STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: December 13, 2019)

DR. WILLIAM KYROS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. NO. PC-2018-8998**
	:	
RHODE ISLAND DEPARTMENT OF HEALTH and NICOLE ALEXANDER-SCOTT, MD, MPH, IN HER CAPACITY AS THE DIRECTOR OF HEALTH OF THE RHODE ISLAND DEPARTMENT OF HEALTH	:	
	:	
Defendants.	:	

DECISION

LANPHEAR, J. Before this Court is the appeal of Dr. William Kyros (Dr. Kyros) from a decision of the Rhode Island Department of Health denying his request to be relicensed. Jurisdiction is pursuant to G.L. 1956 § 42-35-15. For the reasons set forth herein, this Court reverses the Rhode Island Department of Health's final decision.

I

Facts and Travel

The Court first chronicles the extensive, decade-long journey Dr. Kyros has endured at the hands of the Rhode Island Department of Health (RIDOH) and the Board of Medical Licensure and Discipline (the Board). That journey has landed the parties here, with Dr. Kyros appealing the Board's denial of his relicensure application.

Dr. Kyros became a licensed physician in Rhode Island in June 1986. Dr. Kyros's practice of medicine halted in August 2009 pursuant to an "Agreement to Cease Practice" (the Agreement) with RIDOH.[1] Compl. Ex. 16A. Pursuant to the Agreement, Dr. Kyros also agreed to go for an evaluation at the Sante Center for Healing (Sante Center) and have the evaluation report sent to the Board. *Id.* The Board was to review the report and then "make a determination on final sanctions." *Id.*

Dr. Kyros then went to the Sante Center for an evaluation, completing his treatment on August 20, 2009. Appellant Mem. Supp. Appeal Ex. A 3 (Board Decision). The Sante Center recommendation stated that Dr. Kyros may not have been truthful in his evaluations and that he should be monitored when he returns to practice. *Id.* On August 27 and September 30, 2009, Dr. Kyros's attorney wrote to the Board asking what Dr. Kyros's next steps should be. *Id.* at 3-4; Appellant Mem. Supp. Appeal Ex. D, E. There is no evidence that Dr. Kyros ever received a response from the Board. Appellant Mem. Supp. Appeal Ex. A 4 and Ex. F 11 (Hr'g Tr. 156).

Dr. Kyros, on his own accord, began treatment with psychiatrists Dr. Edward M. Brown and Dr. Gene Jacobs for several years. Appellant Mem. Supp. Appeal Ex. A 4. Dr. Brown treated Dr. Kyros in 1991 and 1992 after the first complaint had been made against Dr. Kyros and then again from 2009 to 2011.[2] *Id.* Dr. Jacobs also treated Dr. Kyros for three-and-one-half years. *Id.* In 2013, a psychiatric report written by Dr. Jacobs was submitted to the Board. *Id.*; Appellant Mem. Supp. Appeal Ex. I. He was also evaluated by forensic psychiatrist Dr. Daniel Harrop in August 2013, and Dr. Kyros received a forensic psychiatry report from him. Appellant Mem.

[1] Dr. Kyros has had four complaints of boundary violations with female patients. The first two occurred in the 1990s, and the most recent two occurred in 2008 and 2009, which began the issue at hand.

[2] Dr. Kyros also received an evaluation from Dr. Brown on August 22, 2010.

Supp. Appeal Ex. A 4. All of these doctors have since stated that Dr. Kyros is fit to return to work. Dr. Kyros and his attorney then met with the Board Administrator, Dr. James McDonald. *Id.* Dr. Kyros submitted a license application in 2013, which was subsequently denied.[3] *Id.*

On December 4, 2013, the Board sent Dr. Kyros a letter notifying him that the investigating committee had made a finding of "Unprofessional Conduct" against Dr. Kyros. Compl. Ex. 10. There is no evidence that the Board ever ratified this finding.[4] The Board did not take any official action against Dr. Kyros for some time, and Dr. Kyros's third attorney continued to contact the Board in an effort to resolve the issues at hand. Appellant Mem. Supp. Appeal Ex. M. On September 8, 2016, Dr. Kyros's attorney proposed a consent order that would allow Dr. Kyros to return to practice, to which he never received a response. *Id.* On October 13, 2016, Dr. Kyros's attorney sent another letter to the Board noting its lack of response. Appellant Mem. Supp. Appeal Ex. N. His attorney also requested a response regarding the proposed consent order. *Id.* Nearly a month later, the Board finally responded to Dr. Kyros's attorney stating that the previous letter "did not evidence the requisite insight for the Board to seriously consider [the] request." Appellant

