

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph J. Lazorick, D.M.D.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1558 C.D. 2007
	:	
State Board of Dentistry,	:	Submitted: November 21, 2007
	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: January 24, 2008

In this Petition for Review, Joseph J. Lazorick, D.M.D. (Licensee) challenges the Final Adjudication and Order (A&O) of the State Board of Dentistry (Board), which revoked Licensee’s license to practice dentistry in the Commonwealth and imposed a \$5,000 civil penalty for five violations of The Dental Law.¹ On appeal, Licensee argues that the penalties imposed on him by the Board are disproportionate to the violations found by the Board, and that the

¹ Act of May 1, 1933, P.L. 216, No. 76, as amended, 63 P.S. §§ 120-130j.

Board, therefore, abused its discretion in imposing these penalties. Discerning no merit in this assertion, we affirm.

On November 3, 2006, the Commonwealth, through a prosecuting attorney for the Bureau of Professional and Occupational Affairs (Bureau), filed an Order to Show Cause (OSC) charging Licensee with five counts of violating the Dental Law. Specifically, the OSC alleged that Licensee had prescribed for himself at least 3,540 tablets of the antidepressant Trazodone, approximately 450 tablets of the antidepressant Fluoxetine, and approximately 3,455 tablets of Codeine, a Schedule III narcotic. The OSC also alleged that Licensee prescribed for his receptionist, D.C., with whom Licensee had maintained a personal relationship, 40 tablets of Vicodin ES, a Schedule III narcotic, and 10 Fentanyl patches, a Schedule II narcotic. The OSC alleged that Licensee's patient records did not properly document these prescriptions, or examinations associated with them. Additionally, the OSC alleged that Licensee continued to prescribe Vicodin for himself and D.C. after his license was suspended in March, 2005.² The OSC also alleges that Licensee wrote prescriptions for Vicodin and Fentanyl after his license expired on June 30, 2005. Appended to the OSC was a report by Arthur A. Kravitz, D.M.D., opining that Licensee's prescribing these medications was not medically warranted and constituted unprofessional conduct. By letter dated November 28, 2006, Licensee requested a hearing regarding the charges contained in the OSC; however, Licensee did not address or answer the charges themselves.

² Licensee's license was suspended not for issues to do with the practice of dentistry, but pursuant to Section 4355 of the Domestic Relations Code, 23 Pa. C.S. § 4355.

On December 4, 2006, the Bureau filed a Motion to Enter Default and Deem Facts Admitted, arguing that Licensee's letter did not conform to the requirements for an answer under the General Rules of Administrative Practice and Procedure at 1 Pa. Code § 35.37³ and that the factual allegations in the OSC should, therefore, be deemed admitted. In response, the Board filed an Order Directing Licensee to File an Answer on January 17, 2007, instructing Licensee to submit an answer specifically admitting or denying each allegation in the OSC. Licensee did not reply and, on February 21, 2007, the Board entered an order granting the Bureau's Motion to Enter Default and Deem Facts Admitted. A hearing took place on April 2, 2007 to take evidence and testimony regarding mitigation of the charges. Licensee did not attend.

On July 16, 2007, the Board entered its A&O finding that Licensee had committed five violations of the Dental Law: Section 4.1(a)(8) of the Dental Law,

³ 1 Pa. Code § 35.37 states:

A person upon whom an order to show cause has been served under § 35.14 (relating to orders to show cause) shall, if directed so to do, respond to the same by filing within the time specified in the order an answer in writing. The answer shall be drawn so as specifically to admit or deny the allegations or charges which may be made in the order, set forth the facts upon which respondent relies and state concisely the matters of law relied upon. Mere general denials of the allegations of an order to show cause which general denials are unsupported by specific facts upon which respondent relies, will not be considered as complying with this section and may be deemed a basis for entry of a final order without hearing, unless otherwise required by statute, on the ground that the response has raised no issues requiring a hearing or further proceedings. A respondent failing to file answer within the time allowed shall be deemed in default, and relevant facts stated in the order to show cause may be deemed admitted.

