STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: December 4, 2013]

GERALD DORNHECKER	:	
	:	
v.	:	**C.A. No. PC 12-6620**
	:	
BOARD OF NURSE REGISTRATION AND NURSING EDUCATION	:	

DECISION

NUGENT, J. Before this Court is an administrative appeal from a decision by the Board of Nurse Registration and Nursing Education (Board), imposing a six month suspension of Gerald Dornhecker's (Appellant) nurse practitioner license. That decision also required Appellant to submit to the Board for approval policies and procedures for his place of business (Skin Essentials Spa) to ensure adherence to federal and state regulations regarding inventory prior to the termination of Appellant's suspension pursuant to G.L. 1956 §§ 5-34-24 and 5-34-26. Jurisdiction is pursuant to G.L. 1956 §§ 5-34-1 and 42-35-15.[1]

I

Facts & Travel

Appellant is a Nurse Practitioner with prescriptive privileges pursuant to §§ 5-34-48 and 5-34-39.[2] On or about October or November 2012, Appellant was at all relevant times and still

[1] See also Rules and Regulations for the Licensing of Nurses and Standards for the Approval of Basic Nursing Education Programs, and the Rules and Regulations of the Department of Health Regarding Practices and Procedures Before the Department of Health and Access to Public Records of the Department of Health. (R42-35-PP, April 2004 as Amended.)

[2] See also § 5-34-39, amended February 2013:

"(a) Prescriptive privileges for the certified registered nurse practitioner:

is the owner of Skin Essentials Spa (Skin Essentials) in North Providence, Rhode Island. On October 4, 2012, New England Compounding Centers (NECC) issued a voluntary recall of its pharmaceutical products, instructing all customers to immediately "segregate and quarantine" the recalled products as well as notify the NECC for their return. Appellant signed the voluntary recall response form and checked the box indicating that "we do not have any of the below products in the facility." (Dep't's Ex. 4.)

On or about October 24, 2012, the United States Food and Drug Administration (FDA) conducted a recall order check at Skin Essentials. During the inspection, Appellant again maintained that the facility did not contain any of the NECC recall products. Upon further questioning by the FDA agent, however, Appellant admitted that he did, in fact, possess some of the recall products. Further inspection of the premises resulted in a discovery of multiple products in exam rooms that were not, as the NECC advised, "segregated" or "quarantined."

On or about November 23, 2012, investigators from the Rhode Island Department of Health conducted a follow-up inspection for recalled NECC products. Upon their inspection, investigators discovered multiple NECC recalled products in patient exam rooms, still not segregated or quarantined. Despite further instruction from the FDA, Appellant did not remove

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> "(1) Shall be granted under the governance and supervision of the department, board of nurse registration and nurse education; and
> "(2) Shall include prescription of legend medications and prescription of controlled substances from schedules II, III, IV and V that are established in regulation; and
> "(3) Must not include controlled substances from Schedule I."

See S.B. 197, 2013 Legis. Sess. (R.I. 2013).

the products from the patient rooms, claiming that he was unsure of the definition of "segregate."[3]

Based on the foregoing, the Director of the Rhode Island Department of Health issued a summary suspension of Appellant's nurse practitioner's license on December 5, 2012, pursuant to § 5-34-26, finding that he did not comply with his statutory obligations regarding both the initial recall and the subsequent FDA instructions to dispose of the products. A hearing before the Board was conducted on December 10, 2012.

In its decision, the Board found that Appellant did not comply with his statutory obligations when he learned of the NECC recall and when he received notice from the FDA. The Board's decision was primarily based on § 5-34-24(6)(v), which states in pertinent part:

> "The board of nurse registration and nursing education has the power to deny, revoke, or suspend any license to practice nursing; to provide for a non-disciplinary alternative only in situations involving alcohol or drug abuse or to discipline a licensee upon proof that the person is . . .
> (6) Guilty of unprofessional conduct which includes, but is not limited to, all of the above and also . . . (v) Willful disregard of standards of nursing practice and failure to maintain standards established by the nursing profession."

On December 27, 2012, this appeal was filed contesting the Board's findings of fact. On the same date, Appellant also filed a Motion to Stay (Order), which was granted on January 17, 2012. The Order permitted Appellant to work as a nurse practitioner with prescriptive rights at Landmark Hospital, which was later modified to allow him to work for another health care provider.

[3] See Black's Law Dictionary 902 (6th ed. 1990) ("'segregate' refers to the act or process of separation [ ]").

II

Standard of Review

The review of the Board's decision by this Court is controlled by § 42-35-15(g), which provides for review of a contested agency decision:

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

This section precludes a reviewing Court from substituting its judgment for that of an agency regarding the credibility of witnesses or the weight of evidence on questions of fact. Therefore, this Court's review is limited to determining whether substantial evidence exists to support the Board's decision. Newport Shipyard v. Rhode Island Comm'n for Human Rights, 484 A.2d 893 (R.I. 1984). This is true even in cases where the court, after reviewing the certified record and evidence, might be inclined to view the evidence differently from that of the agency. Berberian v. Dep't of Emp't Sec., 414 A.2d 480 (R.I. 1980).

Further, this Court will "reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record." Milardo v. Coastal Res. Mgmt. Council of Rhode Island, 434 A.2d 266, 272 (R.I. 1981). Questions of law, however, are

not binding upon a reviewing court and may be freely reviewed to determine what the law is and its applicability to the facts. Carmody v. Rhode Island Conflict of Interest Comm'n, 509 A.2d 453, 458 (R.I. 1986). At the same time, "it is also a well-recognized doctrine of administrative law that deference will be accorded to an administrative agency when it interprets a statute whose administration and enforcement have been entrusted to the agency." Pawtucket Power Assocs. Ltd. P'ship v. City of Pawtucket, 622 A.2d 452, 456-457 (R.I. 1993) (citations omitted). The Superior Court's role is to examine whether any competent evidence exists in the record to support the agency's findings. Rocha v. Public Util. Comm'n, 694 A.2d 722, 727 (R.I. 1997). As such, this Court is required to uphold the agency's findings and conclusions if they are supported by competent evidence. Rhode Island Pub. Telecomms. Auth. et al. v. Rhode Island Labor Relations Bd. et al., 650 A.2d 479, 485 (R.I. 1994); see also Pawtucket Power Assocs., 622 R.I. at 456 (citing Young v. Cmty. Nutrition Inst., 476 U.S. 974, 981, 106 S. Ct. 2360, 2365 90 L.Ed. 2d 959, 967 (1986); ("Deference is accorded even when the agency's interpretation is not the only permissible interpretation that could be applied.").

III

Analysis

A

Statutory Construction

As a threshold issue, Appellant maintains that the Department of Health improperly appointed Board members, and in doing so, the Board exceeded the number of members permitted by § 5-34-4.[4] Specifically, Appellant argues that at the time of his hearing, the Board

[4] Section 5-34-4(a) states the following:

consisted of sixteen (16) members rather than fifteen (15) as statutorily required. Due to its failure to meet the statutory requirements, Appellant contends, the Board's decision should be reversed.

The record establishes that there were never sixteen (16) members appointed to the Board at one time during the relevant time period. See Def.'s Ex. 2.

With regard to majority votes by a board, the Rhode Island Supreme Court has noted that:

> "in absence of persuasive circumstances or a statutory directive to the contrary, it is a well-recognized principle that a majority constitutes a quorum and if a quorum is present, the legislative, judicial or administrative body has authority to act in those matters coming within its jurisdiction. An obvious corollary to this principle is that a majority vote is sufficient for a legislative, judicial or administrative body to act in those matters within the ambit of its jurisdiction."

Domestic Safe Deposit Co. v. Hawksley, 111 R.I. 224, 301 A.2d 342, 346 (1973). It should be noted that the evidence in the record establishes the existence of a quorum throughout Appellant's hearing before the Board. See Def.'s Ex. 2.