[3] Dr. Kyros continued to receive his updated license after the Agreement was signed until June 30, 2014. Appeal Hr'g Tr. 12-13, Sept. 18, 2019 (when Dr. Kyros had his last license "[h]e never got notice that he was going to be put on inactive status and it would say that he had received a notice of violation from professional conduct"). No hearing was ever held regarding the suspension of Dr. Kyros's license; it appears the Board simply stopped sending updated licenses to Dr. Kyros. *Id.* at 18 (Dr. Kyros's license was taken away "[w]ithout a hearing . . . his license was just taken away after, I imagine 6/30/2014 when this expired, when his license expired here. For whatever reason. No notice. No hearing.").

[4] The Board admits in its decision that the issue here is not whether Dr. Kyros "engaged in unprofessional conduct by violating a Board order and if so, what discipline should be imposed" but only "whether because of previous complaints of unprofessional conduct that resulted in the Agreement should [Dr. Kyros] be allowed to be re-licensed in light of the requirements in the Agreement." Appellant Mem. Supp. Appeal Ex. A (Board Decision n.3). The Board did not discuss this letter whatsoever in its decision. At a hearing in front of this Court, the parties appeared to agree that there has never been a finding by the Board of unprofessional conduct relative to this matter.

Mem. Supp. Appeal Ex. O. Within a week, Dr. Kyros's attorney responded, again requesting approval of the consent order and outlining all of the steps Dr. Kyros had completed since signing the Agreement. *Id.*

On March 23, 2017, Dr. Kyros applied to the Board for reinstatement. Appellant Mem. Supp. Appeal Ex. Q. The Board found that application to be incomplete, and Dr. Kyros resubmitted the application on April 13, 2017. Appellant Mem. Supp. Appeal Ex. R, S. That application included evidence that Dr. Kyros had completed all continuing medical education (CME) credits since the Agreement was signed in 2009. Appellant Mem. Supp. Appeal Ex. A (Board Decision 3); Appellant Mem. Supp. Appeal Ex. S, T.

In response to Dr. Kyros's application, the Board held a Licensing Committee Meeting on September 7, 2017 and subsequently sent a letter to Dr. Kyros stating that the committee voted to have him attend the Sante Center for re-evaluation and to attend the Center for Personalized Education for Physicians (CPEP) to assess his clinical competency to practice psychiatry. Appellant Mem. Supp. Appeal Ex. U. The Board informed him they would reconsider his application once he completed these evaluations. Compl. Ex. 4. Dr. Kyros then sent a demand for a formal hearing on September 18, 2017. Compl. Ex. 22. The Board responded to Dr. Kyros, informing him that he could come to the next licensing committee meeting and that his application for reinstatement had not yet been approved or denied. Compl. Ex. 24. Dr. Kyros, through his attorney, responded that he did not believe he needed to come in for any further discussion and would like for the Board to review his application. Compl. Ex. 26.

On October 10, 2017, the Board denied Dr. Kyros's application. Compl. Ex. 27. Upon receiving this denial, Dr. Kyros again requested a formal hearing. Compl. Ex. 29. After a hearing, the Board issued its decision regarding Dr. Kyros on November 14, 2018. The Board's Decision

required Dr. Kyros to complete a clinical competency assessment at CPEP[5] and follow all of CPEP's recommendations before Dr. Kyros can be relicensed.[6] Appellant Mem. Supp. Appeal Ex. A 9 (Board Decision). Dr. Kyros was also required to keep the Board informed of his progress at CPEP and satisfy all other statutory requirements for licensing. *Id.* Lastly, the Board required Dr. Kyros to pay a $2000 administrative fee for the cost of the hearing. *Id.*

II

Standard of Review

This Court has jurisdiction over appeals from the Board's decisions pursuant to the Administrative Procedures Act (APA). Section 42-35-15. "Any person . . . who has exhausted all administrative remedies available to him or her within the agency, and who is aggrieved by a final order in a contested case is entitled to judicial review. . . ." Section 42-35-15(a). When reviewing an agency decision, this Court has the authority to

> "[A]ffirm the decision of the agency or remand the case for further proceedings, or it may reverse 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;
>
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

[5] Compliance with this requirement would cost Dr. Kyros approximately $28,016. Appellant Mem. Supp. Appeal Ex. AB.