1 Pa. Code § 35.37.

63 P.S. § 123.1(a)(8),⁴ unprofessional conduct; Section 4.1(a)(6) of the Dental Law, 63 P.S. § 123.1(a)(6),⁵ violation of the Board’s regulations, at 49 Pa. Code § 33.207,⁶ for improper prescribing; Section 4.1(a)(6), violation of the Board’s

⁴ Added by Section 5 of the Act of December 20, 1985, P.L. 513. Section 4.1(a)(8) of the Dental Law provides:

(a) The board shall have authority, by majority action, to refuse, revoke or suspend the license of any dentist or dental hygienist or certificate of an expanded function dental assistant for any or all of the following reasons:

....

(8) Engaging in unprofessional conduct. For purposes of this clause (8), unprofessional conduct shall include any departure from, or failure to conform to, the standards of acceptable and prevailing dental or dental hygiene practice and standard of care for expanded function dental assistants in which proceeding actual injury to the patient need not be established.

63 P.S. § 123.1(a)(8).

⁵ Section 4.1(a)(6) of the Dental Law provides:

(a) The board shall have authority, by majority action, to refuse, revoke or suspend the license of any dentist or dental hygienist or certificate of an expanded function dental assistant for any or all of the following reasons:

....

(6) Violating any of the provisions of this act or of a lawful regulation promulgated by the board or violating a lawful order of the board previously entered by the board in a disciplinary proceeding.

63 P.S. § 123.1(a)(6).

⁶ 49 Pa. Code § 33.207 provides in relevant part:

(a) When prescribing, administering or dispensing controlled substances as defined in section 4 of The Controlled Substance, Drug, Device and Cosmetic Act (35 P. S. § 780-104), a dentist shall comply with, or cause compliance with, the following minimum standards:

(1) Scope of authority. A dentist may prescribe, administer or dispense a controlled substance only:

- (i) In good faith in the course of the dentist's professional practice.
- (ii) Within the scope of the dentist-patient relationship.
- (iii) In accordance with treatment principles accepted by a responsible segment of the profession.

regulations, at 49 Pa. Code § 33.209,⁷ for failure to maintain proper patient

(2) Dental examination and medical history. A dental examination shall be conducted and a medical history shall be taken before a dentist initially prescribes, administers or dispenses a controlled substance to a patient. The examination and medical history shall be complete enough to justify the prescription, administration or dispensation of the controlled substance. The examination shall focus on the patient's dental problems, and the resulting diagnosis shall relate to the patient's specific complaint. The patient's dental record shall contain written evidence of the examination and medical history.

(3) Records.

(i) On each occasion when a controlled substance is prescribed, administered or dispensed to a patient, an entry shall be made in the patient's dental record containing the following information:

(A) The name, quantity and strength of the controlled substance.

(B) The directions for use.

(C) The date of issuance.

(D) The condition for which the controlled substance was issued.

(ii) For the purpose of this subsection, health care facility records will be considered part of the patient's dental record. A patient's dental record that contains entries pertaining to the issuance of controlled substances shall be retained by the dentist for a minimum of 5 years following the date of the last entry of any kind in the record.

....

(b) A dentist's failure to comply with this section will be considered unprofessional conduct and will subject the noncomplying dentist to disciplinary action as authorized in section 4.1(a)(8) of the act (63 P. S. § 123.1(a)(8)).

