUMENTS ..... 9

CONCLUSION ..... 12

## TABLE OF CITATIONS

**Cases** **Page**

*Baxstrom v. Herold*, 383 U.S. 107 (1966) ..... 10

*Mills v. State*, 256 A.2d 752 (Del. 1969) ..... 10

*Richardson v. Bd. of Cosmetology & Barbering of State*, 69 A.3d 353 (Del. 2013) ..... 10

*Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205 (Del. 1992) ..... 6

*Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989). ..... 11

*State v. Brown,* 195 A.2d 379 (Del. 1963) ..... 9

*State v. Hobson*, 83 A.2d 846 (Del. 1951) ..... 9

*State Highway Dept. v. Delaware Power & Light Co.*, 167 A.2d 27 (Del. 1961). ..... 9

*Wilmington Med. Ctr., Inc. v. Bradford,* 382 A.2d 1338 (Del. 1978) ..... 9

**Statutes and Rules**

*Del. Const.* of 1776, Art. 7 ..... 2
*Del. Const.* of 1792, Art. III ..... 2
*Del. Const.* of 1831, Art. III ..... 2

11 *Del. C.* §4364 ..... 5
24 *Del. C. Chp. 19* ..... 7
24 *Del. C.* § 1901 ..... 5
24 *Del. C.* § 1922 ..... 11
29 *Del. C.* § 8735 ..... 4
29 *Del. C.* § 10101 ..... 5
29 *Del. C.* § 10142 ..... 5

**Reference**

*The Delaware Constitution of 1897 the First One Years* (Randy J. Holland, Harvey B. Rubenstein, Matthew F. Boyer, David C. Glebe, Mary M. Johnston, William D. Johnston, Paula R. Steiner, Helen L. Winslow, eds., 1997)..... 1, 2, 3

## ARGUMENT

### I. THE BOARD OF NURSING AND THE SUPERIOR COURT FAILED TO APPRECIATE THE BASES OF THE ARGUMENTS THAT MICHAEL WAS DENIED DUE PROCESS.

In essence, Michael's argument is that while her gubernatorial "pardon does not remove the historical fact of [her] conviction," it does operate to "remove any further punishment and restore [her] civil rights...."[1] Therefore, the Board of Nursing erred in not allowing her to apply for licensure.

Procedure below required that Michael couch her exceptions to the Board of Nursing's actions and inactions as having denied her due process by denying her the right to be heard fairly on the issues she brought to the Board. As a result, the Board and the Superior Court have focused their respective attention upon whether all appropriate steps in the procedural 'cookbook' of due process were correctly followed.

In so doing, both missed the main thrust of Michael's argument that regardless of how it was done, it was *what was done* (or not done) that resulted in a permanent bar upon Michael from ever seeking the imprimatur of the State to practice her chosen profession in the healing arts. Such a result is inconsistent with other state

---

[1] *The Delaware Constitution of 1897 the First One Years* 143 (Randy J. Holland, Harvey B. Rubenstein, Matthew F. Boyer, David C. Glebe, Mary M. Johnston, William D. Johnston, Paula R. Steiner, Helen L. Winslow, eds., 1997).

law and to "the law of the land" and leaves Michael with no recourse or remedy at law. Ever.

That result is also contrary to the belief that "a good society will include recognition of the possibility of reform and redemption," and that "there are occasions in which legal justice should be tempered with mercy."[2] In addition, such a result seems contrary to the intentions of the original framers of our state Constitution.

According to Delaware's original 1776 Constitution, the "President or Chief Magistrate," chosen by ballot by the members of both houses of "The General Assembly of Delaware," "shall have the power of granting pardons or reprieves...."[3] The 1792 Constitution stated that the Governor, in whom "[t]he supreme executive powers of this state shall be vested," "shall have power to ... grant reprieves and pardons ...."[4] The language of the 1831 Constitution is similar.[5]

The power of pardon and reprieve "was held and exercised solely" by the Governor or President for Delaware's first 121 years. A significant change in that power took place when our present-day Constitution was adopted in 1897.

---

[2] *The Delaware Constitution of 1897 the First One Years* 146 (Randy J. Holland, *et al.* eds., 1997).
[3] *Del. Const.* of 1776, Art. 7.
[4] *Del. Const.* of 1792, Art. III, §§ 1, 9.
[5] *Del. Const.* of 1831, art. III, §§ 1, 9.

That Constitution created a Board of Pardons "designed to share with the governor the burden of passing on pardon and commutation applications"[6] to relieve the Governor of the "weighty, open-ended power of pardon." Thus, "the Board of Pardons may be seen as a detailed feature of our constitutional system of checks and balances of governmental power."[7]

The drafters of the 1897 Constitution structured the Board of Pardons as a "fixed body of high state officers, the majority of whom ... were elected by the people."[8] Three of Delaware's five statewide elected officials sit on the Board: the Lieutenant Governor, State Treasurer, and Auditor of Accounts. Those on the Board, having had "nothing to do with the case" or "the evidence submitted before the Courts,"[9] and having had the public's trust placed upon them through election or appointment to high office, are to exercise their judgment on the evidence submitted to them to protect the public from potential recidivism and wanton release of dangerous persons.

