**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**PROVIDENCE, SC.** **SUPERIOR COURT**

**(FILED: August 31, 2020)**

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| **SARAH F. BOYLE** | : | |
| | : | |
| **v.** | : | **C.A. No. PC-2016-0087** |
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| **RHODE ISLAND DEPARTMENT OF HEALTH, BOARD OF MEDICAL LICENSURE AND DISCIPLINE, and NICOLE ALEXANDER-SCOTT, in her Capacity as Director of the Rhode Island Department of Health** | : | |

**DECISION**

**MCGUIRL, J.** Before this Court is an appeal by Sarah F. Boyle (Appellant) from a December 9, 2015 final decision of the Rhode Island Board of Medical Licensure and Discipline (the Board) and Nicole Alexander-Scott, in her capacity as the Director of the Rhode Island Department of Health (hereinafter collectively referred to as the Department) issuing an administrative decision and order disciplining Appellant for unprofessional conduct within the meaning of G.L. 1956 § 5-37-5.1(19). Pursuant to § 5-37-6.3, Appellant's license was revoked, and she was ordered to pay a $10,000 administrative fee. Jurisdiction is pursuant to G.L. 1956 §§ 42-35-15 *et seq*. For the reasons set forth in this Decision, this Court affirms the Board's decision.

## I

## Facts and Travel

Appellant at the time of the events was a licensed psychiatrist in Rhode Island. In

May 2001, Appellant began treating the FPW and FPH[1], a married couple who eventually divorced. (Board Decision at 2-4.) Intermittently between 2001 and 2007, Appellant treated the married couple separately and together. *Id*. at 4. Appellant's last session with the FPW and FPH was recorded to be in March 2008 and August 2007, respectively. (Specification of Charges (SOC) ¶ 3.) Pharmacy records show prescriptions until 2010. In 2011, Appellant began a romantic relationship with the FPH. (Summary Suspension (SS) ¶ 2.) It is this romantic relationship that led the FPW to file a complaint against Appellant on or about May 27, 2014.

Pursuant to § 5-37-5.1(19)[2], the allegations against Appellant included engaging in unprofessional conduct with the FPH, her transfer of the FPW's records, and her appearance at a Family Court hearing with the FPH. Pursuant to § 5-37-5.2(a)[3], the Board reviewed the complaint. Once the Board determined the complaint merited consideration, three members of the Board held an investigative committee meeting on October 2, 2014, which Appellant attended. Section 5-37-5.2(b).

On October 8, 2014, pursuant to § 5-37-8, entitled Grounds for discipline without hearing, the Investigative Committee (the Committee) recommended that the director of the Department impose a summary suspension. The director summarily suspended Appellant's physician license based on evidence and factual findings of the Committee. (Board Decision at 34.) No expert testimony was presented at the summary suspension.

On October 10, 2014, pursuant to § 5-37-5.2, Michael Fine, M.D., the then-

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[1] FPW and FPH refer to the former patient wife and the former patient husband, respectively.
[2] Section 5-37-5.1 is entitled Unprofessional conduct
[3] Section 5-37-5.2 is entitled Complaints

director of the Department designated three members of the Board[4] to act as the Committee for purposes of adjudicating and issuing a final decision in this matter. Appellant moved for immediate rescission of her summary suspension on grounds that the Department failed to demonstrate that her continued practice of psychiatry constituted an immediate danger to the public pursuant to § 5-37-8.

Pursuant to § 5-37-8, a hearing on the summary suspension began on October 14, 2014. The Board denied Appellant's motion but stated that it would be willing to reconsider if Appellant were to have a psychiatric evaluation by a Rhode Island licensed psychiatrist pursuant to § 5-37-1.3(10)(i). (Tr. 45, Oct. 14, 2014.) The summary suspension hearing was included in the hearing on the merits that also took place on the following dates: November 3, December 1 and 3, 2014, January 29 and 30, February 2 and 12, March 18, 23, and 27, and April 10, 2015.

**Specification of the Charges**

On October 23, 2014, the Committee issued Specification of the Charges against Appellant. Appellant was charged with four counts of unprofessional conduct violating § 5-37-5.1(19). Below is the summary of allegations:

**1**

Appellant violated § 5-37-5.1(19) by engaging in a romantic relationship with the FPH. The FPW told the Committee that the FPH and the Appellant took a cruise together in 2010. In the summer of 2014, Appellant attended a Family Court hearing involving both the FPW and FPH. Appellant attended the hearing to provide emotional support to

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[4] The Committee members are Jennifer Barry, Esquire, Joan Crawley, and Stephen Fanning, DO.

the FPH. (SS ¶ 5.) The FPW screamed that she did not want Appellant in the room. An officer asked Appellant to leave the courtroom and Appellant complied, but when the parties moved to another courtroom, Appellant went inside that courtroom. Ultimately, the Committee found that the romantic relationship between Appellant and FPH would be unethical even if he had not been Appellant's former patient, based on the potential impact on the FPW.

**2**

Also, the Committee found that Appellant violated § 5-37-5.1(19) in 2012. The Committee found the violation occurred when she engaged in a financial relationship[5] with the FPH after their physician-patient relationship ended by renting an apartment on the floor above the former marital domicile of the FPH and FPW for $900.00 per month.

**3**

Additionally, the Committee also determined that Appellant did not appropriately discharge the FPW. The medical record did not contain any reference to a discharge letter. In July 2011, Appellant added new diagnoses to the FPW's records more than three years after the FPW's last session with Appellant without having seen the FPW in more than three years, without having any medical notes on the FPW since March 2008, and by adding additional diagnoses based on information Appellant admitted to learning from a third party. The added diagnoses were probable psychotic disorder; delusional, schizoaffective, major depressive disorder with psychosis; and strong borderline,

[5] It is important to note that the Board disagreed with the Committee and found that there was no violation regarding the Appellant and the FPH living in the same apartment building.

narcissistic, and histrionic characteristics. The Department's expert psychiatrist, Dr. Brandon Krupp, believed these additional diagnoses were "dispassionate." *See* Board Decision at 13 (wherein Dr. Krupp asserts that if the FPW had a borderline personality disorder, it would have shown up earlier, and it did not).

**4**

The Committee found Appellant violated the Rhode Island Rules and Regulations for Licensing and Discipline of Physicians Rules 11.2 and 11.4 by not providing requested records to the FPW's succeeding physician and instead providing a summary of diagnoses and treatment. The FPW signed a release of information so that her then-current physician could obtain all her records held by Appellant.

On October 28, 2014, the Board voted to revoke the Petitioner's license. On October 30, 2014, the report and *curriculum vitae* of the Appellant's expert witness, Dr. Patricia Recupero, along with Appellant's Motion to Reconsider the Summary Suspension, were produced for the Board.

On November 3, 2014, Dr. Recupero testified before the Board on behalf of the Appellant as an expert witness. Dr. Recupero concluded that Appellant did not suffer from any mental illness that would impair her ability to practice psychiatry or significantly impair her judgment. (Tr. 18, Nov. 3, 2014.) Appellant maintains that Dr. Recupero found that Appellant did not pose an immediate danger to the public health and safety, and that, based on the information she had received during evaluating Appellant, Appellant had not violated any standards of conduct. *See* Appellant's Mem. at 50. On cross-examination, Dr. Recupero testified that she had not reviewed the medical records for the FPH and FPW. *See* Tr. 32-33, Nov. 3, 2014.

The Committee thereafter requested that Dr. Recupero review the medical records of the FPH and FPW and make a further report. Dr. Recupero testified that the Appellant's May 2, 2005 notes indicated exploration and assessment, and the patients might think of it as therapy. Dr. Recupero further testified that a sufficient time had elapsed between the FPH's treatment and starting a relationship, so that there was a possibility of a nontherapeutic social or romantic relationship. The Board granted Appellant's counsel's request to lift the suspension on a limited basis for two weeks until the next hearing so that Appellant could deal with patients who were in crisis. The next hearings were scheduled to be on December 1 and December 3, 2014.

On December 1, 2014, Dr. Recupero testified regarding her supplemental report addressing the merits of Appellant's charges. The Department cross-examined Dr. Recupero. Dr. Recupero again stated that Appellant's continued practice did not constitute a danger to the public health and safety. (Tr. 37, Dec. 1, 2014.) Dr. Recupero also restated that her opinion regarding the propriety of Appellant's conduct remained unchanged. *Id.* at 32. That same day, Dr. Krupp, the Board's expert in psychiatry, testified. Dr. Krupp reviewed the Appellant's records for the FPH and FPW and testified that their relationships were not purely medication management; they were therapeutic. On cross-examination Dr. Krupp emphasized that an intimate relationship between a psychiatrist and a former patient was a boundary violation and unprofessional conduct in any instance.

Dr. Krupp testified that Appellant's relationship with the FPH was a boundary violation and an unethical violation. After 2008, the Appellant prescribed refills to the FPW which indicated an ongoing relationship. Dr. Krupp testified that it would have been reasonable for Appellant to expect that her attendance at the Family Court hearing

involving both the FPH and FPW would have been difficult for the FPW. Dr. Krupp explained that it is common practice to provide treatment summaries, but indications of the diagnoses added by the Appellant would have shown up in her notes, and they did not. Dr. Krupp testified that Appellant's additional diagnoses of the FPW were "dispassionate." (Board Decision at 13.)

On December 3, 2014, a hearing was held on whether the summary suspension should have been issued. Dr. Recupero returned for continued cross-examination. The Committee decided to conditionally lift the summary suspension. (Board Decision at 1.) The Committee agreed that the hearings held for the summary suspension would be included for consideration of the hearing on the merits. The hearing on the merits of the case began on January 29, 2015, and continued on January 30, February 2 and 12, March 18, 23, 27, and April 10, 2015. *Id*.

On December 9, 2015, after a full hearing and unanimous vote by the Board, the director of the Department revoked Appellant's license to practice medicine in the State of Rhode Island based on findings of unprofessional conduct. Appellant timely appealed the Board's Decision.

## II

## Standard of Review

Pursuant to the Administrative Procedures Act[6], the Superior Court has appellate jurisdiction to review final orders of state administrative agencies. Specifically, § 42-35-15(g) provides:

> "(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse

[6] Section 42-35-15 *et seq*.

> or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> "(1) In violation of constitutional or statutory provisions;
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> "(2) In excess of the statutory authority of the agency;
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> "(3) Made upon unlawful procedure;
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> "(4) Affected by other error of law;
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> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
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> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

This Court's review of the Board's Decision "is limited to an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision." *Barrington School Committee. v. Rhode Island State Labor Relations Board*, 608 A.2d 1126, 1138 (R.I. 1992). Our Supreme Court defines legally competent evidence as "the presence of some or any evidence supporting the agency's findings." *Environmental Scientific Corp. v. Durfee,* 621 A.2d 200, 208 (R.I. 1993) (internal quotation marks omitted). This Court may only reverse the agency's decisions when "factual findings of an administrative agency are completely devoid of competent evidence." *Great American Nursing Centers, Inc. v. Norberg*, 567 A.2d 354, 357 (R.I. 1989). "If competent evidence exists in the record considered . . . , the court is required to uphold the agency's conclusions." *Barrington School Committee,* 608 A.2d at 1138.

A two-tiered system of review is applicable in some agencies. *See Durfee*, 621 A.2d at 200. "Sitting as if at the mouth of the funnel, a hearing officer hears testimonial and documentary evidence from all affected parties: the applicant, the department, and

interested members of the public. Just as the funnel narrows, the hearing officer analyzes the evidence, opinions, and concerns of which he or she has been made aware and issues a decision." *Id.* at 207. At the discharge end of the funnel, the director, in this case the Board, reviews the hearing officer's findings and issues a final decision. "Because the director sits at the narrowest point of the funnel, he or she is not privileged personally to hear or witness the broad spectrum of information that entered the widest end of the funnel. Therefore, the further away from the mouth of the funnel that an administrative official is when he or she evaluates the adjudicative process, the more deference should be owed to the factfinder." *Id*. at 208. In *Durfee*, the Court determined that the board owes deference to a hearing officer's determination.

In the present action, § 5-37-5.2 governs how complaints are handled:

> "(e)(3) In the event of a determination by the investigating committee of probable cause for a finding of unprofessional conduct, the accused may request a hearing (see §§ 5-37-5.3 and 5-37-5.4). A hearing committee shall be designated by the chairperson consisting of three (3) other members of the board, at least one of whom shall be a physician member and at least one of whom is a public member. If the complaint relates to a procedure involving osteopathic manipulative treatment (OMT), at least one member of the investigating committee shall be an osteopathic physician member of the board. The hearing shall be conducted by a hearing officer appointed by the director of the department of health. The hearing officer shall be responsible for conducting the hearing and writing a proposed findings of fact and conclusions of law along with a recommendation of a sanction, if warranted. The hearing committee shall read the transcript and review the evidence and, after deliberation, the hearing committee shall issue a final decision including conclusions of fact and of law. The board shall make public all decisions, including all conclusions against a license holder as listed in § 5-37-6.3."

Here, the statute does not expressly state that the Committee owes deference to a hearing

officer’s findings, but instead the hearing officer is responsible for writing a proposed findings of fact.

## III

## Applicable Law

Pursuant to § 5-37-1.3, the Board was created within the Department. The Board is composed of four licensed physicians who possess the degree of allopathic medicine, two licensed physicians who possess the degree of osteopathic medicine, five public members, one hospital administrator, and the director of the Department, who serves as the chairperson of the Board.[7] The Board investigates all complaints and charges of unprofessional conduct against any licensed physician or limited registrant, holds hearings, directs the director of the department to license applicants, and revokes or suspends licenses, among other things.[8] The Board grants the director the power to revoke or suspend licenses or registrations or implement other disciplinary action against persons licensed or registered.[9]

If the Board finds that there was unprofessional conduct, then sanctions may be imposed. Section 5-37-6.3, Sanctions, provides: “If the accused is found guilty of unprofessional conduct as described in § 5-37-6.2[10], the director, at the direction of the

[7] *See* § 5-37-1.3, Board of medical licensure and discipline—Powers and duties.
[8] *Id.*
[9] *Id.*
[10] Section 5-37-6.2, Decision of the board, provides:

board, shall impose one or more of the following conditions:

> "(1) Administer a reprimand;
> "(2) Suspend or limit or restrict his or her license or limited registration to practice medicine;
> "(3) Require him or her to serve a period of probation subject to certain conditions and requirements including, where appropriate, sanctions or restitution;
> "(4) Revoke indefinitely his or her license or limited registration to practice medicine;
> "(5) Require him or her to submit to the care, counseling, or treatment of a physician or program acceptable to the board;
> "(6) Require him or her to participate in a program of continuing medical education in the area or areas in which he or she has been judged deficient;
> "(7) Require him or her to practice under the direction of a physician in a public institution, public or private healthcare program, or private practice for a period of time specified by the board;
> "(8) Assess against the physician the administrative costs of the proceedings instituted against the physician under this chapter; provided, that this assessment does not exceed ten thousand dollars ($10,000);
> "(9) Any other conditions or restrictions deemed appropriate under the circumstances."

