IN THE UTAH COURT OF APPEALS

----ooOoo----

W. Scott Jepson, R.N.,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner,	)	
	)	Case No. 20040808-CA
v.	)	
	)	F I L E D
Division of Occupational and Professional Licensing, and Department of Commerce,	)	(July 8, 2005)
	)	2005 UT App 316
Respondents.	)	

Original Proceeding in this Court

Attorneys: Arron F. Jepson, Sandy, for Petitioner
Mark L. Shurtleff, Karl G. Perry, and Blaine R. Ferguson, Salt Lake City, for Respondents

---

Before Judges Billings, Davis, and Thorne.

DAVIS, Judge:

W. Scott Jepson, R.N., seeks the review of a final order in a formal proceeding before the Department of Commerce (Department), wherein the Department concluded that Jepson had engaged in unprofessional and unlawful conduct and issued him a private reprimand. We affirm.

On July 5, 2002, the Department's Division of Occupational and Professional Licensing (DOPL) issued a petition seeking sanctions against Jepson, alleging that he had engaged in unprofessional and unlawful acts.[1] After a hearing before an Administrative Law Judge (ALJ) and the Board of Nursing (Board), DOPL determined that Jepson had possessed controlled substances

---

[1]DOPL's petition referenced the 1998 version of the Utah Code and the 2002 version of the Utah Administrative Code. Because any amendments made thereto do not affect the outcome of this case, we cite to those versions throughout our decision.

outside of his responsibilities as a nurse (Count I)[2] and failed to produce a medication he purchased for a patient (Count III).[3] The Department determined that Jepson should be privately reprimanded and required Jepson to notify his current employer, and future employers for the next five years, of the private reprimand. Jepson filed a timely Petition for Review with this court.

On appeal, Jepson posits some twenty-one queries, each characterized as an "issue" on appeal. However, most are repetitive, unclear, and difficult to differentiate. We have therefore distilled Jepson's arguments to the essential issues.

Jepson argues that Nurse Baker's testimony should be stricken because she lacked specialization "in the handling, control[,] and administration of liquid morphine." Jepson also claims that he made certain objections and had certain communications off the record that should be considered on appeal.[4] However, "issues not raised in proceedings before administrative agencies are not subject to judicial review except in exceptional circumstances." Brown & Root Indus. Serv. v. Industrial Comm'n, 947 P.2d 671, 677 (Utah 1997). An objection to admission of evidence at trial must be timely and specific to preserve the purported evidentiary error for appeal. See State v. McCardell, 652 P.2d 942, 947 (Utah 1982) ("This is clearly a case where a timely and specific objection would have afforded the trial court the opportunity to address [the defendant's] concerns and at the same time permit the State to proceed with the evidence most relevant to its case."). Here, Jepson did not make a record of the purported objections and communications that allegedly occurred "out of the hearing of the Board." And he never objected to Nurse Baker's specialization in the handling, control, and administration of liquid morphine. Instead, Jepson

---

[2]See Utah Code Ann. § 58-37-8(2)(a)(i) (1998); id. § 58-31b-502(5) (Supp. 1998); id. § 58-1-501(2)(a) (1998).

[3]See Utah Code Ann. § 58-31b-502(7).

[4]Jepson alleges that the ALJ erroneously excluded evidence, despite discussions he had with DOPL "in the hall out of the hearing of the Board." He also argues that he made objections, off the record, to statements made by DOPL in its closing argument. He similarly avers that the ALJ assured him, again off the record, that the Board would not make a finding of theft or taking.

objected to Nurse Baker's testimony for a host of other reasons and actually expressed confusion regarding whether Nurse Baker was testifying as an expert or a lay person. Jepson's only objection to Nurse Baker's qualifications went to whether she was qualified to testify about the lethal effects of certain medications. Therefore, Nurse Baker's qualification as an expert and Jepson's alleged objections and communications that occurred off the record have not been preserved for appeal.[5]

