

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: 11/15/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

ROSALYN D. KEITH, D.D.S., ) No. 1 CA-CV 12-0014  
)  
Plaintiff/Appellant, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ARIZONA STATE BOARD OF DENTAL ) Rule 28, Arizona Rules of  
EXAMINERS, ) Civil Appellate Procedure)  
)  
Defendant/Appellee. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. LC2009-000836-001

The Honorable Crane McClennen, Judge

**AFFIRMED**

Jeffrey J. Tonner Phoenix  
Attorney for Plaintiff/Appellant

Thomas C. Horne, Arizona Attorney General Phoenix  
by Mary DeLaat Williams, Assistant Attorney General  
Attorneys for Defendant/Appellee

S W A N N, Judge

¶1 Appellant Rosalyn Keith ("Keith"), a dentist, was sanctioned by the State Board of Dental Examiners (the "Board") after it accepted an Administrative Law Judge's findings of fact, conclusions of law and recommendation in a case arising

out of Keith's unauthorized administration of conscious sedation. Among other sanctions, the Board imposed a ninety-day suspension as a condition of probation. Keith sought review in the superior court, which affirmed the decision of the Board. Keith argues that the Board denied her due process, and that it violated Arizona's Open Meetings Law, A.R.S. § 38-431 *et seq.* We conclude that Keith was not denied due process, and that the Board did not violate the Open Meetings Law when it entered executive session. We therefore affirm the superior court's judgment.

#### *FACTS AND PROCEDURAL HISTORY*<sup>1</sup>

¶12 The Board investigated Keith based on a complaint by L.P. regarding reconstructive dental treatment that Keith performed. L.P. visited Keith on several occasions for dental treatment and follow-up visits. Keith gave L.P. Valium to be taken the night before each procedure and Triazolam to be taken sublingually the morning of the procedure.

¶13 L.P. was dissatisfied with Keith's treatment. She contended that her provisional veneers did not fit correctly, and that Keith left part of the packing string under her gum line. L.P. ultimately sought treatment from another dentist.

---

<sup>1</sup> We view the facts in the light most favorable to upholding the Board's decision. See *Eaton v. Ariz. Health Care Cost Containment Sys.*, 206 Ariz. 430, 431, ¶ 2, 79 P.3d 1044, 1045 (App. 2003).

Clinical and radiographic documentation from L.P.'s new dentist showed that provisional restorations on several of L.P.'s teeth "had deficient margins and/or there was decay present."

¶4 In March 2007, L.P. filed a complaint against Keith with the Board, alleging unprofessional conduct for the "administration of oral conscious sedation without a valid permit and the inadequate provisional restorations [Keith] placed." Pursuant to A.R.S. § 32-1263.02, the Board conducted an investigation and referred the matter to the Office of Administrative Hearings for a formal administrative hearing.<sup>2</sup> The Board's Complaint and Notice of Hearing charged Keith with four violations of the Dental Practices Act: (1) unprofessional conduct; (2) Keith's "administration of oral conscious sedation to [L.P] without a valid permit"; (3) Keith's unprofessional statements "to the practice monitoring firm during its assessment of [Keith's] possession of permit to administer oral conscious sedation"; and (4) Keith's failure to maintain L.P.'s original treatment record, and failure to provide that record to the Board.

---

<sup>2</sup> Pursuant to an earlier Board order, in February 2008, Keith had commissioned the services of a practice monitoring firm to assess her dental practice. The firm evaluated operation and management of Keith's practice, the accuracy of Keith's billing practices, and the quality of the office's documentation. The firm found that Keith's practice was deficient in many areas, including disorganization, "a lack of business acumen," "serious" financial problems, mismanagement, and questionable billing practices.