The director has absolute statutory authority to impose any of the nine sanctions listed in § 5-37-6.3.

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> "If a majority of the members of the board, sitting as the hearing committee, vote in favor of finding the accused guilty of unprofessional conduct as specified in the charges, the board shall prepare written findings of fact and law in support of that conclusion. The board shall immediately transmit its findings, together with an order stating the sanction to be imposed upon the accused, to the director who shall, as soon as practicable, order that appropriate action be taken in accordance with the order of the board. In no case shall a person be found guilty of unprofessional conduct unless a majority of the hearing committee votes in favor of finding the person guilty. If the accused is found not guilty, the board shall immediately issue an order dismissing the charges."

## IV

## Sufficiency of Agency Decision

### 1

Appellant first argues that the Board's decision revoking Petitioner's license should be reversed because it was made on unlawful procedure. Appellant argues that the Board failed to adhere to a two-tiered hearing process. Appellant's position is that pursuant to § 5-37-5.2(e)(3), a hearing officer conducts the hearing and writes the proposed findings of fact and conclusions of law along with a recommendation of a sanction, if warranted. After the hearing, the officer writes his/her findings, the hearing committee reads the transcript, reviews the evidence, and after deliberating, the hearing committee issues a final decision.

Here, Appellant argues that the hearing officer never prepared her own written proposed findings of fact, conclusions of law, and a recommendation of sanction. Instead, Appellant asserts that the hearing officer and Committee worked together to create a decision. Appellant cites to *Blais v. Department of Health* as support for overturning the Board's Decision. In *Blais*, this Court found that there was no substantial evidence in the record for the director of the Department of Health to have rejected the findings of Hearing Officer Warren. *Blais v. Rhode Island Department of Health*, No. PC20125791, 2014 WL 7368789, at *8 (R.I. Super. Dec. 22, 2014). *Blais*, unlike the within case, involved the Board of Pharmacy. The hearing officer in *Blais* also included two separate decisions. One decision was from the hearing officer, and the final decision was from the Director of the Department of Health. *Blais* also is a Superior Court decision that has no binding

authority.

Conversely, the Department argues that under §§ 5-37 *et seq*., the Board has the authority to investigate all complaints and charges of unprofessional conduct, hold hearings to determine whether those charges are substantiated, and direct the director to revoke or suspend licenses or registrations. The Department maintains that the Board is the sole authority to hold hearings, make findings, and impose sanctions. Section 5-37-5.2(e)(3), entitled Complaints, provides in pertinent part that:

> "The hearing shall be conducted by a hearing officer appointed by the director of the department of health. The hearing officer shall be responsible for conducting the hearing and writing a proposed findings of fact and conclusions of law along with a recommendation of a sanction, if warranted. The hearing committee shall read the transcript and review the evidence and, after deliberation, the hearing committee shall issue a final decision including conclusions of fact and of law."

"[T]his court attributes great weight to an agency's construction of a regulatory statute when the statute's provisions are unclear." *In re Advisory Opinion to the Governor*, 732 A.2d 55, 76 (R.I. 1999) (internal quotation omitted). "[W]here the provisions of [the enabling law] are unclear or subject to more than one reasonable interpretation, the construction given by the agency charged with its enforcement is entitled to weight and deference as long as that construction is not clearly erroneous or unauthorized." *Id*. (internal quotation omitted). Section 5-37-5.2(e)(3) expressly delegates authority to the hearing officer to conduct the hearing and write a "proposed" findings of fact and conclusions of law. The Department's regulations also require compliance with § 42-35-15. Section 14.1, Rules and Regulations for the Licensure and Discipline of Physicians, as amended in October 2015, provides:

> "14.1 All hearings and reviews required under the provisions of the Act and these Regulations shall be held in accordance with the provisions of the *Rules and Regulations Pertaining to Practices and Procedures Before the Rhode Island Department of Health [R42-35- PP*]."

The Department's current regulations do not mention anything pertaining to deference given to a hearing officer's proposed writing of fact. Appellant, in reliance on § 12.22, Weight of Evidence, of the Department's regulations, as amended in April 2004, maintains that a two-tiered standard of review applies. Section 12.22 of the 2004 revised regulations provides**:**

> "The weight to be attached to any evidence in the record will rest within the sound discretion of the AHO. The matter is closed after the final decision and order is issued."

It is important to note that in the April 2014 Amendment of the Department's regulations, the Department removed § 12.22 as a requirement that the record will rest within the sound discretion of the hearing officer. The public laws regarding the Board do not address deference being given to the hearing officer. Any language that required the Board to give deference to the administrative hearing officer can be found in the Department's 2004 regulations. Since 2004, the Department has removed any language requiring deference be given to a hearing officer. The agency proceedings of this case occurred in 2015. Therefore § 12.22 is not applicable to this case. *See In re Advisory Opinion to the Governor*, 504 A.2d 456, 459 (R.I. 1986) (holding that an interpretative regulation issued by an agency charged with the administration of a statute will ordinarily be given great weight when the statute is ambiguous and in need of interpretation, provided the agency's interpretation does not alter or amend the scope of the statute).

Here, the record shows that Catherine Warren is the administrative hearing officer who conducted the hearings. An examination of changes occurring to P.L. 1986, ch. 301, § 6 shows that the proposed findings of fact requirement was added in 2003. *See* P.L. 2003, ch. 176, § 1. The within record does not contain a proposed findings of fact and conclusions of law from Hearing Officer Warren; however, § 5-37-5.2(e)(3) does not expressly state that the Board will rely on the hearing officer's findings of fact to issue a decision thereby promulgating a two-tiered system of review. Other cases that impose a two-tiered system of review involve two decisions; one decision from a hearing officer and one final decision. *See Durfee*, 621 A.2d at 209. In the instant matter, § 5-37-5.2(e)(3) does not authorize a hearing officer to issue a decision. If the statutory language is clear and unambiguous, then this Court must give the words their plain and ordinary meaning. *5750 Post Road Medical Offices, LLC v. East Greenwich Fire District*, 138 A.3d 163, 167 (R.I. 2016). When examining an unambiguous statute, there is no room for statutory construction and this Court must apply the statute as written. *Id.*

Section 5-37-5.2(e)(3) only authorizes one decision from the hearing committee. The public laws regarding the Board do not address deference being given to the hearing officer.