[6] The Board relied solely on Dr. Kyros's nine-year gap in practicing medicine to justify the need to evaluate Dr. Kyros's clinical competence. Appellee Mem. Opp'n Appeal 13 ("Appellant's lapse of more than nine years speaks for itself relative to the question of clinical competence. . . .").

> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Section 42-35-15(g). "The trial justice must not 'substitute [his or her] judgment for that of the agency as to the weight of the evidence on questions of fact.'" *Endoscopy Associates, Inc. v. Rhode Island Department of Health*, 183 A.3d 528, 532 (R.I. 2018) (quoting *Interstate Navigation Co. v. Division of Public Utilities and Carriers*, 824 A.2d 1282, 1286 (R.I. 2003)) (alteration in original). This Court must defer to the agency's factual determinations made in an administrative proceeding when there is legally competent evidence to support such findings. *Arnold v. Rhode Island Department of Labor & Training Board of Review*, 822 A.2d 164, 167 (R.I. 2003). "Legally competent evidence is 'relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance.'" *Id.* (quoting *Rhode Island Temps, Inc. v. Department of Labor & Training, Board of Review*, 749 A.2d 1121, 1125 (R.I. 2000)). It is not within this Court's discretion to determine if an agency chose the appropriate sanction; it only decides whether the agency's findings are supported by legally competent evidence. *Rocha v. State Public Utilities Commission*, 694 A.2d 722, 726 (R.I. 1997). However, '"an administrative decision can be vacated if it is clearly erroneous in view of the reliable, probative, and substantial evidence contained in the whole record."' *Auto Body Association of Rhode Island v. State Department of Business Regulation*, 996 A.2d 91, 95 (R.I. 2010) (quoting *Costa v. Registrar of Motor Vehicles*, 543 A.2d 1307, 1309 (R.I. 1988)).

III

Issues on Appeal

Dr. Kyros believes that the Board's Decision regarding his "fitness for duty" determination was arbitrary and capricious and an abuse of discretion. He argues that requiring him to attend

CPEP is disproportionately harsh as compared to sanctions imposed on other similarly situated physicians and that it is unsupported by factual findings in the Board's Decision. Dr. Kyros is currently required to complete both a "clinical competency" and "fitness for duty" assessment at CPEP—located only in North Carolina and Colorado—and then complete all recommendations from CPEP. Dr. Kyros alleges this course will cost him approximately $20,000. Dr. Kyros also argues that the administrative fee imposed here was inappropriate because the Board did not find him guilty of unprofessional conduct.

RIDOH argues that Dr. Kyros has not presented any evidence that he is clinically competent to return to the practice of medicine and his nine-year gap in practicing medicine speaks for itself. The Board believes Dr. Kyros also has not taken the same steps as the physicians he claims were similarly situated to him, and therefore, the disproportionate treatment is merely reflective of the differences in these situations. The Board also believes that the requirement for CPEP classes is warranted to ensure that Dr. Kyros is ready to reenter practice after a significant gap. The Board Decision states that under the Agreement, the final sanction was to be determined by the Board. Thus, RIDOH contends that the imposition of administrative fees is warranted under the Agreement.

IV

Analysis

A

CPEP Classes

Although this Court "cannot substitute its judgment on the evidence even though it might be inclined to view that evidence differently" than the administrative agency, it can determine that the agency's decision was devoid of competent evidence. *See Rhode Island Public*

Telecommunications Authority v. Rhode Island State Labor Relations Board, 650 A.2d 479, 485 (R.I. 1994); *see Bunch v. Board of Review, Rhode Island Department of Employment & Training*, 690 A.2d 335, 337 (R.I. 1997); *Barrington School Committee v. Rhode Island State Labor Relations Board*, 608 A.2d 1126, 1138-39 (R.I. 1992) (affirming the Superior Court's finding that there was no competent evidence to support the agency's decision and was therefore clearly erroneous). An administrative decision that lacks findings of fact "cannot be upheld." *Sakonnet Rogers, Inc. v. Coastal Resources Management Council*, 536 A.2d 893, 896-97 (R.I. 1988).

Here, the Board relies solely on Dr. Kyros's nine-year gap in practicing medicine—a gap that the Board is largely responsible for—to justify requiring clinical competency courses. The Board arbitrarily believes this gap speaks for itself. Appellee Mem. Opp'n Appeal 13. Although the Court is principally concerned for the safety and welfare of patients, it also acknowledges Dr. Kyros's "concern for continued employment." *Costa*, 543 A.2d at 1311 (finding insufficient findings of fact by the administrative agency when it did not find some competent, substantial evidence of the existence of a tangible disease or defect that would adversely affect the appellant's capacity to work without harming the public); *compare Guarino v. Department of Social Welfare*, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980) (finding evidence that appellant had not performed professional duties sufficiently and determining that discharge was therefore appropriate).

The record here is devoid of nearly any evidence that Dr. Kyros is not clinically competent. *Compare Rocha*, 694 A.2d at 726 (finding that competent evidence existed and the Superior Court "merely disagreed with the sanction decided upon by the [agency] and reversed the [agency]'s decision"). On the other hand, the only doctors who spoke of Dr. Kyros's clinical competence—Dr. Brown, Dr. Jacobs, and Dr. Harrop—determined that he was able to return to his profession in some capacity. *See Bulwer v. Mount Auburn Hospital*, 46 N.E.3d 24, 35 (Mass. 2016) (the high

court of Massachusetts considering conflicting evidence from various doctors regarding the clinical competence of another doctor). Dr. Kyros also stayed up-to-date with his CME courses—including courses on medical ethics, burnout in physicians, chronic pain, prescription opioids, medical marijuana, Parkinson's Disease, and several others—completing them throughout this nearly-ten-year period when he was unable to practice.

Further, the Court is very concerned about the extensive license deprivation here: the Board created a situation where Dr. Kyros was unable to understand and fulfill what it wanted for over nine years. Dr. Kyros repeatedly attempted to follow the recommendations of the Sante Center and various doctors to appease the Board, with little response from the Board. The Board's odd statute regarding refusal of licensure, G.L. 1956 § 5-37-4, allows the Board to "refuse" a license after notice and opportunity to be heard.[7] Instead, the Board refused Dr. Kyros for over nine years.

In a footnote, the Board's Decision attempts to justify the circuitous and extensive travel of this case.[8] From this footnote, it is clear that the issue the Board addressed was whether Dr. Kyros should be relicensed. However, according to the Agreement, Dr. Kyros was never unlicensed. *See* Compl. Ex. 2. Dr. Kyros's license was never taken from him; rather, back in 2009, he agreed not to practice and did not practice for over nine years. Dr. Kyros was only forced to apply for relicensure to get the Board to come to a conclusion when it repeatedly remained silent regarding Dr. Kyros's efforts to return to practice. Appellant Mem. Supp. Appeal Ex. A 4 and F 11 (Hr'g Tr. 156).

[7] Counsel did not question the constitutionality of this license deprivation and the High Court disfavors such *sua sponte* challenges. *State v. Beaudoin*, 137 A.3d 717, 726 (R.I. 2016) ("The trial justice was without authority to raise and decide, *sua sponte*, a constitutional issue that was not squarely placed before him by the parties.").

[8] That footnote details the applicable Rhode Island statutes and the lack of a finding of unprofessional conduct here. The Board also attempts to justify its reasoning in deciding at that juncture whether Dr. Kyros should be relicensed. Board Decision n.3.