¶15 After a hearing, the ALJ issued his decision on September 1, 2009, finding that: (1) Keith administered oral conscious sedation without a permit; (2) Keith's administration of oral conscious sedation without a permit "constituted a danger to the health, safety, and welfare" of L.P., violating A.R.S. § 32-1201(21)(n); and (3) Keith failed to maintain L.P.'s original treatment record. The ALJ found that there was insufficient evidence to demonstrate that Keith falsely represented that she had a permit to administer oral conscious sedation. The ALJ recommended that the Board sanction Keith with a stayed revocation of her dental license for five years during a probationary period, a prohibition on her use of oral conscious sedation (subject to later Board review in the event Keith obtains a permit to administer oral conscious sedation or anxiolysis), and a \$2,000 administrative penalty.

¶16 The Board heard oral argument and considered the recommended order of the ALJ. On October 14, 2009, the Board issued an order that imposed the ALJ's recommendations. The Board also imposed the following conditions on Keith's probation: (1) A ninety-day suspension; (2) "RANDOM RECORD AUDITS, at the expense of [Keith], to ensure anxiolysis or Oral Sedation drugs have not been administered to her patients"; and (3) "RANDOM SURVEYS by the Chief Investigator to both Pharmacies and Drug Suppliers, reportable to the Board and also at

[Keith's] expense." The Board also issued a finding of emergency, making the order immediately effective.

¶17 Keith appealed to the superior court, which affirmed the decision of the Board. Keith timely appeals. We have jurisdiction pursuant to A.R.S. § 12-913.

*STANDARD OF REVIEW*

¶18 We review constitutional claims, such as an alleged denial of due process, de novo.<sup>3</sup> *Carlson v. Ariz. State Personnel Bd.*, 214 Ariz. 426, 430, ¶ 13, 153 P.3d 1055, 1059 (App. 2007). When reviewing the decision of an administrative agency, "the superior court examines whether the agency's action was arbitrary, capricious, or an abuse of discretion . . . [and] [t]he court must defer to the agency's factual findings and affirm them if supported by substantial evidence." *Gaveck v. Ariz. State Bd. of Podiatry Examiners*, 222 Ariz. 433, 436, ¶ 11, 215 P.3d 1114, 1117 (App. 2009) (citation omitted). We engage in the same review as the superior court when reviewing its ruling affirming an administrative decision. *Id.* at ¶ 12.

---

<sup>3</sup> In her Opening Brief, Keith broadly challenges the discipline imposed as a violation of *Ritland v. Arizona State Board of Medical Examiners*, 213 Ariz. 187, 140 P.3d 970 (App. 2006). We examine that specific contention in Section C. Though Keith's Opening Brief does not clearly spell out the relationship between her legal theories and the procedural facts of which she complains, we have endeavored to identify her discrete arguments and address them separately.

*DISCUSSION*

¶9 Keith contends that she was denied due process because one of the Board members was biased, the Board did not articulate the standard of care when it affirmed the decision of the ALJ, and the Board modified the credibility findings of the ALJ without properly justifying its actions. She also suggests that an executive session that preceded the decision of the Board violates Arizona's Open Meetings Law.

*I. KEITH'S RIGHT TO DUE PROCESS WAS NOT VIOLATED BY THE BOARD'S DECISION.*

¶10 Keith contends that the superior court erred by affirming the decision of the Board because the Board acted in a manner inconsistent with due process, rendering the judgment void. We disagree and conclude that the Board acted consistently with due process.

¶11 Keith's due process right is based on her property interest in her license. See *Comeau v. Ariz. State Bd. of Dental Examiners*, 196 Ariz. 102, 106, ¶ 18, 993 P.2d 1066, 1070 (App. 1999). "When a professional license is at stake, 'the State's interest must justify the degree of infringement which ensues from the sanction, and appropriate procedures must be used to guard against arbitrary action.'" *Id.* at ¶ 19 (citation omitted). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a

meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, (1976) (citation omitted). Procedural due process requires notice and an opportunity to be heard. *Iphaar v. Indus. Comm'n*, 171 Ariz. 423, 426, 831 P.2d 422, 425 (App. 1992).