This Court gives "deference to an agency's interpretation of an ambiguous statute that it has been charged with administering and enforcing, provided that the agency's construction is neither clearly erroneous nor unauthorized." *Rossi v. Employees' Retirement System*, 895 A.2d 106, 113 (R.I. 2006). An email from a representative of the Department, Amy Coleman, to Appellant's counsel states "[t]he

hearing officer works with the hearing committee to produce the decision so there is no separate report." An agency is entitled to rely on its experience and expertise so long as it discloses that it is doing so. *See Expertise and Experience Restrains Judicial Interference*, 3 Admin. L. & Prac. § 9:14 (3d ed.). Here, the Board has disclosed its reliance on how they conduct their proceedings. This Court is required to accord great deference to the agency's interpretation of its authority to act. *In re Advisory Opinion to the Governor*, 732 A.2d at 76. Accordingly, the agency does not impose a two-tiered review process as prescribed by § 5-37-5.2(e)(3). Therefore, the Board's Decision was not made upon unlawful procedure. *See* § 42-35-15(g)(3).

**2**

Additionally, Appellant argues that the Board violated § 42-35-12[11] in that it failed to enunciate the applicable minimal standard of care with respect to romantic relationships

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[11] Section 42-35-12, Orders, provides:

> "Any final order adverse to a party in a contested case shall be in writing or stated in the record. Any final order shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If a party, in accordance with agency rules, submitted proposed findings of fact, the order shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any order. Included with the final order shall be a separate notice advising the parties of the availability of judicial review, the appeal period and the procedure for filing an appeal, and providing a reference to the statutory authority. If the agency fails to provide such notice, the time for taking an appeal shall be extended for an additional thirty (30) days beyond the time otherwise authorized by law. Upon request, a copy of any final order stated in the record shall be delivered or mailed forthwith to each party and to his or her attorney of record."

with former patients. The Board found Appellant guilty of § 5-37-5.1(19).[12] Appellant argues that a reading of the Board's Decision does not provide a precise standard of care that the Board applied or expects from psychiatrists in the future. Appellant argues that without a clearly articulated standard of care, the reviewing Court is left without any evidentiary support. Appellant cites to *Ater v. Idaho Bureau of Occupational Licenses*, 160 P.3d 438 (Idaho 2007). In *Ater*, the court found that "judicial review is impractical where this Court is left with no clear standard upon which to judge the alleged bad conduct and the Board's subsequent disciplinary decision." *Ater*, 160 P.3d at 442 (*overruled by City of Osburn v. Randel*, 277 P.3d 353 (Idaho 2012)).

On the issue of standard of care, the Board heard from two experts, Dr. Krupp and Dr. Recupero. Dr. Recupero testified that Appellant and the FPH had a medication management relationship so that the standard to apply for judging their romantic relationship was the traditional medical standard rather than the psychotherapy standard. (Board Decision at 3.) Dr. Recupero does not specify what that medical standard is.

Dr. Krupp testified that the standard of care in psychiatry is that intimate relations between patients and psychiatrists do not exist. (Tr. 123, Feb. 12, 2015.) Dr. Krupp referred to the guidelines set by the American Psychiatric Association (APA) as support.

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[12] Section 5-37-5.1(19), Unprofessional conduct, states:

> "Incompetent, negligent, or willful misconduct in the practice of medicine, which includes the rendering of medically unnecessary services, and any departure from, or the failure to conform to, the minimal standards of acceptable and prevailing medical practice in his or her area of expertise as is determined by the board. The board does not need to establish actual injury to the patient in order to adjudge a physician or limited registrant guilty of the unacceptable medical practice in this subsection."

Dr. Krupp found that Appellant's relationships with the FPW and FPH were more than medical management and they involved psychotherapy. (Tr. 28, Mar. 18, 2015.) Dr. Krupp testified that a psychiatrist having a relationship with a former patient has the opportunity for exploiting the patient. (Tr. 118, Feb. 12, 2015.) Dr. Krupp believed that guidelines promulgated by the APA, *The Principles of Medical Ethics,* represent the standard of care here. (Board Decision at 12.) Dr. Krupp testified that psychiatrists are free to follow whatever guidelines they believe are appropriate, but he thought the guidelines outlined by the APA do represent the standard of care. (Tr. 6, Mar. 18, 2015.)

Section 2 of *The Principles of Medical Ethics* states: "Sexual activity with a current or former patient is unethical." *The Principles of Medical Ethics*, at 4. It is important to note that these principles are not laws but rather they are standards of conduct defining the honorable behavior for a physician. "All APA members are bound by the ethical code of the medical profession, specifically defined in *American Psychiatric Associations Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry." See* https://www.psychiatry.org/psychiatrists/practice/ethics. However, Dr. Recupero indicated that membership in the APA is voluntary. Appellant is not a member of the APA and thereby is not bound by these principles.

The Board found that Appellant's notes indicated that she was prescribing more than prescriptions to both the FPH and FPW. (Board Decision at 27.) The Board also found that the topics covered during Appellant's sessions provided therapy about communication and relationships. *Id.* As a basis for overturning the Board's Decision, Appellant also cites to *Sherman v. Gifford*, No. PC-2006-3245, 2009 WL 3328502, at *15 (R.I. Super. Aug. 21, 2009) for failure to state the minimal standard of care without

explaining why. In *Sherman*, a Superior Court case, this Court reversed the board's decision on Count V which alleged that "the medical care that [Dr. Sherman] provided to the patient did not comport with the accepted standards of medical practice," because it neglected to make any findings of fact supporting Dr. Sherman's guilt. *Id.*, at *16. Here, the Board made findings of fact regarding Appellant's behavior toward the FPW and FPH. The evidence suggests that the Board relied more on Dr. Krupp's view rather than on Dr. Recupero's. Dr. Krupp testified that the Appellant's relationship with the FPH was a boundary violation and an ethical violation. The Board found that regardless of whether Appellant's treatment was more medical management or psychotherapy, Appellant still owed a duty of care to both the FPH and FPW. (Board Decision at 27.) The Board did not violate § 42-35-12. The Board's Decision is supported by competent evidence.

**3**

Moreover, Appellant contends that the findings of the Board regarding the minimal standard of care regarding relationships with a former patient were arbitrary and capricious in view of the reliable, probative, and substantial evidence on the whole record. The arbitrary and capricious standard "means that reviewing courts will uphold administrative decisions . . . as long as the administrative interpreters have acted within their authority to make such decisions and their decisions were rational, logical, and supported by substantial evidence." *Goncalves v. NMU Pension Trust*, 818 A.2d 678, 682–83 (R.I. 2003). The Board is afforded wide discretion in making determinations as to what constitutes unprofessional conduct. *See* § 5-37-5.1 (stating that "[t]he term 'unprofessional conduct' as used in this chapter includes, but is not limited to, the following items or any combination of these items and may be further defined by

regulations established by the board with the prior approval of the director"); *see also Mills v. Nolan*, No. PC 01-4153, 2003 WL 22790706, at *17 (R.I. Super. Nov. 13, 2003) (finding that § 5-37-5.1 is not limited to the thirty-one items listed).[13]