49 Pa. Code § 33.207.

⁷ 49 Pa. Code § 33.209 provides in relevant part:

(a) A dentist shall maintain a dental record for each patient which accurately, legibly and completely reflects the evaluation and treatment of the patient. A patient dental record shall be prepared and maintained regardless of whether treatment is actually rendered or whether a fee is charged. The record shall include, at a minimum, the following:

records; Section 4.1(a)(6), violation of the Board's regulations, at 49 Pa. Code

- (1) The name and address of the patient and, if the patient is a minor, the name of the patient's parents or legal guardian.
- (2) The date of each patient visit.
- (3) A description of the patient's complaint, symptoms and diagnosis.
- (4) A description of the treatment or service rendered at each visit and the identity of the person rendering it.
- (5) Information as required in § 33.208 (relating to prescribing, administering and dispensing medications) and this section with regard to controlled substances or other medications prescribed, administered or dispensed.
- (6) The date and type of radiographs taken and orthodontic models made, as well as the radiographs and models themselves. Notwithstanding this requirement, the dentist may release orthodontic models to the patient. This transaction shall be memorialized on a form which is signed by the patient. The signed form shall become part of the patient's record.
- (7) Information with regard to the administration of local anesthesia, nitrous oxide/oxygen analgesia, conscious sedation, deep sedation or general anesthesia. This shall include results of the preanesthesia physical evaluation, medical history and anesthesia procedures utilized.
- (8) The date of each entry into the record and the identity of the person providing the service if not the dentist of record—for example, dental hygienist, expanded function dental assistant, dental assistant, and the like.

(b) A patient dental record shall be retained by a dentist for a minimum of 5 years from the date of the last dental entry.

....

(g) This section does not restrict or limit the applicability of recordkeeping requirements in §§ 33.207 and 33.208 (relating to prescribing, administering and dispensing controlled substances; and prescribing, administering and dispensing medications).

(h) A dentist's failure to comply with this section will be considered unprofessional conduct and will subject the noncomplying dentist to disciplinary action as authorized in section 4.1(a)(8) of the act (63 P. S. § 123.1(a)(8)).

49 Pa. Code § 33.209.

§ 33.101,⁸ practicing dentistry with a suspended license; and Section 4.1(a)(6), violation of the Board's regulations, at 49 Pa. Code § 33.101, practicing dentistry with an expired license. Pursuant to Section 10.1 of the Dental Law, 63 P.S. § 129.1,⁹ the Board imposed the maximum \$1000 civil penalty for each of these violations and revoked Licensee's license to practice dentistry in the Commonwealth.

⁸ 49 Pa. Code § 33.101 provides:

- (a) Only persons holding a current license issued by the Board may practice dentistry or may practice as a dental hygienist in this Commonwealth.
- (b) Only persons holding a certificate issued by the Board may practice as an expanded function dental assistant in this Commonwealth.
- (c) To secure a license or certificate, an applicant shall satisfy the requirements of the act and of this subchapter.
- (d) Applications for licensure or certification shall be made on forms supplied by the Board and shall be accompanied by the application fee in § 33.3 (relating to fees).

49 Pa. Code § 33.101.

⁹ Section 10.1 of the Dental Law provides:

In addition to any other civil remedy or criminal penalty provided for in this act, the board, by a vote of the majority of the maximum number of the authorized membership of the board as provided by law, or by a vote of the majority of the duly qualified and confirmed membership or a minimum of six members, whichever is greater, may levy a civil penalty of up to one thousand dollars (\$ 1,000) on any current licensee who violates any provision of this act or on any person who practices dentistry or as a dental hygienist or as an expanded function dental assistant without being properly licensed or certified to do so under this act. The board shall levy this penalty only after affording the accused party the opportunity for a hearing as provided in Title 2 of the Pennsylvania Consolidated Statutes (relating to administrative law and procedure).

63 P.S. § 129.1

Licensee now appeals to this Court,¹⁰ arguing that the penalties imposed on him by the Board are disproportionate to the violations found by the Board, and that the Board, therefore, abused its discretion in imposing these penalties. Licensee argues that the Board's primary purpose is to protect the Commonwealth from unfit practitioners and that, in the absence of evidence that Licensee was a threat to the public, the Board abused its discretion in levying upon him the harshest penalties allowed by the Dental Law.

The Legislature has given the Board discretion in imposing penalties for violations of the Dental Law, and this Court will not “substitute its judgment for that of the Board” or interfere with the Board's discretion. Zook v. State Board of Dentistry, 683 A.2d 713, 715 (Pa. Cmwlth. 1996). “In the absence of bad faith, fraud, capricious action or abuse of power, reviewing courts will not inquire into the wisdom of the agency's action or into the details or manner of executing agency action.” Slawek v. State Board of Medical Education and Licensure, 526 Pa. 316, 321, 586 A.2d 362, 365 (1991). Even where a penalty assigned by the Board appears to this Court to be unreasonably harsh, this Court will not overturn such a decision so long as it is in accordance with the law. Zook, 683 A.2d at 715 (citing Slawek).

Although Licensee tries to characterize this case as an incidence of a regulatory board running amok, it does not appear to this Court that the penalty

¹⁰ In an appeal from a decision by the Board, this Court's review is limited to determining whether the Board's decision is supported by substantial evidence, whether the Board committed errors of law, and whether constitutional rights were violated. Mostatab v. State Board of Dentistry, 881 A.2d 1271, 1273 n.2 (Pa. Cmwlth. 2005.)

assigned by the Board is unreasonably harsh under the circumstances. The Board found that Licensee prescribed for himself, and for an employee with whom he had previously had a personal relationship, very large quantities of controlled narcotics.¹¹ The Board also found that Licensee had prescribed for himself very large quantities of antidepressant medication. The Commonwealth has a strong interest in ensuring that access to dangerous or addictive drugs is strictly controlled. Health care providers have special access to these drugs, and a violation of this trust is a serious matter. This is hardly the first case in which such violations have been severely punished by a health care regulatory board. Karageorge v. State Dental Council and Examining Board, 458 A.2d 299 (Pa. Cmwlth. 1983) (dentist's license revoked following conviction for dispensing controlled substances without a prescription); see also, Cohen v. State Board of Medicine, 676 A.2d 1277 (Pa. Cmwlth. 1996) (affirming revocation of Physician's license for illicitly prescribing narcotics); Gaynor v. State Board of Pharmacy, 513 A.2d 521 (Pa. Cmwlth. 1986) (revoking Pharmacist's license following federal conviction for conspiring to distribute and distributing controlled substances); Moeslein v. State Board of Pharmacy, 432 A.2d 295 (Pa. Cmwlth. 1981) (upholding revocation of pharmacist's license for illicit distribution of controlled substances); Quintana v. State Board of Osteopathic Medical Examiners, 466 A.2d 250 (Pa. Cmwlth. 1983) (upholding revocation of osteopath's license for fraudulent conduct in connection with controlled substances).

¹¹ Although in his brief Licensee repeatedly characterizes the facts of this case as "deemed established," Licensee does not appear to dispute these facts or to argue that the order deeming these facts admitted was improperly entered.

And while, as Licensee argues, the suspension and expiration of his license may have had nothing to do with his fitness to practice dentistry, the fact that he continued to write prescriptions for dangerous narcotics certainly does raise serious questions regarding his judgment and fitness. Likewise, Licensee's argument that the Board's renewal of his license on January 23, 2007, more than two months after the OSC was filed, indicates that the Board did not regard him as a threat to the public, is specious. As the Board points out, renewal of a professional license is a ministerial function, which the Dental Law does not give the Board the discretion to decline to do. See 63 P.S. § 122.1.

Finally, Licensee argues that by imposing the maximum penalties for the violations in this case, the Board leaves itself nowhere to go when confronted with even more serious violations. Again, this argument fails. The violations the Board found in this case are serious, and the Board treated them seriously. Merely because some practitioner might do something worse is not a reason to overturn the Board's decision to impose the maximum penalties allowed by the Dental Law.

For these reasons, we affirm the A&O of the Board.

RENÉE COHN JUBELIRER, Judge

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Petitioner	:	
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v.	:	No. 1558 C.D. 2007
	:	
State Board of Dentistry,	:	
	:	
Respondent	:	

ORDER

NOW, January 24, 2008, the Final Adjudication and Order of the State Board of Dentistry in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge