

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 02-21-2012
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GLENN M. LIPTON, M.D.,) 1 CA-CV 11-0352
)
Plaintiff/Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
ARIZONA MEDICAL BOARD,) - Rule 28, Arizona
) Rules of Civil
Defendant/Appellee.) Appellate Procedure)
)

Appeal from the Superior Court in Maricopa County

Cause No. LC2010-000881-001

The Honorable Crane McClennen, Judge

AFFIRMED

The Ledbetter Law Firm, P.L.C.
By James E. Ledbetter
and Tosca G. Henry
Attorneys for Plaintiff/Appellant

Cottonwood

Thomas C. Horne, Arizona Attorney General
By Jennifer A. Boucek, Assistant Attorney General
Attorneys for Defendant/Appellee

Phoenix

K E S S L E R, Judge

¶1 Plaintiff/Appellant Glenn M. Lipton, M.D., appeals the superior court's dismissal of his complaint against Defendant/Appellee Arizona Medical Board ("Board") for lack of

subject matter jurisdiction. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In June 2010, the Board received a complaint against Lipton alleging inappropriate advertising. The Board opened an investigation, notified Lipton of the complaint, and requested that he respond to the allegations. Lipton responded to the complaint, provided records, and later filed an additional response to the Board's investigation report. On October 13, 2010, the Board voted to issue Lipton an advisory letter for failing to adequately disclose his board certification qualifications in his advertisements, which Arizona law defines as unprofessional conduct. See Arizona Revised Statutes ("A.R.S.") section 32-1401(27)(mm) (Supp. 2011).¹

¶3 Lipton filed a complaint in the superior court, seeking judicial review of the Board's decision. He alleged the Board had exceeded its authority and violated his constitutional rights by issuing the advisory letter. The Board moved to dismiss for lack of jurisdiction on the grounds that an advisory letter is not subject to judicial review. The court granted the motion to dismiss. Lipton timely appealed.

¶4 We have jurisdiction pursuant to A.R.S. § 12-

¹ We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

2101(A) (1) (Supp. 2011).

DISCUSSION

¶5 Lipton contends the superior court erred in dismissing his complaint for lack of subject matter jurisdiction. He argues the superior court had jurisdiction to review his appeal from the Board's advisory letter because (1) it was a final decision, and (2) he challenged the Board's jurisdiction to issue the letter. We review a dismissal for lack of jurisdiction de novo. *Guminski v. Ariz. State Veterinary Med. Examining Bd.*, 201 Ariz. 180, 182, ¶ 9, 33 P.3d 514, 516 (App. 2001).

A. The Administrative Letter is not an Appealable Decision.

¶6 The Board is a state agency that licenses and disciplines allopathic medical doctors. A.R.S. §§ 32-1401 to -1491 (2008 & Supp. 2011). It is authorized to investigate evidence or complaints that a doctor is medically incompetent, guilty of unprofessional conduct, or mentally or physically unable to safely engage in the practice of medicine. A.R.S. § 32-1451(A) (Supp. 2011). If the Board determines, after investigation, that a matter is not of sufficient seriousness to merit disciplinary action, it may instead file an advisory letter and/or require the licensee to complete continuing medical education courses. A.R.S. § 32-1451(E)(2)-(3). It may

also dismiss the matter if it determines the complaint is without merit. A.R.S. § 32-1451(E)(1).

¶7 The Administrative Review Act, A.R.S. §§ 12-901 to -914 (2003 & Supp. 2011), governs actions for judicial review of an administrative agency's final decision. A.R.S. § 12-902(A) (2003). It defines a "decision" as: "any decision, order or determination of an administrative agency that is rendered in a case, that affects the legal rights, duties or privileges of persons and that terminates the proceeding before the administrative agency." A.R.S. § 12-901(2) (2003). In *Murphy v. Board of Medical Examiners of the State of Arizona*, 190 Ariz. 441, 448-49, 949 P.2d 530, 537-38 (App. 1997), this court expressly held that the Board's issuance of a letter of concern (now denominated an advisory letter)² is not a final decision subject to superior court review. Although it is true that the Board's advisory letter terminated its investigation of the complaint against Lipton, the advisory letter is not a "decision" because it does not affect Lipton's legal rights, duties, or privileges. See *id.*

¶8 Lipton argues *Murphy* does not apply to the facts in this case because he alleged in his complaint that the Board

² See 1999 Ariz. Sess. Laws, ch. 218, §§ 3 & 12 (1st Reg. Sess.) ("advisory letter of concern" renamed an advisory letter).

violated his legal rights to due process, equal protection, and freedom of speech by issuing the advisory letter. However, because the advisory letter did not impair or limit Lipton's medical license or any liberty interest, it did not affect his legal rights, duties, or privileges. See A.R.S. § 12-901(2); *Murphy*, 190 Ariz. at 448-49, 949 P.2d at 537-38.³ Because this case does not involve the deprivation of legal rights, Lipton is only entitled to minimal due process. *Murphy*, 190 Ariz. at 449, 949 P.2d at 538; see *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands." (internal citations and quotation marks omitted)); *Paul v. Davis*, 424 U.S. 693, 712 (1976) ("[I]nterest in reputation . . . is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law.").

³ Lipton argues the advisory letter affected his property right in his medical license, citing *Comeau v. Arizona State Board of Dental Examiners*, 196 Ariz. 102, 106, ¶ 18, 993 P.2d 1066, 1070 (App. 1999). In that case, we held that the dental board's decision to censure a licensee was a "form of deprivation" that required due process. *Id.* *Comeau* is not controlling, however, because the Board did not censure Lipton or impose any other disciplinary action against him. *Murphy*, 190 Ariz. at 448, 949 P.2d at 537 (rejecting physician's claim that advisory letter affected any property rights that would raise due process concerns).

Although Lipton did not receive a separate hearing, he was able to respond to the allegations in writing, and was permitted to address the Board at its meeting on October 13, 2010. We do not believe this level of participation violates minimal due process.

¶9 Further, we reject Lipton's argument that the advisory letter was appealable because it allegedly caused harm to his reputation because it was previously available through the Board's website and remains in his file and available to the public by request.⁴ We rejected a similar argument in *Murphy*, ruling that the physician's claim of possible reputational harm from an advisory letter was "purely speculative" and did not affect the physician's legal rights. 190 Ariz. at 448, 949 P.2d at 537.

¶10 The superior court did not have subject matter jurisdiction over Lipton's appeal because the advisory letter was not a final decision under the Administrative Review Act.

B. Challenge to the Board's Authority

¶11 Lipton next argues the court had jurisdiction over his complaint for judicial review because he challenged the Board's

⁴ Although records concerning a non-disciplinary order issued by a health profession regulatory board against a licensee remain available to the public, Arizona law now prohibits the display of such records on the website of the regulatory board. A.R.S. § 32-3214(B) (Supp. 2011).

authority to issue the advisory letter.

¶12 We considered the scope of the Board's authority in *Murphy* when a licensed physician who worked as the medical director for a managed health care company challenged the Board's jurisdiction to review a complaint charging him with medical incompetence and unprofessional conduct. *Id.* at 444, 446, 949 P.2d at 533, 535. The physician was not engaged in the traditional practice of medicine, but reviewed medical information provided by insureds and their physicians to decide whether the managed health care company would pre-certify certain medical procedures. *Id.* at 446, 447, 949 P.2d at 535, 536. The court rejected the physician's argument that the Board lacked authority to intercede in what he characterized as insurance matters regulated by the Arizona Department of Insurance, and held that to the extent the physician rendered medical decisions, his conduct was reviewable by the Board. *Id.* at 446-47, 949 P.2d at 535-36.

¶13 In this case, there is no dispute that Lipton is licensed by the Board to practice medicine, and that the Board's action concerned Lipton's alleged unprofessional conduct; specifically, his representations concerning his professional certifications. See A.R.S. §§ 32-1401(27)(mm), -1451(A). Because the Board is authorized to investigate evidence or

complaints that a doctor is guilty of unprofessional conduct, it is clear it had authority to issue the advisory letter. See A.R.S. § 32-1451(A).

¶14 To the extent Lipton claims his challenge to the Board's authority allowed the superior court to review the merits of the advisory letter even though it was not an administrative decision subject to judicial review, we reject his argument. Although we acknowledged in *Murphy* that an administrative decision that exceeds an agency's statutory power may be challenged for lack of jurisdiction in a collateral proceeding, 190 Ariz. at 448, 949 P.2d at 537; see also *Ariz. Bd. of Regents ex rel. Univ. of Ariz. v. State ex rel. State of Ariz. Pub. Safety Ret. Fund Manager Adm'r*, 160 Ariz. 150, 156, 771 P.2d 880, 886 (App. 1989), the court did not hold that such review would extend to the merits of the non-final agency action. *Murphy*, 190 Ariz. at 448-49, 949 P.2d at 537-38. And, after it examined the threshold jurisdictional question in *Murphy*, the court declined to consider the merits of the challenged advisory letter. *Id.* Thus, the superior court's consideration of the merits of the advisory letter in this case would have been improper.

CONCLUSION

¶15 For the foregoing reasons, we affirm the superior court's dismissal of Lipton's complaint. Lipton requests an award of attorneys' fees and costs on appeal pursuant to A.R.S. §§ 41-1001.01(A) (Supp. 2011), 12-348(A)(2) (Supp. 2011), and 12-2030 (2003), which allow an award of fees and costs to a party who prevails in a court proceeding to review a state agency decision. Because Lipton has not prevailed in this matter, we deny his request.

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

MARGARET H. DOWNIE, Judge