The composition of the Board of Pardons speaks to both its gravitas and the deference it should be afforded. The remaining members of the Board are the

---

[6] *The Delaware Constitution of 1897 the First One Years* 144 (Randy J. Holland, *et al.* eds., 1997).
[7] *Id.*
[8] *Id.* at 144-45.
[9] *Id.* at 145, *quoting* 3 *Constitutional Debates* at 1977.

Chancellor, who was the state's senior judicial officer in 1897, and who (then and now) has no original criminal jurisdiction; and the Secretary of State, a gubernatorial appointment requiring approval by the Senate, who was "placed on the Board to represent the interest of the executive branch."[10]

The only other statewide elected official besides the Governor who does not sit on the Board of Pardons is the Attorney General, as "'it would be a rather delicate matter for the Attorney General, after having prosecuted a man for a crime, to sit in judgment upon the subsequent development of facts as to whether that person should be pardoned.'"[11] Michael makes that same point here as to the Secretary of State.

The Division of Professional Regulation of the Department of State is closely intertwined with all Title 24 Boards, including the Board of Nursing. The Division is "responsible for the administrative, ministerial, budgetary, clerical and exclusive investigative functions (including but not limited to the appointment, removal, compensation and duties of employees) as provided by law of the … (11) Board of Nursing as set forth in Chapter 19 of Title 24."[12]

The Secretary of State sits on the Board of Pardons "to represent the interest of the executive branch" which includes the interests of the Division of Professional Regulation and the Board of Nursing. Therefore, the Board and the Division should

---

[10] *Id.* at 145.

[11] *Id., quoting* 1 *Constitutional Debates* at 175.

[12] 29 *Del. C.* § 8735.

have concluded here, but did not, that the Secretary of State and the remainder of the Board of Pardons sufficiently addressed its ostensible "interests" here when Michael came before the Board of Pardons. To the extent that concerns remained regarding Michael's post-conviction threat to the public, those were addressed by the Board of Pardons, which provided ample bases for the Board of Nursing to conform to the actions of the Board of Pardons without fear that it would have abrogated its responsibility to the public.[13]

Further, the Board argued (at p.14 of its Answering Brief) that Section 10142 of Title 29 requires this Court "take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted" "when factual determinations are at issue."[14] Michael does not dispute that, except to point out that the Court consider Section 10142 in context with Section 10101, which states that:

> The purpose of this chapter [101. Administrative Procedures] is to standardize the procedures and methods whereby certain state agencies exercise their statutory powers and to specify the manner and extent to which action by such agencies may be subjected to public comment and judicial review.[15]

---

[13] *See Answering Brief* at 31-32. *See al*so 24 *Del. C.* § 1901 ("The General Assembly hereby declares the practice of nursing by competent persons is necessary for the protection of the public health, safety and welfare and further finds that the levels of practice within the profession of nursing should be regulated and controlled in the public interest....").

[14] 29 *Del. C.* §10142.

[15] 29 *Del. C.* §10101.

In addition, the Board of Nursing did not apply its "experience and specialized competence" to decide upon Michael's licensure applications. Notwithstanding the arguments on appeal as to how and why Michael's license was revoked in the first place, the Board never went that far, deciding instead that Michael's revocation precluded any consideration of her applications.

Anecdotally, certain members of the Board expressed sympathy for Michael's plight when she appeared before it. Their sympathy indicates that even though those Board members understood "the purposes of the basic law under which the agency has acted," the Board decided as a whole that its hands were tied.

Michael agrees with the Board's argument (at p.14-15 of its Answering Brief) that per *Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.,*[16] this Court reviews the record below to determine whether the decisions below were supported by substantial evidence and free from legal error. Michael disagrees, however, with the significance of that proposition here because the far more important part of such "limited" review here is the Court's plenary review of statutory construction and the application of the law to the facts.[17]

For example, in response to Michael's various arguments why certain provisions of Chapter 19 of Title 24 would have and should have permitted the Board

---

[16] 616 A.2d 1205, 1208 (Del. 1992).

[17] *Id.* at 1208, *citing to E.I. du Pont de Nemours Co., Inc., v. Shell Oil Co.,* 498 A.2d 1108, 1113 (Del. 1985).

of Nursing to permit Michael to apply for licensure,[18] the Board offered (at page 19 of its Answering Brief) a perfect explanation as to why those arguments were not considered: because the Board looked no further than its prior permanent revocation. Simply put, the Board concluded that because of that revocation it did not need to consider whether any other provision of Chapter 19 would have permitted it to take action, since a prior Board had made a decision that stands immortal regardless of the changed circumstances that Michael presented. Again, that is contrary to the spirit if not the letter of our Constitution and places the essential question here within the Court's plenary review of statutory construction.