Appellant also argues that the Board failed to satisfactorily address the reasons for rejecting Dr. Recupero's views over those of Dr. Krupp. Appellant argues that there was a dispute in the medical community as to whether Appellant could have ethically engaged in a romantic relationship with a former patient. In support, Appellant cites to *Cochran v. Board of Psychologist Examiners,* 15 P.3d 73, 77 (Or. 2000) (finding that when the Board of Psychologist Examiners seeks to fill the gaps in its ethical rules by finding that a psychologist has not followed "proper" professional standards, it should articulate the standard it employs in determining the limits of professional competence). The *Cochran* court held: "If, for example, the Board wishes to discipline a licensee for espousing the views of a minority of his or her profession, it should explain why adhering to that minority view means that the licensee has fallen below the professional standard that psychologists should meet." *Id*. at 78. Here, the facts in *Cochran* are distinguishable from those of the instant case. The Board's Decision did not acknowledge a discussion of a majority or a minority view regarding psychiatrists having relationships with former patients. Dr. Krupp emphasized that psychiatrists are free to follow whatever guidelines they believe are appropriate, but he thought the guidelines outlined by the APA represent the standard of care. (Tr. 6, Mar. 18, 2015.) Dr. Krupp testified that he had spoken to many psychiatrists over the years on the issue of having a sexual relationship with a former patient. *Id*. at 7. In the course of Dr. Krupps's career teaching and practicing he noted he

[13] *Mills* is a Superior Court case and is not binding authority.

had numerous discussions with other psychiatrists in the state who do not support having a sexual relationship with a former patient. *Id*. Dr. Krupp believed that a vast majority of psychiatrists in the state would uphold that position. *Id*. Dr. Krupp did not read Dr. Recupero's report. *Id*. However, when asked on cross-examination, Dr. Krupp was familiar with some of Dr. Recupero's citations. On the issue of transference, Dr. Krupp acknowledged that there are different degrees to which transference could occur. *Id*. at 11. There is no evidence that suggests that the Board expressly rejected Dr. Recupero's view. Even if the Board did reject Dr. Recupero's view, "[i]t is well settled that a fact-finder is free to accept or reject the testimony of an expert witness." *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1089 (R.I. 2013) (finding that the Board's accepting the testimony of the respondents' expert witness was a decision that was within its discretion).

Dr. Recupero was retained by the Appellant to evaluate Appellant's danger to the public and the medical standard of care. The Department retained Dr. Krupp to discuss the treatment of FPH and FPW and to provide the standard of care regarding intimate relationships between doctors and former patients. The Board was free to consider or reject either expert's opinion. The Board found that Dr. Krupp's testimony was more relevant and credible as it went to the substance of the allegations against Appellant. (Board Decision at 22.) "This Court does not substitute its judgment for that of the agency concerning the credibility of witnesses or the weight of the evidence concerning questions of fact." *Tierney v. Department of Human Services*, 793 A.2d 210, 213 (R.I. 2002). As long as the agency gives a full and fair explanation of the grounds for a decision, it may not be required to explain the weight it gave to each piece of evidence or testimony.

*Factfinding*, 2 Admin. L. & Prac. § 5:64 (3d ed.) The Board's Decision explains the evidence they relied on to reach their decision. The Board's Decision regarding the standard of care was not arbitrary and capricious and was supported by competent evidence.

**4**

Appellant further contends that the "once a patient, always a patient" violates the Due Process Clause of the Constitution. Appellant argues that the Department is a governmental entity that must accept the rights of licensees to privacy in matters involving intimate relationships. Appellant argues that under *Obergefell v. Hodges*, 576 U.S. 644 (2015) and *Lawrence v. Texas*, 539 U.S. 558 (2003), the Due Process Clause of the Constitution which protects the rights to engage in intimate relationships is fundamental to individual liberty. This Court will not decide whether a psychiatrist can ever engage in a romantic relationship with a former patient. Appellant had a romantic relationship with the FPH, and she also treated the FPW, sometimes together. On direct examination, Dr. Krupp was asked the potential for harm to the former spouse of a patient that is dating his or her former psychiatrist. Dr. Krupp testified that "in this case the FPW would, upon entering therapy with a physician, would have expected that the physician would not have had a relationship with a spouse, family member, et cetera, and the fact that this can happen can be detrimental to the former patients and could make [her] have a great difficulty trusting another therapeutic relationship, engaging in another doctor/patient relationship, getting another psychiatrist." (Tr. 118-19, Feb. 12, 2015.) Dr. Krupp went on to explain that it would be difficult for someone in that position to trust the medical profession again and be able to open up in a way that he or she needed to be able to get

help. *Id.* at 119.

The record does not suggest that the Board took the "once a patient, always a patient" stance. In fact, when asked about the ethical parameters a psychiatrist should consider when processing whether or not such a relationship should go forward, Dr. Krupp testified that a psychiatrist would have to

> "establish that this new relationship was free of the kinds of unconscious or sometimes conscious feelings that were present in the treatment relationship. That somehow it has now changed such that there was no transference. That the feelings for the psychiatrist are now somehow pure and autonomous. That there's nothing at work that might represent pathology on the part of the former patient." (Tr. 121, Feb. 12, 2015.)

Dr. Krupp's testimony suggests that if certain precautions are followed, it is possible for a psychiatrist to have a relationship with a former patient. The record evidences that the "once a patient, always a patient" stance was not adopted by the Board to the extent that Appellant argues. *See Greene v. Rhode Island Co.,* 38 R.I. 17, 94 A. 869 (1915) (holding that exceptions, grounds of appeal or assignments of errors not discussed on appeal, either in the brief or oral argument will be deemed waived or abandoned and will not be considered). The Board's Decision was not in violation of constitutional or statutory provisions. The Board's Decision was supported by competent evidence.

**5**

Additionally, Appellant contends the Board acted in an arbitrary and capricious fashion, and in disregard of reliable, probative, and substantial evidence on the record when finding that Appellant had failed to have a discussion with the FPH regarding the implications of a potential romantic relationship. Appellant argues that the Board's finding regarding "unpacking the issues" in the relationship is more than overwhelmed by

the uncontradicted, competent evidence on the record. Appellant testified as follows:

> "Q. And at some point you investigated whether or not you were violating any ethical boundaries by becoming romantically involved with him; correct?
>
> "A. Yes.
>
> "Q. And how did you go about doing that?
>
> "A. Well, when he followed through, persisted, and I realized that he was serious about it, I looked into the laws, and I did some reading and spoke to some friends, family, but I also had a lot going on, so it didn't happen right away.
>
> "Q. And did you consider any harm to the ex-patient/ex-wife?
>
> "A. I'm not sure how to answer that. I certainly considered how it would impact her, if it would impact her?
>
> "Q. Did you draw any conclusions about whether or not it would impact her?
>
> "A. Yes, it was my belief that she had, as I guess I've already said, she had moved on and she was involved in a number of other relationships. She had filed for divorce, and she had made it very clear that she wasn't going to be happy if he was involved with anybody, so I knew that there would be some issues. But as far as related more specifically to me, I felt that as a person who was divorced, that the former patient husband had the right to his own autonomy as a single person, I think removed from that relationship or having been removed from that relationship really." (Tr. 53-54, Feb. 12. 2015.)