A. Keith Did Not Demonstrate That a Board Member Acted with Actual Bias.

¶12 Due process requires a "fair trial in a fair tribunal." *United States v. Superior Court*, 144 Ariz. 265, 280, 697 P.2d 658, 673 (1985) (citation omitted). Decision makers, including judges and administrative tribunals, "are entitled to a presumption of 'honesty and integrity.'" *Emmett McLoughlin Realty, Inc. v. Pima Cnty.*, 212 Ariz. 351, 357, ¶ 24, 132 P.3d 290, 296 (App. 2006) (citation omitted). "To rebut this presumption, the challenging party must show actual bias; mere speculation about bias is not sufficient." *Id.* To show bias, Keith was required to demonstrate that the mind of the decision maker was "irrevocably closed" on the issue in question. *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Products, Inc.*, 167 Ariz. 383, 387, 807 P.2d 1119, 1123 (App. 1990).

¶13 Keith contends that a member of the Board was biased against her because at the October 9, 2009 Board meeting, the member stated that she should be suspended for ninety days -- Keith contends that this demonstrated that the Board had come to a decision before meeting. We disagree. At the meeting,

Keith's counsel and the Board's advocate counsel both presented arguments.<sup>4</sup> The Board's counsel stated "the ALJ's decision [was] fair and supported by the evidence that was presented at the hearing from both sides[,]" but she explained that during the ALJ hearing she had recommended "that some type of suspension be placed on [Keith's] license," arguing that "with the addition of certain probationary terms that recommendation will adequately protect the public[.]"

¶14 A Board member asked the Board's counsel what she believed would be an adequate time frame for the suspension. Although the Board's counsel did not provide a specific time frame, she recommended at least thirty days, "because anything less than that [she] just view[ed] as a vacation to some people." The Board followed that advice and collectively decided on the ninety-day suspension. The Board then decided to adopt the ALJ's recommendations verbatim with the addition of the ninety-day suspension.

¶15 There is nothing in the record to show that the Board had any "actual bias" toward Keith. The Board member listened to the presentation of the Board's counsel and made an informed decision to recommend imposition of the ninety-day sanction. The Board agreed with the recommendation. The fact that the

---

<sup>4</sup> Two counsel were present for the Board. One served as an independent advisor, and the other as an advocate.



Board made a collective decision to implement its counsel's advice, as opposed to adopting the position taken by Keith's counsel, does not demonstrate bias against Keith. We conclude that Keith's due process rights were not violated in this regard.

B. The Board Adequately Set Forth the Applicable Legal Standards and Demonstrated the Manner in Which Keith's Actions Deviated from Those Standards.

¶16 Keith further contends that her due process rights were violated because the board did not articulate the standard of care and her alleged divergence in regards to unprofessional conduct. Pursuant to *Gaveck*, the Board cannot "provide a fair hearing on an issue of negligence without identifying the standard of care and articulating the alleged deviation." 222 Ariz. at 438, ¶ 18, 215 P.3d at 1119 (citation omitted).

¶17 Under A.R.S. § 32-1201(21)(n), unprofessional conduct can be evidenced by "[a]ny conduct or practice that constitutes a danger to the health, welfare or safety of the patient or the public." Moreover, A.R.S. § 32-1201(21)(w) sets forth that unprofessional conduct occurs when a party fails "to comply with a board subpoena in a timely manner." The ALJ's recommendation provided the pertinent law for unprofessional conduct and demonstrated the facts which the ALJ concluded deviated from that standard. The Conclusions of Law clearly set forth the law and the pertinent facts:

4. [Keith's] treatment of L.P. involving the administration of oral conscious sedation without a permit and the inadequate provisional restorations that [Keith] placed constituted a danger to the health, safety, and welfare of L.P. Such conduct constitutes a violation of A.R.S. § 32-1201(21)(n).

5. [Keith's] failure to maintain L.P.'s original treatment record and to provide it to the Board in response to the Board's subpoena constitutes a violation of A.R.S. §§ 32-1264(A) and 32-1201(21)(w) and (x).

We conclude that these findings are both clear and adequate. The Board laid out the pertinent law and applied the relevant facts, effectively explaining the manner in which Keith's actions deviated from those legal standards. We discern no due process violation.

C. The Board Did Not Alter the ALJ's Credibility Determinations.

¶18 Keith contends that her due process rights were violated because after the ALJ made certain credibility findings during the hearings, "[t]he medical board, without stating why, changed those findings and held [them] against the physician." Keith argues this action violated *Ritland v. Arizona State Board of Medical Examiners*, 213 Ariz. 187, 140 P.3d 970 (App. 2006), mandating reversal. Again, we disagree.

¶19 The credibility findings of the ALJ were not at issue, and the record does not demonstrate that the Board disagreed with those determinations. The Board adopted the ALJ's Findings of Fact in its entirety. This key fact distinguishes *Ritland*,

which arose out of a different board apparently rejecting an ALJ's credibility findings. See *id.* at 191-92, ¶ 15, 140 P.3d at 974-75. Moreover, both suspension of Keith's license and probation, combined, are authorized consequences under A.R.S. § 32-1263.01(A)(2) and (4) (noting Board "may take any one or a combination of the following disciplinary actions," including suspension and probation).

¶20 After listening to the argument from counsel for both L.P. and Keith, the Board made a collective decision to add to the recommendation of the ALJ the ninety-day suspension, random record audits, and random surveys by the Chief Investigator to pharmacies and drug suppliers. The record demonstrates that these decisions were not based upon modification of the credibility findings of the ALJ, but rather on the Board's own judgment as to the proper sanction -- especially in view of Keith's disciplinary history.<sup>5</sup>

## II. THE BOARD DID NOT VIOLATE ARIZONA'S OPEN MEETINGS LAW.

¶21 Under the Open Meetings Law, "[a]ll meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. All legal action of public bodies shall occur during a public meeting." A.R.S. § 38-431.01(A). With a

---

<sup>5</sup> Between 1999 and 2007, Keith had been subjected to discipline by ten different Board orders.

majority vote of the members constituting a quorum, a public body may hold an executive session for "[d]iscussion or consideration of employment" and "disciplining" of a public officer. A.R.S. § 38-431.03(A)(1). Under the Open Meetings Law, "[m]inutes of executive sessions shall include . . . an accurate description of all instructions given pursuant to § 38-431.03, subsection A, paragraphs 4, 5, and 7[.]" A.R.S. § 38-431.01(C). The description must include a

[d]iscussion or consultation with the attorneys of the public body in order to consider its position and instruct its attorneys regarding the public body's position regarding contracts that are the subject of negotiations, in pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation.

A.R.S. § 38-431.03(A)(4).

¶122 Keith suggests that the Board violated the Open Meetings Law because it entered executive session before any discussion on the merits of the case and proceeded to accept the ALJ's recommendations with no changes and without any discussion on the merits. She suggests that the Board's actions strongly suggested that the Board impermissibly discussed and decided the case in an illegal closed session. Finally, Keith suggests that the Board did not attest that minutes or a transcript of the executive session exist.

¶123 We find no merit in those arguments. The Board provided the minutes and the transcript for the October 9, 2009

meeting. The transcript demonstrates that the Board thoroughly discussed the merits of the case in public before entering executive session. The Open Meetings Law does not require additional discussion after executive session, so long as the Board's action is premised on the discussion held in open session. Nothing in the record indicates a violation of the Open Meetings Law.

*CONCLUSION*

¶24 For the foregoing reasons, we affirm the superior court's judgment. Because she is not the prevailing party, we deny Keith's request for attorney's fees and costs.

/s/

---

PETER B. SWANN, Judge

CONCURRING:

/s/

---

PHILIP HALL, Presiding Judge

/s/

---

SAMUEL A. THUMMA, Judge