IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

KEITH SOKOLOFF, D.O.,	)	
	)	
Appellant,	)	C.A. No.: N09A-11-005 DCS
	)	
v.	)	
	)	
THE BOARD OF MEDICAL PRACTICE,	)	
	)	
Appellee.	)	

Submitted: May 20, 2010
Decided: August 25, 2010

Upon Appeal From a Decision and Order of the Board of Medical Practice.
AFFIRMED.

MEMORANDUM OPINION

Appearances:

Christopher A. Selzer, Esquire, Wilmington, Delaware
Theodore Annos, Esquire, Wilmington, Delaware
Attorneys for Appellant Keith Sokoloff.

Patricia Davis Oliva, Deputy Attorney General, Dover, Delaware
Attorney for Board of Medical Practice.

STREETT, Judge.

Before this Court is Keith R. Sokoloff, D.O.'s ("Sokoloff") appeal of a decision and order of the Board of Medical Practice ("the Board") dated November 3, 2009, denying his application for a certificate to practice medicine in the State of Delaware pursuant to 24 *Del. C.* § 1720(e)(4).

FACTUAL & PROCEDURAL BACKGROUND

On March 21, 2000, Sokoloff was issued a certificate to practice medicine in the State of Delaware.[1] Beginning in February 2002, Sokoloff's employer, Total Care Physicians, P.A. ("Total Care") began receiving reports from various pharmacies regarding Sokoloff's prescribing practices and discovered that Sokoloff was writing prescriptions for patients with whom he had no doctor/patient relationship or documentation,[2] in violation of Delaware's Uniform Controlled Substance Act ("UCSA"), 16 *Del. C.* ch. 47.[3] On February 24, 2004, Total Care issued a written warning to Sokoloff reminding him that UCSA requires record-keeping of controlled substance prescriptions and dispensing.[4] Upon receiving additional pharmacy inquiries requesting verification for controlled substance prescriptions written by Sokoloff for patients for whom there were no medical

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[1] Hearing Panel Report, at *24.
[2] *Id.*
[3] 16 *Del. C.* ch. 47 states, in part:

> Practitioners authorized to prescribe or dispense controlled substances shall maintain a record with the following information: (a) name and address of patient (b) date prescribed [and] (c) name, strength, and amount of medication . . . The information for prescribed controlled substances may be kept either in a log or on patient records provided such records or logs are made available for inspection . . . Entries must include the date dispensed, name and address of the patient, name and strength of the medication, and amount dispensed.

[4] Hearing Panel Report, at *3.

records, Sokoloff was issued a second formal reprimand by letter from Total Care on March 17, 2004.[5] The March 17 reprimand suspended Sokoloff from his employment with Total Care, required that he refrain from the practice of medicine during the term of his suspension, enter into a structured therapeutic relationship with a medical practitioner, and provide Total Care with a formal action plan to implement the corrective measures.[6] On March 30, 2004, following the two formal reprimands from Total Care's Board of Directors, Sokoloff was terminated from his employment at Total Care for failure to comply with the terms of his suspension.[7] After discharging Sokoloff, Total Care filed a complaint against Sokoloff with the Division of Professional Regulation ("DPR").[8]

In April or May of 2004, the DPR began an investigation of Sokoloff and his activities.[9] Subsequently, the DPR Investigator became employed by the State of Delaware and a criminal investigation was initiated. The criminal investigation, revealed that Sokoloff excessively prescribed tranquilizers, muscle relaxants, pain medication and narcotics to individuals who were not his patients.[10] On March 15, 2005, during an interview with the State investigator in connection with its criminal investigation, Sokoloff in the presence of his attorney, admitted in a

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*, at *4.
[9] *See id.*
[10] *Id.*, at *5.

recorded statement that he had written illegal controlled substance prescriptions in exchange for money and had become addicted to Percocet.[11]