Appellant's testimony regarding her research on having a relationship with the FPH and whom she spoke to on that topic lacked specificity. Appellant was not able to name any literature on which she relied. Appellant testified to not consulting with a professional regarding a relationship with the FPH. Instead, Appellant consulted her friends and family but could not provide names. The Board found that Appellant never

even tried to "unpack the issues" that such a relationship entailed and instead tried to blame the FPW for any issues. The Board found that whatever the FPW's attitude was to the FPH's dating, such an attitude would never relieve the Appellant of her professional responsibilities as a psychiatrist to both the FPW and FPH. The Appellant argued that the FPH was autonomous. However, the Board found that the FPH's choices do not relieve the Appellant of her professional responsibilities as a psychiatrist to both the FPW and the FPH. (Board Decision at 27.) The Board makes it clear that even if an "unpacking" of a relationship between Appellant and the FPH took place, that does not mean that a relationship between Appellant and the FPH would be appropriate in this situation. *Id*. at 28. The Board's Decision explains the evidence they relied on to reach their decision. If the Court finds that legally "competent evidence exists in the record . . . , [then] the court is required to uphold the agency's conclusions." *Barrington School Committee*, 608 A.2d at 1138. The Board's Decision regarding the Appellant "unpacking the issues" was not arbitrary and capricious. The Board's Decision was supported by competent evidence.

**6**

Appellant contends the Board acted in an arbitrary and capricious fashion, and in disregard of reliable, probative, and substantial evidence on the record when finding that Appellant had failed to have a discussion with the FPW regarding the implications of a potential romantic relationship with the FPH. Appellant argues that there is not a single piece of competent evidence on the record that would support the proposition that the minimally accepted standard of care would have required the Appellant and the FPW to engage in a discussion of Appellant having a relationship with the FPH.

The Board reiterates that Appellant was a psychiatrist for both the FPW and FPH and that Appellant moving into a romantic relationship with her former patient was not just a relationship between her and the FPH but also impacted the FPW whom Appellant had treated along with the FPH. The Board emphasizes that even if Appellant had reached out to the FPW regarding a relationship with the FPH, such action does not mean that the relationship would have been appropriate. Appellant had not even reached out to the FPW regarding her relationship with the FPH. Appellant attended a Family Court hearing between the FPH and FPW to provide emotional support to the FPH, and Appellant blamed the FPW for her negative reaction at the Family Court hearing.

Dr. Krupp testified that it would have been reasonable for the Appellant to expect that her attendance at the Family Court hearing would be difficult for the FPW. (Tr. 133, Feb. 12, 2015.) Dr. Krupp testified that psychiatrists have an obligation to do no harm to their patients. *Id.*; *see* 4 *American Law of Torts* § 15:37 stating, "[l]ike all other medical doctors, the psychiatrist is under legal obligation to his or her patient to act with a suitable degree of care, with accepted medical skill, and with concern for the patient's welfare." The Board's Decision regarding the Appellant's failure to have a discussion with the FPW about being in a relationship with the FPH was not arbitrary and capricious. The Board's Decision was supported by competent evidence.

**7**

Next, Appellant argues that the findings of the Board regarding the standard of care with respect to whether Appellant had appropriately discharged the FPW were arbitrary and capricious, and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Appellant argues that the Board failed to explain

its reasoning for having rejected Appellant's account as to how the treatment relationship ended. In reaching its decision, the Board examined the FPW's testimony, the Appellant's testimony, and prescription notes. Appellant prescribed for the FPW in 2008 and 2009 and only saw her once during that time period. The FPW testified that the Appellant "wouldn't accept my phone calls. She wouldn't accept my text messages. She just like cut me off, that was it, one day." (Tr. 21, Feb. 3, 2015.) The FPW testified that the Appellant never sent her a letter ending her treatment or suggest that she see another psychiatrist. (Board Decision at 14.) Appellant argued that she avoids "at all costs" sending a letter to a patient formally ending a treatment relationship "because of the nature of the relationship and the fragility of a lot of my patients, that I think that's detrimental and perhaps could have a very unfortunate outcome, and I can't contribute to that in good faith." (Tr. 74, Feb. 12, 2015.)

Again, this Court does not substitute its judgment for that of the agency concerning the credibility of witnesses or the evidence concerning questions of fact. *Tierney*, 793 A.2d at 213. The findings of fact of the administrative hearing officer that Appellant stopped returning the FPW's calls are all factual determinations that are not reviewable by this Court. The Board found that the Appellant did not see the FPW in person after March 2008 but continued to treat her until the summer of 2009 when the Appellant stopped treatment despite never sending a discharge letter. (Board Decision at 22-23.) In reaching its conclusion, the Board reasoned that at the very minimum Appellant owed the FPW a discharge letter, explaining that she could no longer treat her rather than ignoring her. *See* G.L. 1956 § 40.1-5-11, Discharge-Recertification.

Appellant also argues that the record contained no competent evidence upon which

it could base its finding that the minimal standard of care required Appellant to give the FPW a discharge letter. The Board reached its decision on this issue by stating that the behavior fails to conform to the minimal standard of acceptable and prevailing medical practice in her area of expertise (psychiatry). Online, the Department of Health has a continuity of care discharge/transfer of patient form on the homepage for physicians to use when discharging a patient. *See Continuity of Care Discharge/Transfer of Patient Form*,http://www.health.ri.gov/forms/continuityofcare/DischargeTransferofPatientForm.pdf (last visited Nov. 19, 2019). Therefore, the findings of the Board with respect to Appellant failing to appropriately discharge the FPW were not arbitrary and capricious, and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The Board's Decision was supported by competent evidence.

**8**

Appellant further contends the Board acted in an arbitrary and capricious fashion, and in disregard of reliable, probative, and substantial evidence on the record when finding that Appellant violated a minimal standard of care when preparing the FPW's treatment summary. Rule 11.4 of the regulations provides:

> "Medical Records shall be legible and contain the identity of the physician. . . The records must contain sufficient information to justify the course of treatment, including, but not limited to: active problem and mediation [*sic*] lists; patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations."

The Board found that it was undisputed that right before the Appellant went on a cruise with the FPH, she sent medical records for the FPW to FPW's new provider and added new diagnoses for FPW without having seen the FPW in person for over three years

or having any medical notes for the FPW since March 12, 2008. (Board Decision at 29.) The Board charged Appellant with making inappropriate additions to the record and failing to transmit her patient's record on request from a new provider, thereby violating § 5-37.3-4. Appellant contends that the FPW instructed her never to release her medical records to anyone even with a release. (Tr. 30, Nov. 3, 2014; Tr. 87, Mar. 27, 2015.)

In a medical summary to the FPW's new subscriber, Appellant added additional diagnoses such as probable psychotic disorder: delusional disorder v. schizoaffective v. major depressive disorder/w psychosis, and Cluster B Personality Traits, strong borderline, narcissistic & histrionic characteristics. Dr. Krupp testified that it is common practice to provide treatment summaries, but indications of the FPW's symptoms would have appeared in Appellant's notes and these did not. In *Bogdan v. New York State Board for Professional Medical Conduct*, 606 N.Y.S.2d 381 (N.Y. 1993), the Court held that it is professional misconduct to fail "to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient." *Bogdan*, 606 N.Y.S.2d at 383.