Jepson seems to argue that there was insufficient evidence to support DOPL's determination regarding Counts I and III. In particular, Jepson challenges the sufficiency of Nurse Baker's testimony regarding the relevant standard of care. The appropriate standard of care for a specific profession is a finding of fact. See Vance v. Fordham, 671 P.2d 124, 127-28 (Utah 1983); Robb v. Anderton, 863 P.2d 1322, 1327-29 (Utah Ct. App. 1993). The party challenging an agency's findings of fact must marshal all of the evidence supporting the findings and show that, despite the supporting evidence, the findings are not supported by substantial evidence. See First Nat'l Bank of Boston v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990). "When a party fails to marshal the evidence supporting a challenged fact finding, we reject the challenge as '"nothing more than an attempt to reargue the case before [the appellate] court."'" Campbell v. Box Elder County, 962 P.2d 806, 808 (Utah Ct. App. 1998) (alteration in original) (citations omitted). Furthermore,

> [w]e are in no position to second guess the detailed findings of the ALJ which were adopted by the Board. It is not our role to judge the relative credibility of witnesses. In undertaking such a review, this court will

---

[5]To the extent that it was preserved for appeal, the exclusion of Jepson's exhibit was entirely proper. A trial court "has broad discretion to determine whether proffered evidence is relevant, and we will find error in a relevancy ruling only if the trial court has abused its discretion." State v. Hobbs, 2003 UT App 27,¶11, 64 P.3d 1218 (quotations and citation omitted), cert. denied, 72 P.3d 685 (Utah 2003). Here, the excluded exhibit clearly pertains to public facilities, specifically referring to "patient waiting area[s]" and "patient examination room[s]." Thus, the ALJ did not abuse his discretion in ruling that this exhibit was irrelevant in a case involving standards of care in home health care settings.

> not substitute its judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review. It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences.

Albertsons, Inc. v. Department of Employment Sec., 854 P.2d 570, 575 (Utah Ct. App. 1993) (quotations and citations omitted). Here, instead of marshaling the evidence in support of DOPL's finding regarding the proper standard of care, Jepson simply reargued the evidence in favor of his position. Jepson has therefore failed to meet his burden of showing that the Board's determination was not supported by substantial evidence.[6]

Jepson also implies that the Board ignored certain legal "instructions" when it reached its decision regarding Count III. However, even where there are allegations that the fact-finder has ignored instructions, we will not reverse a decision "where there is sufficient evidence in the record to support the [fact-finder's] verdict on legally sound grounds." Jensen v. IHC Hosps., Inc., 2003 UT 51,¶106, 82 P.3d 1076 (quotations and citation omitted) (refusing to reverse a jury verdict even though the plaintiff argued that the jury ignored the instructions of law it received). Jepson here admits that he obtained the morphine sulfate for the patient's use, took the medication to his home, kept it there against the patient's and her family's wishes, and later destroyed it. Clearly, there is sufficient evidence in the record to support the Board's determination that

---

[6]Jepson also asks this court to strike certain findings relating to his disposal of the morphine sulfate, arguing that there is insufficient evidence to support them. However, such findings are relevant only to Counts II and IV of DOPL's petition, both of which were dismissed. Therefore, even if the findings were unsupported, they are harmless and need not be addressed by this court. See State v. Verde, 770 P.2d 116, 120 (Utah 1989) ("Errors we label 'harmless' are errors which . . . are sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings.").

Jepson failed to produce a medication he purchased for a patient in violation of Utah Code section 58-31b-502(7). See Utah Code Ann. § 58-31b-502(7) (Supp. 1998) (prohibiting the "unauthorized taking or personal use of a patient's personal property").[7]

Jepson also finds error with DOPL's and the Department's interpretation of Utah Administrative Code rule 156-37-502(4) (Rule 502(4)).[8] See Utah Admin. Code R156-37-502(4) (2002). He seems to argue that his actions were consistent with, if not mandated by, the requirements of Rule 502(4), and that the interpretation of Rule 502(4) amounted to an improper modification thereof. But even if DOPL's interpretation were incorrect, Jepson provides neither analysis nor authority addressing the effect of Rule 502(4) on the violations set out in Counts I and III. Furthermore, "this court will not disturb the agency's interpretation or application of one of the agency's rules unless its determination exceeds the bounds of reasonableness and rationality. Thus, we will overturn the agency's interpretation only if that interpretation is an abuse of discretion." Brown & Root Indus. Serv., 947 P.2d at 677 (citation omitted); see also State v. Garcia, 965 P.2d 508, 511 n.1 (Utah Ct. App. 1998) ("Generally, an agency's interpretation