Furthermore, Appellant's argument was not raised at the time of the administrative proceeding. It is well established that "this Court's 'raise-or-waive' rule precludes our consideration of an issue that has not been raised and articulated at trial." E.g., State v. Brown, 915 A.2d 1279, 1282 (R.I. 2007); State v. Ibrahim, 862 A.2d 787, 795 (R.I. 2004). Our Supreme Court has long recognized that "a litigant cannot raise an objection or advance a new theory on

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> "(a) Within the division of professional regulation, pursuant to chapter 26 of this title, there is a board of nurse registration and nursing education. The board shall be composed of fifteen (15) members. The term of office shall be for three (3) years. No member shall serve more than two (2) consecutive terms. The member shall serve until a qualified successor is appointed to serve. In making those appointments, the director of the department of health shall consider persons suggested by professional nurse organizations and the practical nurse's association."

appeal if it was not raised before the trial court." State v. Bido, 941 A.2d 822, 828-29 (R.I. 2008) (citing Hydro–Mfg., Inc. v. Kayser–Roth Corp., 640 A.2d 950, 959 (R.I. 1994). Additionally, our Supreme Court has declared that "[t]he same rule should apply to the decision of a quasi-judicial administrative tribunal as to the judgment of a court . . . ." See Dep't of Corr. of State of R.I. v. Tucker, 657 A.2d 546, 549 (R.I. 1995); see State v. Burke, 522 A.2d 725, 731 (R.I. 1987) (articulating the underlying rationale of the raise-or-waive rule); see G.L. 1956 § 28-5-30 (finding with respect to a human rights commission that "[a]n objection that has not been urged before the commission, its member, or agent shall not be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances[ ]"); see also G.L. 1956 § 34-37-6(c); see Bucci v. Lehman Brothers Bank, FSB, 68 A.3d 1069, 1082 (R.I. 2013). Nonetheless, "[t]his Court has not explicitly held that the raise-or-waive doctrine applies to administrative proceedings . . . ." E. Bay Comty. Dev. Corp. v. Zoning Bd. of Rev. of Town of Barrington, 901 A.2d 1136, 1153 (R.I. 2006).

Here, Appellant did not raise issues regarding the number of Board members at the administrative level. Furthermore, even if those issues were raised properly before the Board, they are without merit. See E. Bay Comty. Dev. Corp., 901 A.2d at 1153 (concluding without considering the applicability of the raise-or-waive rule to the administrative hearing that "[i]t is enough that [this Court is] satisfied that Appellant's position as presented . . . lacks merit in the circumstances of the present case[ ]"). As noted, the record establishes that there were never more than fifteen (15) members appointed to the Board at one time during the relevant time period and that there was a majority or quorum present at each hearing. See Def.'s Ex. 2.

B

Standard of Care

Appellant also argues that sufficient evidence was not presented to demonstrate that he violated the standard of care for a nurse practitioner. (R. at 5, Ex. 9.) Moreover, Appellant maintains that the record does not contain sufficient evidence to adequately establish the standard of care.[5]

Specifically, Appellant references Rule 12.11 of the Rules and Regulations of the Rhode Island Department of Health Regarding Practices and Procedures Before the Department of Health, which reads in part:

> "In contested cases the Rhode Island rules of evidence as applied in civil cases in the Superior Courts of this state shall govern. Irrelevant, immaterial or unduly repetitious evidence shall be excluded in all proceedings wherein evidence is taken.
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> While the Rhode Island Rules of Evidence as applied to civil cases in the Superior Courts of this state shall be followed to the extent practicable, the AHO shall not be bound by technical evidentiary rules. Evidence not otherwise admissible may be admitted, unless precluded by statute, when necessary to ascertain facts not reasonably susceptible of proof under the rules, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. The rules of privilege recognized by law shall apply."