Moreover, Dr. Krupp testified that "[the] adding [of a] diagnosis[--even if one was considered at one point during treatment--]to a treatment summary some years after [one has] seen the patient [and one is in] or anticipating being involved with the [FPH] . . . looks like a . . . countertransference; . . . [h]owever unintentional that might be." (Tr. 134, Feb. 12, 2015.) *See* 216-RICR-40-10-12.5.4 (affirming that "[e]ach medical record shall contain sufficient information and data to support the diagnosis, plan of treatment to define treatment modalities, responses to treatment and on-going progress reports of patient care"); *see Sanabia v. Travelers Insurance Co*., No.9539, 1999 WL 66915 (Mass. App. Div. 1999) (finding that the board necessarily concluded that there was

unprofessional conduct for keeping such inadequate records); *see also Younes v. Nolan*, No. 2004-6053, 2005 WL 372294, at *7 (R.I. Super. Jan. 19, 2005) (a Superior Court's finding that inadequate record keeping was a form of unprofessional conduct under § 5-37-5.1).[14] The Board's Decision regarding the Appellant's added diagnosis was not arbitrary and capricious, and in disregard of reliable, probative, and substantial evidence on the record. The Board's Decision was supported by competent evidence.

**9**

Next, Appellant contends that the imposition of a revocation was arbitrary and capricious, and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Appellant argues that an examination of the record demonstrates that the Board committed legal error when revoking her license. Appellant maintains that boards must consider the relevant factual circumstances surrounding the alleged offense. Appellant has presented evidence of three different cases regarding psychiatrists that engaged in unprofessional conduct. Appellant argues that the Board treated the other psychiatrists more favorably than her.

In support, Appellant cites to *Blais* and *Jake & Ella's*, a Superior Court case that has no binding authority. "The factors to be considered in weighing the severity of the violation should include: the number and frequency of the violations, the real and/or potential danger to the public posed by the violation, the nature of any violations and sanctions previously imposed, and any other facts deemed relevant in fashioning an effective and appropriate sanction." *Jake & Ella's, Inc. v. Department of Business*

[14] This unpublished opinion is not cited for precedential value but rather for illustrative value. *See Estate of Chen v. Lingting Ye*, 208 A.3d 1168, 1175 n.8 (R.I. 2019).

*Regulation*, No. NC01-461, 2002 WL 977812, at *6 (R.I. Super. Apr. 22, 2002). The present case is distinguishable from *Jake & Ella's*. Here, at issue is a revocation of a medical license, whereas *Jake & Ella's* dealt with a liquor license violation. In *Jake and Ella's, Inc.*, the Court discussed whether the imposition of a sanction of revocation was arbitrary and capricious or an abuse of discretion. *Id*., at * 4. The Court found that "[a]s a general matter, the Superior Court is not permitted to decide whether an agency chose the appropriate sanction in a given case. *Id*. (citing *Rocha v. Public Utilities Commission*, 694 A.2d 722, 726 (R.I. 1997)). "This general rule is based on the assumption that to do so (alter the sanction) is an act of substituting the Court's judgment for that of the agency." *Id*. "Indeed, if there is competent evidence to support the agency's finding, and it is permitted by law, a Superior Court will not ordinarily alter that sanction." *Id.* With respect to the other three cases involving the different psychiatrists, the Board had those psychiatrists enter into consent orders. Ultimately, the psychiatrists that entered the consent orders are able to apply for reinstatement of their license after a five-year probationary period. The other psychiatrists also admitted that their conduct was wrongful, unlike here where the Appellant maintained that she did nothing wrong and contested her conduct throughout the proceedings. Appellant has not acknowledged any unprofessional conduct on her part. The Board's making their decision regarding the appropriate sanction is not an abuse of discretion. The Board found that Appellant was guilty of unprofessional conduct. Because of her unprofessional conduct, sanctions were imposed. The Board turned to § 5-37-6.3(1), Sanctions, which provides:

> "If the accused is found guilty of unprofessional conduct as described in § 5-37-6.2, the director, at the direction of the board, shall impose one or more of the following conditions:

…

> "(4) Revoke indefinitely his or her license or limited registration to practice medicine."

The authority of the Board to revoke Appellant's license is specifically delegated in § 5-37-6.3. Because there is competent evidence to support the agency's finding that Appellant engaged in unprofessional conduct, Appellant's license revocation was not arbitrary and capricious. *See Stefanik v. Nursing Education Committee,* 70 R.I. 136, 140, 37 A.2d 661, 663 (1944) (holding that the director has authority to revoke a license by necessary implication from the express language in the statute).

**10**

Additionally, Appellant contends that the Board acted erroneously and in violation of lawful procedure when failing to provide a written decision regarding the summary suspension, thereby violating § 42-35-12. Section 5-37-8[15] authorizes the director to summarily suspend a license without a hearing. Appellant's license was summarily suspended and within ten days a hearing was held. The Board did not reinstate Appellant's license but required Appellant to undergo a psychiatric evaluation. Appellant returned for

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[15] Section 5-37-8, Grounds for discipline without hearing, provides:

> "The director may temporarily suspend the license of a physician or limited registrant without a hearing if the director finds that evidence in his or her possession indicates that a physician's or limited registrant's continuation in practice would constitute an immediate danger to the public. In the event that the director temporarily suspends the license of a physician or limited registrant without a hearing, a hearing by the board must be held within ten (10) days after the suspension has occurred."

reconsideration on November 3, 2014; December 1, 2014; and December 3, 2014. On December 3, 2014, the Board imposed that Appellant's prescriptions be monitored. Appellant argues that the Board's December 3, 2014 decision represented its final ruling with respect to the summary suspension and it needed to be in writing. Appellant argues that in the process of failing to provide a written decision, the Board did not supply an explanation for the monitoring.

Here, the Board found multiple reasons for issuing a summary suspension and imposing a monitor. Two prominent reasons were 1) Appellant's changing the FPW's medical records more than two years after the FPW's last session with her by including a diagnosis that had not been mentioned in the earlier medical records and 2) Appellant's failing to transfer medical and behavioral records in the manner required by sections 11.2 and 11.4 of the Rules and Regulations for Licensure and Discipline of Physicians. Based on these reasons, the Board required that Appellant's prescriptions be monitored. The Summary Suspension was not a final ruling in any way because several hearings were held after December 3, 2014, and the future of Appellant's license was still being considered by the Board. There is no statutory authority that mandates a written decision.

Appellant argues that the Department did not produce any evidence establishing that Appellant presented an immediate danger to the public health and safety warranting a suspension. In support, Appellant presented Dr. Recupero's testimony claiming that not only did Appellant not present a danger to society, but also that Appellant had not violated any accepted standards of conduct. In support, Appellant cites to *Dahnad v. Buttrick*, 36 P.3d 742, 748 (Ariz. Ct. App. 2001); *Stjernholm v. Colorado State Board of Chiropractic Examiners*, 865 P.2d 853, 856 (Colo. App. 1993); *Cunningham v. Agency for Health Care*

*Administration*, 677 So.2d 61 (Fla. Dist. Ct. App. 1996); and *Bio-Med Plus, Inc. v. State Department of Health*, 915 So.2d 669 (Fla. Dist. Ct. App. 2005).

In *Dahnad*, the Arizona Court of Appeals held that (1) the board may, if emergency circumstances require such action, summarily suspend a dental license without providing a pre-suspension hearing, but (2) the board must then promptly convene a post-suspension hearing. *Dahnad*, 36 P.3d at 742. In *Stjernholm*, the Colorado Court of Appeals held that: (1) the board acted *ultra vires* by summarily suspending chiropractor's license until final agency decision, and (2) evidence supported board's finding that chiropractor had engaged in unprofessional conduct. *Stjernholm*, 865 P.2d at 853.

In *Cunningham*, the Second District Court of Florida affirmed the agency's emergency order insofar as it barred Dr. Cunningham from the practice of psychiatry in treating the three patients at issue and from prescribing narcotic medications. 677 So. 2d at 62. The Court reversed the order insofar as it exceeded those conditions. The court stated "[o]ur reversal and remand does not, of course, preclude the agency from revoking or suspending Dr. Cunningham's license to practice psychiatry if the allegations against him are proved." *Id*. Finally, in *Bio-Med Plus, Inc*, the First District Court of Florida held that the emergency suspension order entered by the Department of Health lacked factual allegations showing immediate danger to public health, safety, or welfare. 915 So.2d at 669.

None of the facts presented in these cases directly apply to Appellant. Section 5-37-8 allows the "director [to] temporarily suspend [a] license. . . if the director finds that evidence in his or her [own] possession." The statute does not specify what type of evidence may or may not be relied upon. When the summary suspension occurred, Dr.

Recupero's testimony was not provided to the Board. Dr. Recupero was retained to evaluate Appellant after the emergency suspension of her license. (Board Decision at 21.) Dr. Recupero's focus was narrower, focusing solely on the danger to the public, whereas Dr. Krupp's testimony focused on the allegations of unprofessional conduct. (Board Decision at 22.) It is important to note that only Dr. Recupero examined whether Appellant presented a danger to society. In contrast, Dr. Krupp was not retained to evaluate Appellant's danger to the public. (Board Decision at 23.) The Board had reliable, probative, and substantial evidence, such as witness testimonies, and lack of supporting medical documents to conclude whether Appellant was an immediate danger to the public.

**11**

Lastly, Appellant contends that the Board acted in violation of lawful procedure when bringing charges against Appellant because, pursuant to the Open Meetings Act, § 42-46-5(a)(1),[16] she was required to receive written notice that her job performance, character, or physical or mental health would be discussed at the October 2 and 8, 2014 meetings. Appellant also argues that she was entitled to notice of her right to have those

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[16] Section 42-46-5(a)(1) provides:

> "(a) A public body may hold a meeting closed to the public pursuant to § 42-46-4 for one or more of the following purposes: (1) Any discussions of the job performance, character, or physical or mental health of a person or persons provided that such person or persons affected shall have been notified in advance in writing and advised that they may require that the discussion be held at an open meeting. Failure to provide such notification shall render any action taken against the person or persons affected null and void. Before going into a closed meeting pursuant to this subsection, the public body shall state for the record that any persons to be discussed have been so notified and this statement shall be noted in the minutes of the meeting."

discussions in public. Appellant argues that the Board violated both provisions of the Open Meetings Act, and, as a penalty, this Court should nullify the summary suspension and charges.

A reading of the transcript shows that Appellant's counsel brought up the Open Meetings Act, and the Department's attorney, Mr. Corrigan, asserted it was an open meeting and there was public notice. (Tr. 30, Jan. 29, 2015.) Further, Mr. Corrigan asserted that individual notice under § 42-46-5(a)(1) was not applicable. Appellant's attorney argues that it was a discussion of her job performance and her character, thereby making individual notice applicable. Mr. Corrigan asserts that "[i]t was a discussion of the Specification of Charges. It was simply to approve the Specification of Charges as drafted." *Id.* at 31. Hearing Officer Warren supported Mr. Corrigan's argument explaining that the investigating committee goes into executive session to approve the specification of charges. *Id*. Linda Julian, a health policy analyst, testified on behalf of the Department that a complaint was sent to the Appellant, but it was returned to the Department because Appellant had moved. (Board Decision at 2.) Section 5-37-5.3 governs Specification of Charges.[17] The Board found that Appellant was notified and attended the investigating

[17] Section 5-37-5.3, Specification of charges, provides:

> "When the investigating committee determines that action is required or the accused requests a hearing on allegations of unprofessional conduct, a specification of charges of unprofessional conduct against the licensee or limited registration holder shall be prepared by the investigating committee and a copy shall be served upon the accused, together with notice of the hearing, as provided in § 5-37-5.4. A hearing shall then be scheduled before the hearing committee of the board."

committee meeting on October 2, 2014[18]. (Board Decision at 2.) The Board received a complaint charging Appellant for unprofessional conduct. *Id*. A complaint was sent to Appellant on June 17, 2014. Upon review of that complaint, the Board determined the complaint to have merit and referred the complaint to an investigating committee that found probable cause of unprofessional conduct. Then, on October 2, 2014, Appellant appeared before the Committee with legal counsel. *Id*. Thereafter, the Board issued specification of charges of unprofessional conduct. Neither §§ 42-46-4 nor 42-46-5 mandate that the Board's going into an executive session to approve a specification of charges requires giving individual notice to the Appellant. A total of twelve hearings were conducted over numerous dates at which Appellant and her counsel were present. The Board did not violate the Open Meetings Act. *See Rhode Island Affiliate, American Civil Liberties Union*, *Inc. v. Bernasconi*, 557 A.2d 1232, 1233 (R.I. 1989) (finding, for example, that a discussion and approval of a topic such as a search that can lead to civil penalties is proper for a closed meeting and thereby exempt from the Open Meetings Act).

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[18] Section 5-37-5.4, Time and notice of hearing, provides:

> "The time of the hearing shall be fixed by the hearing committee of the board as soon as is practicable. The hearing committee of the board shall issue a notice of a hearing of the charges, which shall specify the time and place of the hearing and shall notify the accused that he or she may file with the hearing committee of the board a written response within twenty (20) days of the date of service. The notice shall also notify the accused that a stenographic record of the proceedings will be kept; that he or she shall have the opportunity to appear personally and to have counsel present, with the right to produce witnesses and evidence in his or her own behalf; to cross-examine witnesses; to examine any documentary evidence that may be produced against him or her; and to have subpoenas issued by the hearing committee of the board."

Here, the Board had a discussion approving a specification of charges, therefore Appellant's presence at such meeting was not required. *See* § 42-46-52(a)(4) (finding that a body may hold a closed meeting for any investigative proceedings regarding allegations of misconduct). The Board's Decision was not in violation of lawful procedure.

## V

## Conclusion

After review of the entire record, this Court finds the decision of the Board was supported by the reliable, probative, and substantial evidence in the record, and was not affected by error of law or in violation of statutory provisions. Furthermore, this Court finds that the Board's Decision was not arbitrary or capricious or an abuse of discretion. Thus, the substantial rights of Appellant have not been prejudiced. For the reasons stated herein, the decision of the Board, which finds the Appellant in violation of § 37-5.1, is affirmed. Counsel shall submit an appropriate judgment for entry.

**RHODE ISLAND SUPERIOR COURT**
***Decision Addendum Sheet***

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| **TITLE OF CASE:** | **Sarah F. Boyle v. Rhode Island Department of Health, Board of Medical Licensure and Discipline, et al.** |
| **CASE NO:** | **PC-2016-0087** |
| **COURT:** | **Providence County Superior Court** |
| **DATE DECISION FILED:** | **August 31, 2020** |
| **JUSTICE/MAGISTRATE:** | **McGuirl, J.** |
| **ATTORNEYS:** | |
| **For Plaintiff:** | **Vicki J. Bejma, Esq.** |
| **For Defendant:** | **Stephen A. Morris, Esq.** |