---

[7]Jepson also contends that the determination that he violated Utah Code section 58-31b-502(7) was in error because DOPL found he "acted with good intentions." However, section 58-31b-502(7) simply prohibits the "unauthorized taking . . . of a patient's personal property"; it does not require that the "taking" be done knowingly or intentionally. Compare Utah Code Ann. § 58-31b-502(7) (Supp. 1998) ("'Unprofessional conduct' includes: . . . (7) unauthorized taking or personal use of a patient's personal property.") with id. § 58-31b-502(8) ("'Unprofessional conduct' includes: . . . (8) knowingly entering into any medical record any false or misleading information . . . ." (emphasis added)). Furthermore, the "unauthorized taking" proscribed by section 58-31b-502(7) constitutes "unprofessional conduct"; it does not constitute "unlawful conduct," which is punishable as a crime under Title 58. See, e.g., Utah Code Ann. § 58-1-502 (1998); id. § 58-31b-503 (Supp. 1998) (prescribing criminal penalties for "unlawful" conduct).

[8]Rule 502(4) states that "[u]nprofessional conduct" includes "failing to maintain controls over controlled substances which would be considered by a prudent practitioner to be effective against diversion, theft, or shortage of controlled substances." Utah Admin. Code R156-37-502(4) (2002).

of its own rules, especially where the Legislature has granted the agency discretion in that area, is subject to deference by a reviewing court."). Rule 502(4) is clearly one of DOPL's rules. See Utah Code Ann. § 58-1-501(2) (1998) ("'Unprofessional conduct' means conduct, by a licensee or applicant, that is defined as unprofessional conduct . . . under any rule adopted under this title . . . ."); Utah Admin. Code R156-37-103 (2002) (stating that the Utah Controlled Substances Act Rules, including Rule 502(4), were adopted under Utah Code Title 58 "to enable [DOPL] to administer Title 58, Chapter 37"). Where, as here, DOPL's interpretation of Rule 502(4) was reasonable and rational, DOPL did not abuse its discretion.

Jepson also argues that DOPL's interpretation would cause nurses to illegally distribute controlled substances in violation of section 58-37-8(1)(a)(ii) of the Utah Controlled Substances Act (UCSA). See Utah Code Ann. § 58-37-8(1)(a)(ii) (1998). However, section 58-37-8(1)(a)(ii) specifically excepts those acting "as authorized by [Chapter 37]." And under Chapter 37, persons licensed to distribute controlled substances may do so to the extent authorized by their license. See Utah Code Ann. § 58-37-6(2)(b) (1998). Therefore, a nurse distributing a controlled substance in conformance with his license would not violate section 58-37-8(1)(a)(ii) of the UCSA.[9]

Jepson finally argues that requiring him to notify his current and future employers of the private reprimand is unreasonable and inconsistent with a private reprimand. An agency's decision regarding how to sanction a licensee is a mixed question of law and fact. See Rogers v. Division of Real Estate of the Dep't of Bus. Regulations, 790 P.2d 102, 106 (Utah Ct. App. 1990). Therefore, we will not disturb the agency's decision unless its determination exceeds the bounds of reasonableness and rationality. See id. DOPL may "revoke, suspend, restrict, place on probation, issue a public or private reprimand to, or otherwise act upon the license" of a licensee that has engaged in unlawful or unprofessional conduct. See Utah Code Ann. § 58-1-401(2) (1998). Here, DOPL and the Department acted within their statutory discretion, "otherwise act[ing] upon the license" of Jepson. Id. As such, the decision to require Jepson to

---

[9]Furthermore, a controlled substance is not "distributed" when it is given to its rightful owner. See State v. Soroushirn, 571 P.2d 1370, 1371 (Utah 1977). Therefore, Jepson would not have violated the UCSA by giving the prescription to his patient or to her family members residing with her. See Utah Code Ann. § 58-37-2(kk) (1998) (defining "[u]ltimate user" as "any person who lawfully possesses a controlled substance for his own use [or] for the use of a member of his household").

notify his current and future employers of the reprimand against him does not exceed the bounds of reasonableness and rationality.

Affirmed.

_____
James Z. Davis, Judge

WE CONCUR:

_____
Judith M. Billings,
Presiding Judge

_____
William A. Thorne Jr., Judge