Appellant's reference to this particular regulation is misplaced. The rule actually draws attention to the more relaxed evidentiary standards applied in administrative agency proceedings,

[5] See Tine Hansen-Turton & Jamie Ware, Frank McClellan (FNaaa1), Nurse Practitioners in Primary Care, 82 Temp. L. Rev. 1235, 1252, 1261 (2010) (citing Butler v. Louisiana State Bd. of Educ., 331 So. 2d 192, 196 (La. Ct. App. 1976)) (holding that "nurses and medical technicians who undertake to perform medical services are subject to the same rules relating to the duty of care and liability as are physicians in the performance of professional services"), cert. denied, 334 So. 2d 230 (La. 1976), aff'd Belmon v. St. Frances Cabrini Hosp., 427 So. 2d 541 (La. App. 3d Cir. 1983).

pursuant to which this Court may determine whether legally competent evidence exists to support such findings. See § 42-35-15; Rhode Island Pub. Telecomms. Auth., 650 A.2d at 485 (holding that if "competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions"); see also Auto Body Ass'n of Rhode Island v. State Dep't of Bus. Reg., 996 A.2d 91, 95 (R.I. 2010) ("[T]he phrase 'legally competent evidence' as meaning 'the presence of some or any evidence supporting the agency's findings.'" (quoting Envtl. Sci. Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993))); see also Sartor v. Coastal Res. Mgmt. Council, 542 A.2d 1077, 1082-83 (R.I. 1988).

In its decision, the Board specifically references § 5-34-24(6)(v), which gives the Board the discretionary authority to discipline a nurse who exhibits "unprofessional conduct." The statutory language states in pertinent part:

> "The board of nurse registration and nursing education has the power to deny, revoke, or suspend any license to practice nursing; to provide for a non-disciplinary alternative only in situations involving . . . discipline [of] a licensee upon proof that the person is . . . . (6) Guilty of *unprofessional conduct* which includes . . . (v) Willful disregard of standards of nursing practice and failure to maintain standards established by the nursing profession."

The record consists of dozens of exhibits and a plethora of testimony that demonstrate the ways in which Appellant violated his statutory obligations. See Dep't's Exs. 1-14. First, Appellant admits, for example, that his reason for not segregating the recall products completely was that he "forgot that these products even existed." (R. at 86, ¶¶ 10-14.) Appellant goes on to explain that products "were so outdated" that he "didn't realize they were even in the facility." Id. at ¶¶ 14-16. Upon requesting an explanation as to why such outdated products were in the facility at all, Appellant conceded that it was his fault for not realizing the error, and that the products "should have been disposed of probably years before that." Id. at ¶¶ 17-22.

Appellant maintains that the only testimony elicited was about a voluntary recall of prescription medicine, and that in the opinion of the Department of Health and the FDA, those medications were "supposedly not segregated or quarantined in his facility." (R. at 85, ¶¶ 14-24; R. at 86, ¶ 1; R. at 102 ¶¶ 7-10.) The record demonstrates otherwise.

In the parties' stipulation, for example, Appellant concedes that he was fully aware of the NECC recall of all its products. See Stipulated Set of Facts. This is further evidenced by Appellant "forgetting" to include on the form that the facility did, in fact, carry two of the recall products, while at the same time remembering to include other non-recall products. (R. at 83, ¶¶ 3-23; R. at 85, ¶¶ 14-21; R. at 86, ¶¶ 1-5, 14.) Appellant admits that he was aware of the products in his facility when filling out the voluntary recall form. (R. at 88, ¶¶ 8-24.) Appellant explains that he indicated otherwise because he had planned to dispose of the products by pouring them down the sink. Id. at 19-23. Once Appellant realized that his method of disposal was "ridiculous," he took no further action to segregate or quarantine the products as prescribed by Rhode Island law, nor did he do so after the follow-up inspection by the FDA. Id. at 19-24.

Additionally, Appellant's claim—that there is no relation between the handling of medications in a "private setting" to the standard of care applied here—is not supported by the competent evidence in the record. There exists evidence in the record to prove that recall products were discovered in the open in the spa's patient exam rooms on two occasions, one after Appellant had been warned. (Dep't's Ex. 11.) Appellant must be well-versed with the standard of care to which a nurse practitioner is expected to adhere.[6] Official recognition of the advanced level of skill required by the nurse practitioner comes from professional certification and statutory recognition in Rhode Island rules and corresponding regulations. See § 5-34-1 et

[6] Nurse practitioners provide a wide range of care including primary care involving evaluation, diagnosis, treatment, education, case management and well care. See §§ 5-34-3(3) and 5-34.2-2.

seq.; see also Boccasile v. Cajun Music Ltd., 694 A.2d 686, 690 (R.I. 1997) (noting that "'when there is no medical order requiring a certain type of treatment or precaution, it becomes a question of proper nursing practice and care under the particular facts and circumstances of the case . . . .'" (quoting Leonard v. Providence Hosp., 590 So. 2d 906, 908 (Ala. 1991)).

Further, Appellant mischaracterizes the standard of care and confuses its application in an administrative appeal with the standard applied in a civil negligence case, maintaining that since "there was no duty alleged to be necessary, there can be no breach, if there is no breach there obviously can be no harm to an individual . . . . Even if this Court wanted to somehow base an implied duty in negligence . . . ." (Pl.'s Mem. Supp. Appeal at 4, ¶ 3.) The issues raised on appeal do not concern civil litigation, but what constitutes "unprofessional conduct" in a regulatory hearing. In the instant matter, the question before the Board was whether Appellant's conduct was unprofessional, not whether his actions or inactions proximately caused a detriment to his patients.

The purpose of § 5-37-5.1(19) is designed to protect the public from a medical professional, such as a nurse practitioner, exhibiting unprofessional conduct. Section 5-37-5.1(19) expressly states that "unprofessional conduct" includes:

> "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 need not establish actual injury to the patient in order to adjudge a physician or limited registrant guilty of the unacceptable medical practice in this subdivision."[7]

[7] See also 16 C.F.R. § 1115.23 and 21 CFR §§ 7.40-7.59 (outlining federal purposes for recalls and delineating the responsibilities of industry in conducting recalls).

Although Appellant claims that the Board has not presented sufficient evidence to adequately describe the nature of his statutory obligations, the language contained in § 5-37-5.1(19) supports the Board's decision that Appellant violated the proper standard of care. Among the evidentiary support, the most probative is Appellant's blatant disregard for the numerous personal and written notifications advising him to segregate and quarantine the recall products—which are not in accord with even "the minimal standards of acceptable and prevailing medical practice [as a nurse practitioner.]" See § 5-37-5.1(19).

The Board has specialized knowledge regarding the effectuation of its governing statute. See Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944) ("[Administrative] policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case . . . . [t]hey do determine the policy which will guide applications for enforcement . . . ."). Even assuming, arguendo, that Appellant was correct in his assertion that the Board did not state precisely which obligations he violated, § 5-37-5.1 provides 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 the regulations established by the board with prior approval of the director." See § 5-37-5.1. This Court's primary objective in applying a statute is to ensure that its enforcement is consistent with the statute's underlying purpose. See Zannelli v. Di Sandro, 84 R.I. 76, 121 A.2d 652, 655 (1956). Thus, the Board's interpretation of this statute based on its expertise and knowledge of the profession is afforded deference. See Carmody, 509 A.2d at 458.

The substantial record evidence proves that Appellant willfully disregarded the standards of nursing practice and failed to maintain the standards established by the nursing profession. See § 5-34-24. Appellant admitted he was aware of the October 2012 recall, and he ignored the

additional notifications from the FDA advising Appellant to dispose of all recall products. (R. at 83, ¶¶ 3-23; R. at 88, ¶¶ 8-16.) The record consists of reliable, probative, and substantial evidence upon which the Board's decision rests. "Judicial scrutiny on appeal 'is limited to a search of the record to determine if there is any competent evidence upon which the agency decision rests. If there is such evidence, the decision will stand.'" Restivo v. Lynch et al., 707 A.2d 663, 665 (R.I. 1998) (quoting E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 285-86, 373 A.2d 496, 501 (1977)). Accordingly, the Board's decision is affirmed.

IV

Conclusion

After review of the entire record, this Court finds that the Board's decision is supported by the reliable, probative, and substantial evidence on the record and is not clearly erroneous. Substantial rights of the Appellant have not been prejudiced. The Board's decision is affirmed. Counsel shall present the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Gerald Dornhecker v. Board of Nurse Registration and Nursing Education
CASE NO:	PC 12-6620
COURT:	Providence County Superior Court
DATE DECISION FILED:	December 4, 2013
JUSTICE/MAGISTRATE:	Nugent, J.
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