Focusing *only* on the Agreement, it is clear that Dr. Kyros did not surrender his license but merely agreed to cease practice; the Board was to make a determination when it received the Sante Center report in September 2009, which it never did. The physicians' committee found Dr. Kyros fit for duty in 2013, and the Board only addressed Dr. Kyros after his third attorney repeatedly asked for a consent agreement four years later. Both parties have attempted to compare this case to that of another Superior Court case, *Jake and Ella's, Inc. v. Department of Business Regulation*, to determine whether the Board's sanctions were arbitrary and capricious; however, neither party has addressed the central differentiating fact of that case. No. NC01-461, 2002 WL 977812 at *6 (R.I. Super. Apr. 22, 2002). There, the Superior Court found wrongful conduct on the part of the appellant, whereas, here no such conduct has even been found. *Id.* Here, there has been no finding by the Board of unprofessional conduct. Dr. Kyros's license was never given up or revoked.

This Court finds that there was no competent evidence to support a finding requiring Dr. Kyros to attend CPEP classes to address his clinical competency. Therefore, the imposition of that penalty was arbitrary and capricious. *See id.* Accordingly, the Court reverses the decision of the Board requiring Dr. Kyros to attend CPEP classes.

B

Administrative Fees

The Board imposed an administrative fee of $2000 on Dr. Kyros pursuant to § 5-37-6.3(8). Section 5-37-6.3 provides that "[i]f 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 . . . (8) [a]ssess against the physician the administrative costs of the proceedings instituted against the physician under this chapter" (emphasis added). Under § 5-37-

6.2, "[i]n 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."

As noted previously, the Board specifically stated in its decision that it was not making a finding of unprofessional conduct at this juncture but merely determining whether Dr. Kyros should be relicensed. Compl. Ex. 1; Board Dec. n.3. Nowhere in its decision does the Board suggest that there has been a finding of unprofessional conduct against Dr. Kyros by the Board. There is no evidence that the Board ever ratified the investigating committee's finding of unprofessional conduct in 2013. *Compare Danzer v. Rhode Island Board of Medical Licensure & Discipline*, 745 A.2d 733, 734 (R.I. 2000) (After the investigating committee made a finding of unprofessional conduct, *the board ratified that finding*, and a consent order agreement was proposed that included payment of an administrative fee.). Although the Agreement allows the Board to "make a determination on final sanctions," administrative fees must still be imposed in accordance with the statute. *See* § 5-37-6.3.

The administrative fee was clearly imposed "[i]n violation of constitutional or statutory provisions," namely § 5-37-6.3(8). *See* § 42-35-15(g)(1). With the record devoid of a Board determination regarding unprofessional conduct on the part of Dr. Kyros, administrative fees cannot be statutorily imposed under this section. *See Town of Richmond v. Rhode Island Department of Environmental Management*, 941 A.2d 151, 155 (R.I. 2008) (considering whether an agency acted unconstitutionally or in excess of its statutory authority). Therefore, this Court finds that the imposition of an administrative fee was in excess of RIDOH's statutory authority and would prejudice Dr. Kyros's substantial rights. Accordingly, this Court reverses the Board's Decision as to the imposition of an administrative fee.

V

Conclusion

For the foregoing reasons, this Court finds that Dr. Kyros never lost his license, and therefore, the imposition of an administrative fee was in excess of the Board's statutory authority and would prejudice Dr. Kyros's substantial rights. Further, this Court removes the requirement that Dr. Kyros participate in the new, expensive CPEP course as (1) there were no factual findings on Dr. Kyros's lack of competence; (2) the Board never found CPEP competence courses appropriate; (3) the Sante Center never found Dr. Kyros's skill or competence in dispute; (4) the Board relied on new, inapplicable 2018 regulations to justify its decision; and (5) the Board made few, insufficient findings of fact. Although the Court would typically be inclined to remand this case to RIDOH for further proceedings—with respect to inadequate findings of fact—here, the Court finds that doing so would only cause more harm and opportunity for delay after a nearly decade-long saga, and moreover, the Board Decision was not supported by competent evidence. *See Sakonnet Rogers, Inc.*, 536 A.2d at 897 ("To delay the administrative process further by remanding the case to [the agency] for additional consideration of a petition filed seven years ago would prejudice the right of the petitioner to a final adjudication of his petition within a reasonable period."). Accordingly, the Board's Decision is reversed and it is directed to act in accordance with this Court's holding. Counsel for petitioner shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Dr. William Kyros v. Rhode Island Department of Health, et al.**
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COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**December 13, 2019**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
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