

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thuy P. Dang, R.Ph.,	:	
Petitioner	:	
	:	
v.	:	No. 371 C.D. 2010
	:	SUBMITTED: August 13, 2010
Department of State, State Board of	:	
Pharmacy,	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: October 14, 2010

Thuy P. Dang appeals from the Final Adjudication and Order of the State Board of Pharmacy (Board), which revoked his license to practice pharmacy in the Commonwealth of Pennsylvania. This disciplinary action was initiated after Dang pleaded guilty to a felony. Dang does not deny that he engaged in professional misconduct, but argues that the administrative hearing below did not provide due process, and that the Board abused its discretion by not choosing a more lenient punishment. We affirm.

In 2008, Dang pleaded guilty to one count of theft of government property, a felony, in violation of 18 U.S.C. § 641. He was sentenced to imprisonment for 12 months and one day, followed by two years of probation, and ordered to pay \$150,000 in restitution. Dang’s conviction stemmed from his actions while employed as a pharmacist at the United States Army War College in

Carlisle, Pennsylvania. Dissatisfied with his supervisor at the pharmacy, Dang took prescription drugs belonging to his employer and flushed them down the toilet, or otherwise disposed of them. He did this with the belief that the loss of inventory would create problems for his supervisor. This behavior continued for approximately 18 months.

In 2009, the Commonwealth filed an order to show cause why the Board should not take disciplinary action against Dang, contending that he was subject to disciplinary action under Section 5(a)(2) of the Pharmacy Act,¹ 63 P.S. § 390-5(a)(2), and Section 9124(c)(1) of Criminal History Record Information Act, 18 Pa. C.S. § 9124(c)(1).² An administrative hearing was held, at which Dang participated, *pro se*, by telephone from federal prison. Following the hearing, the Hearing Examiner issued a proposed adjudication and order, which recommended revoking Dang's license. Now with counsel, Dang filed a brief on exceptions before the Board. Attached to this brief as Exhibit A were a number of documents related to Dang's employment history, including performance reviews. The Board, *sua sponte*, issued an order striking Exhibit A, because it was not made part of the record at the hearing. Shortly thereafter, the Board issued its final adjudication and order in this matter, revoking Dang's license. An appeal to this court followed.

On appeal, Dang argues that the administrative hearing below did not provide due process and that the Board abused its discretion by not choosing a more lenient punishment.

¹ Act of September 27, 1961, P.L. 1700, *as amended*. Section 5(a)(2) grants the Board the power to refuse, revoke or suspend the license of a pharmacist who “[h]as been found guilty [or] pleaded guilty . . . to any offense in connection with the practice of pharmacy or any offense involving moral turpitude before any court of record of any jurisdiction.”

² Section 9124(c)(1) authorizes state boards with professional licensing responsibility to revoke a license “[w]here the applicant has been convicted of a felony.”

Dang argues that he did not receive due process at his administrative hearing, at which he participated *pro se* via telephone, because the Hearing Examiner failed to inform him of his right to submit physical evidence.³ The Board argues that this argument is waived because it was not included in Dang's brief on exceptions before the Board. Dang's brief to the Board raised only one issue, though it was addressed in three separate ways: that it would be "an abuse of discretion to adopt the Hearing Examiner's proposed revocation of [Dang's] license, as opposed to suspension of same." Reproduced Record (R.R.) at 73a.

Issues not raised before the Board in the brief on exceptions are waived. 1 Pa. Code § 35.213; *Mostatab, D.M.D. v. State Bd. of Dentistry*, 881 A.2d 1271 (Pa. Cmwlth. 2005). As Dang did not raise his due process argument before the Board, we cannot consider it here.⁴

Dang's second argument is that the Board abused its discretion in revoking his license.⁵ A pharmacist whose license has been revoked is eligible to

³ Dang does not challenge the Board's order striking, *sua sponte*, Exhibit A to his brief on exceptions before the Board.

⁴ Even absent waiver, the due process argument lacks merit. Dang argues that he was never informed of his right to introduce physical evidence. However, the Commonwealth's Order to Show Cause, which initiated this action, informed Dang that the "Respondent may appear, with or without counsel, offer testimony or other evidence on his or her behalf, and confront and cross-examine the Commonwealth's witnesses." R.R. at 7a. We also note that Dang failed to provide any testimony regarding his employment record and performance reviews.

⁵ In the heading given to this argument in Dang's brief, it appears to be an argument that the Board's findings lack a factual basis in the record. Appellant's brief at 12. Closer examination reveals, however, that it is in fact an abuse of discretion argument. Unless a licensing board is accused of bad faith or fraud, an allegation not made in this case, the scope of appellate review of the board's disciplinary sanction is "limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions." *Ake v. State Bd. of Accountancy*, 974 A.2d 514, 519 n.6 (Pa. Cmwlth. 2009) (internal quotations omitted).

apply for reinstatement after five years. Section 7.1 of the Pharmacy Act, 63 P.S. § 390-7.1.

Dang argues the revocation was too harsh by pointing to a number of allegedly mitigating factors, including that he was not stealing for illicit resale or for personal use, that he cooperated with the investigation of his crime and that he has shown remorse for his actions. Dang also cites to *DePanfilis v. State Board of Pharmacy*, 551 A.2d 344 (Pa. Cmwlth. 1988), in which the Board imposed a two year suspension on a pharmacist convicted of Medicaid fraud, and argues a punishment in line with that case would be more appropriate.

We find the Board did not abuse its discretion in revoking Dang's license. *DePanfilis* is a case that is over twenty years old and involved vastly different misconduct; we see no reason to require the Board to impose an analogous penalty in this case. In addition, the mitigating factors Dang cites were considered by the Board. The Board weighed those factors against Dang's very serious misconduct, which involved the theft of federally owned prescription drugs that went on for 18 months and caused a loss of approximately \$150,000, and found that revocation was the most appropriate punishment. Finding no manifest and flagrant abuse of discretion, we cannot reverse that decision.

For all the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 14th day of October, 2010, the order of the State Board of Pharmacy in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge