STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF COMMUNITY HEALTH Petitioner-Appellee,	UNPUBLISHED March 27, 2012
v	No. 300741 Board of Medicine
FREDERICK CHARLES KRAUS, M.D., Respondent-Appellant.	Disciplinary Subcommittee LC No. 2009-001595

Before: M.J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals as of right from an administrative decision of the Michigan Department of Community Health Board of Medicine. The board fined respondent $250 because it determined that he was in violation of MCL 333.16221(b)(x) of the Public Health Code, MCL 333.1101, et seq. We affirm.

I. BASIC FACTS

In November 2001, while respondent, a radiologist, was working at Akron City Hospital in Ohio, he was asked to read a CT study for a 27-year-old man who complained of shortness of breath, generalized pain, and demonstrated a high white blood cell count. After reviewing the films, respondent was unable to find a cause of the patient's pain and did not note any significant findings. During the patient's hospitalization, he underwent an appendectomy and ultimately died. In 2003, the decedent's estate filed a medical malpractice/wrongful death claim against respondent. The estate claimed that respondent failed to properly diagnose an aortic dissection. In defense, respondent had several experts deposed who stated that respondent did not breach the standard of care.

In 2005, without respondent admitting responsibility, the parties reached a settlement. After the settlement, respondent notified each of the 40 states in which he was licensed.

In 2007, respondent applied to the Colorado Medical Board to renew his license there. As part of the application process, respondent admitted to being part of the 2005 Ohio settlement. Due to this admission, the Colorado Medical Board opened an investigation. On August 8, 2008, it wrote a letter to respondent, requesting various documents and information regarding the settlement. Respondent supplied the requested information.

Without conducting any further type of hearing, the Colorado Medical Board issued a letter of admonition on June 11, 2009, in which the board found that respondent breached the standard of care related to the events in Ohio. The letter, while it did not impose any other type of sanction, indicated that respondent had 20 days to contest the finding and to request a formal disciplinary proceeding. Respondent, living in Australia at the time the letter was issued, was not notified until approximately 5 days into the 20-day period. But respondent did not contest the finding until well after the 20-day period had lapsed. Respondent testified that, at the time, he did not "appreciate" the significance of the letter and limited timeframe involved.

After the 20-day period lapsed, the Colorado Medical Board closed the matter and reported the issuance of the letter to the National Practitioner's Data Bank ("the Data Bank"). The Data Bank, in turn, reported the letter to each of the 39 other states in which respondent held a medical license.

Upon the Michigan Board of Medicine learning of the letter, a formal administrative complaint was filed, charging respondent with violating MCL 333.16221(b)(x) (final adverse administrative action from another state). A formal hearing was held on June 2, 2010, before an administrative judge. At the hearing, respondent dedicated considerable time explaining and presenting evidence on how the Colorado letter was unjustified because there was ample proof that he was not negligent in the Ohio case. The administrative law judge acknowledged that "there is an oddity in the reality that [respondent's] problems arise from a disciplinary action undertaken in Colorado years after the Ohio matter was thought closed without any adverse action on [respondent's] license." However, the administrative law judge, concluded that the Colorado letter met the requirements of being an adverse administrative action by another state, and found that respondent had violated MCL 333.16221(b)(x).

Respondent timely filed exceptions to the administrative law judge's proposal for decision. On October 1, 2010, the Michigan Board of Medicine Disciplinary Subcommittee adopted the proposed decision and fined respondent $250 for violating MCL 333.16221(b)(x). Respondent appeals of right from that order.

II. ANALYSIS

A. ALLEGED DUE PROCESS VIOLATION

Respondent first argues that he was denied due process at the June 2, 2010, administrative hearing. Specifically, respondent argues that he was denied a "meaningful opportunity to be heard" at the hearing. We disagree. Whether a person has been afforded due process is a question of law, which is reviewed de novo. *In re Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009).

Procedural due process requires notice and a meaningful opportunity to be heard before an impartial decision maker. *In re Beck*, 287 Mich App 400, 401-402; 788 NW2d 697 (2010). Respondent claims that he was denied a meaningful opportunity to be heard because "no evidence, no matter how exculpatory . . . would have avoided a finding of violation of" the Public Health Code. This assertion is without merit. Respondent was given a hearing in order to contest that the elements of MCL 333.16221(b)(x) were established. MCL 333.16221(b)(x)

provides that the disciplinary subcommittee shall impose sanctions against a respondent if it finds that a "personal disqualification" exists, which includes a

> [f]inal adverse administrative action by a licensure, registration, disciplinary, or certification board involving the holder of, or an applicant for, a license or registration regulated by another state or a territory of the United States, by the United States military, by the federal government, or by another country.

Additionally, the provision provides that "[a] certified copy of the record of the board is conclusive evidence of the final action."

Respondent states that, if he is not allowed to contest the underlying events behind Colorado's letter, i.e., his actions in the Ohio matter, then he is denied his right to a meaningful hearing. However, respondent fails to recognize the statute that he was accused of violating. MCL 333.16221(b)(x) only requires that a final adverse administrative action have been taken against respondent from another state. There is no dispute that the Colorado letter meets this requirement. Whether the letter was properly supported or justified is not pertinent for whether the letter was issued to respondent. Respondent accurately points out in his brief on appeal that "[t]he Statute itself makes clear that the issuance of any adverse action by a sister state is all that needs proven to prove a violation." However, this does not mean that respondent was denied a meaningful hearing. By way of example, he was free to present evidence, if any evidence existed, that no such letter was issued to him or that such a letter was not authentic. The fact that respondent concedes the existence and authenticity of the letter, because petitioner's case against respondent was extremely strong does not equate to a finding that he was denied an opportunity to be heard.

B. CONSTITUTIONALITY OF MCL 333.16221(b)(x)

Respondent next argues that MCL 333.16221(b)(x) is unconstitutional as applied to him in this case. We disagree. We review constitutional issues de novo. *In re Ayres*, 239 Mich App 8, 10; 608 NW2d 132 (1999). The party challenging a statute as unconstitutional bears the burden of proof, and statutes are presumed constitutional. *Id.* "[T]he courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Id.*

The constitutionality of the exercise of the state's police power, as is the case here under the Public Health Code, is determined by whether there exists a rational basis for the legislation. *Katt v Ins Bureau*, 200 Mich App 648, 652-653; 505 NW2d 37 (1993); *Hecht v Twp of Niles*, 173 Mich App 453, 460; 434 NW2d 156 (1988). Specifically, respondent has the burden to prove that the legislation is not rationally related to a legitimate state interest. *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 541; 273 NW2d 829 (1979), citing *Mich Canners v Agric Bd*, 397 Mich 337, 343-344; 234 NW2d 1 (1976).

Respondent's argument focuses on the fact that, in his view, the Colorado letter was a product of a procedure that denied him his due process rights. As a result, respondent claims that it is inherently unfair for Michigan to penalize him for the mere existence of a letter, when the evidence surrounding the underlying malpractice claim seems to favor a finding that there was no malpractice. However, respondent's argument misses the point.

At the outset, it is clear that MCL 333.162219(b)(x) is constitutional because it is rationally related to a legitimate governmental interest. The legitimate governmental interest is to protect the public welfare. See *Consumer & Indus Servs v Greenberg*, 231 Mich App 466, 471; 586 NW2d 560 (1998). And sanctioning physicians who have had a final adverse administrative action entered against them by foreign jurisdictions is rationally related to that goal of protecting the public welfare. Respondent's contention that the Michigan statute is unconstitutional as applied to him because he was allegedly denied due process in the Colorado proceeding constitutes an improper collateral attack of the Colorado adverse administrative action. See *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 315; 805 NW2d 226 (2011) (a collateral attack on a foreign judgment is only permitted when the attack is based on the issuing court lacking jurisdiction).[1] Moreover, a cursory review of the record shows that respondent was not denied due process in Colorado.

First, his claim that his attorney was never notified even though the Colorado Board stated that it would copy his attorney is without merit. The notification that Colorado sent regarding the initiation of its investigation of the Ohio matter stated,

> It is the policy of the Board to copy your attorney (if you were represented) on all correspondences in order to assure that your attorney is aware of developments in your case. *If you are represented by an attorney in this matter, please provide your attorney's contact information to the Board in writing*. If the Board already has your attorney's contact information, your attorney's name should be identified below as a carbon copy or "cc," indicating that a copy of this letter was sent to your attorney. [Emphasis added.]

The letter did not have anyone listed as getting a "carbon copy." Thus, respondent knew that the Colorado Board did not have any record of any current attorney. But when respondent replied to the Colorado Board's inquiries, he did not state that he was currently represented by counsel. At most, respondent provided the names of "plaintiff's" and "defendant's" attorneys in the 2003 Ohio law suit. Nowhere did respondent claim that he was currently represented, some four years after the Ohio settlement, by any counsel. In fact, respondent testified that he had not been in contact with his Ohio counsel "for years" and that his Ohio counsel was not involved with the Colorado proceeding until after the 20-day period lapsed. Therefore, it is apparent that the Colorado Board did not copy an attorney because respondent never provided the contact information as requested.

Second, contrary to respondent's assertions, he was not denied an opportunity to be heard in Colorado. When Colorado initially informed respondent that it was initiating an investigation regarding the events surrounding the Ohio case, it gave respondent an opportunity to "provide any additional information that [he] believe[s] is pertinent to the investigation of this matter." And in fact, respondent did supply information to the Colorado Board. Thus, it is undisputable that respondent was given an opportunity to be heard, and actually was heard, in the Colorado

[1] Since respondent was licensed to practice medicine in Colorado, it is not disputed that the Colorado Board possessed jurisdiction in the matter.

proceeding. Furthermore, after the Colorado Board issued its decision, as stated in its letter of admonition, it gave respondent 20 days to request a full hearing on the matter. The letter stated that "[i]f such a request is timely made, this letter of admonition will be deemed vacated and the matter will be processed by means of a formal complaint and hearing." The fact that respondent chose to not contest or appeal the Colorado Board's disposition within the 20-day period because he did not "appreciate" the ramifications of the letter is not relevant to whether he had an *opportunity* to present a defense. See *Bohn v Bohn*, 26 Mich App 270, 273; 182 NW2d 107 (1970).

C. DISCIPLINARY SUBCOMMITTEE'S FINDING

Respondent next argues that Michigan's disciplinary subcommittee finding that he was in violation of MCL 333.16221(b)(x) is not supported by the evidence. We disagree. This Court reviews challenges to the factual basis for a disciplinary subcommittee's final order to determine whether the order is "supported by competent, material and substantial evidence on the whole record." *Dep't of Community Health v Risch*, 274 Mich App 365, 371-372; 733 NW2d 403 (2007), citing Const 1963, art 6, § 28.

Again, respondent focuses his argument on the fact that he presented ample evidence that he, indeed, was not negligent in the Ohio matter. However, the Michigan Board did not charge him with being negligent in Ohio. Instead, he was charged with violating MCL 333.16221(b)(x), which applies where another state issued a "[f]inal adverse administrative action" against respondent. There was no dispute that the June 11, 2009, letter of admonition issued by the Colorado Medical Board qualified as such a final adverse administrative action. Therefore, the letter was competent, material, and substantive evidence that respondent violated MCL 333.16221(b)(x).

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Douglas B. Shapiro