"The law of the land" establishes a procedure whereby persons convicted of even a heinous or infamous crime can be pardoned and thus return to some semblance of a normal life, including pursuit of employment and licensure. On the other hand, Michael was convicted almost nine years ago, disciplined by the Board over four years ago, and pardoned over two years ago; yet she can never hope to return to her chosen profession. As a simple statement of public policy, it is illogical to conclude that those two results derive from our laws.

The Board's interpretation of the dichotomy between Chapter 19 of Title 24 and Section 4364 of Title 11 to reach such a conclusion is contrary to the Preamble of the Constitution, standing as it does as an absolute bar to Michael acquiring and

---

[18] *See Opening Brief* at 18-19.

protecting her reputation and her property interest in professional employment. It is also contrary to Section 7 of Article 1 because it deprives her of a property interest in professional employment contrary to the "law of the land."[19]

[19] *Del. Const.* Pmbl., Art. I, § 7.

## II. THE BOARD OF NURSING AND THE SUPERIOR COURT MIS-APPREHENDED MICHAEL'S CONSTITUTIONAL ARGUMENTS.

The Board's arguments (at pages 28-31 of its Answering Brief) in response to Michael's arguments that the Nurse Practice Act is the only professional or vocational licensure statute that uses the phrase "permanent revocation" exclusively are unavailing. In fact, at page 28 of its Brief, the Board concedes that point. Unfortunately, both the Board and the Superior Court immersed themselves in how Michael challenged that law rather than why.

Simply put, Michael's challenge to that statute makes the constitutional question of its validity "fairly debatable."[20]

From there, Michael's burden becomes practically insurmountable; even if the question is fairly debatable, "legislative judgment must be allowed to control."[21] "There is a strong presumption of constitutionality attending a legislative enactment which "the court will be reluctant to ignore," unless the evidence of unconstitutionality is clear and convincing.[22] Michael carries a heavy burden to overcome the statute's presumed validity.[23]

---

[20] *Wilmington Med. Ctr., Inc. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978).
[21] *State v. Hobson*, 83 A.2d 846 (Del. 1951).
[22] *State Highway Dept. v. Delaware Power & Light Co.*, 167 A.2d 27 (Del. 1961).
[23] *State v. Brown*, 195 A.2d 379 (Del. 1963).

This is a case, however, that as much as the Court "would prefer to avoid the Constitutional issues," it "cannot strain the construction of the statute to the point of preventing its purpose."[24] Although equal protection of the laws does not require that all persons be dealt with identically, "it does require that a distinction must have some relevance to the purpose for which the classification is made."[25] There is no purpose, relevant or otherwise, for the distinction between nurses and all other professions and vocations regulated by Title 24. Thus, there is no valid bases for its draconian – and exclusive - "permanent revocation" statute.

Key to that determination is statutory interpretation. It is axiomatic that in Delaware the goal of statutory construction is to give effect to legislative intent. Equally axiomatic is the doctrine of *in pari materia.*[26] Whereas the Board argues (at pages 29-30 of its Answering Brief) that Michael is attempting to "engraft" language upon the Nurse Practice Act language "which has clearly been excluded therefrom,"[27] that is, in fact, the exact opposite of what Michael seeks.

Simply put, Michael implores this Court to view the statutes within Title 24 as a whole as to revocation and *permanent* revocation. Such a review renders it

---

[24] *Mills v. State*, 256 A.2d 752 (Del. 1969).
[25] *Baxstrom v. Herold*, 383 U.S. 107 (1966).
[26] *Richardson v. Bd. of Cosmetology & Barbering of State*, 69 A.3d 353, 357 (Del. 2013).
[27] Internal citation omitted.

incumbent upon this Court to invalidate any "literal or perceived interpretations which yield mischievous or absurd results,"[28] such as the implication by the Board that the General Assembly intended to consider nurses, or at least the Board of Nursing, as different from all other Boards, professions and vocations. There is no evidence to support a conclusion that the General Assembly intended nurses to be the only professionals who must suffer permanent revocation. Moreover, the absence of some rational basis for such distinction renders 24 Del.C. §1922(b) (1) unconstitutional.

[28] *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989)

## CONCLUSION

For all of the factual and legal arguments set forth in this Brief and the Opening Brief, Appellant Maia Michael respectfully submits that the decisions be reversed and that this matter be remanded to the Board of Nursing with instructions to permit Michael to apply for licensure.

Respectfully submitted,

**ELZUFON AUSTIN & MONDELL, P.A.**

*/s/ Gary W. Alderson*
GARY W. ALDERSON (# 3895)
300 Delaware Avenue, Suite 1700
P.O. Box 1630
Wilmington, DE 19899-1630
(302) 428-3181
*Attorney for Appellant Below/Appellant*

Dated: December 11, 2017

G:\Docs\CLIENT\131779\27971\PLEADING\01229250.DOCX