Sokoloff was arrested on March 15, 2005 and charged with sixty felonies. Sokoloff subsequently pled guilty on May 3, 2006 to one count of Felony Delivery of a Narcotic Schedule II Controlled Substance, one count of Felony Health Care Fraud, and one count of Felony Conspiracy to Commit Health Care Fraud.[12] On July 21, 2006, the Court sentenced Sokoloff to five years at Level V, suspended after 6 months, for 3 years at Level IV Home Confinement, suspended after 6 months, for 2 years at Level II Probation, with a hold at Level III.[13] The Court further ordered him to complete mental health and substance abuse evaluations and treatment following his release from prison, to perform 1000 hours of community service, and to speak to medical students about his drug addiction and associated legal problems.[14]

On September 11, 2006, the State filed a formal complaint with the Board against Sokoloff alleging unprofessional conduct pursuant to § 1731(b) of the Medical Practice Act.[15] Specifically, the complaint stated that he (1) committed three felonies substantially related to the practice of medicine in violation of 24

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[11] Hearing Panel Report, at *26.
[12] Sokoloff was initially charged with sixty (60) felonies, including eight (8) counts of Felony Health Care Fraud, twenty-six (26) counts of Felony Delivery of a Schedule II Narcotic, and twenty-six (26) counts of Felony Conspiracy to Commit Health Care Fraud. *See* Sokoloff Criminal History Record.
[13] Sentencing Hearing, at *5-7.
[14] *Id.*, at *6-7.
[15] 24 *Del. C.* § 1731(b).

Del. C. § 1731(b)(2); (2) used, distributed, or issued prescriptions for a dangerous or narcotic drug, other than for therapeutic or diagnostic purposes, in violation of 24 *Del. C.* § 1731(b)(6); and (3) committed misconduct, incompetence or gross negligence in the practice of medicine in violation of 24 *Del. C.* § 1731(b)(11).[16]

The Board conducted a hearing before a three-member Panel ("the Panel") on January 5, 2007, and the Panel received documentary evidence and heard sworn testimony.[17] Sokoloff subsequently filed a Motion to Supplement the Record with the testimony of Dr. Jay Weisberg.[18] The Board granted Sokoloff's request over the objection of the State, and reconvened on May 1, 2007 for the limited purpose of hearing the supplemental testimony.[19]

Although Sokoloff presented evidence that he suffered from a bipolar disorder and was involved in a dysfunctional relationship with a mistress, the Panel unanimously found, on December 28, 2007, that the allegations of unprofessional conduct based on 24 *Del. C.* § 1731(b)(2), (6) and (11) were established by a preponderance of the evidence.[20] As a result of its findings of fact and conclusions

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[16] *See* Complaint, at *1-2.

[17] 24 *Del. C.* § 1734(a) provides, in pertinent part, as follows:

> (a) Procedure – After the Board accepts a formal complaint which ahs been prepared by the Board-appointed investigative committee, the Board shall appoint a hearing panel composed of 3 members of the Board, who shall hear all evidence concerning charges of unprofessional conduct . . . alleged in the complaint. Such evidence shall be taken upon sworn testimony. The rules of evidence of the Superior Court of this State shall be followed as far as practicable. After all evidence has been heard by the hearing panel, it shall make a written statement of its findings of fact and conclusions of law. The findings of fact made by the hearing panel shall be binding on the parties appearing before it and shall also be adopted by and binding upon the Board . . . .

[18] *See* Hearing Panel Report, at *1, n.1 and *19-24.

[19] *Id.*

[20] *Id.*, at *34.

of law, the Panel recommended that Sokoloff's medical license be revoked for a period of one (1) year from the date of the Board's final order or the expiration of Sokoloff's period of probation, whichever occurs *last*.[21] The Panel also recommended that Sokoloff be prohibited from re-applying for licensure during the period of revocation.[22]

On March 4, 2008, pursuant to 24 *Del. C.* § 1734(f), the Board held a formal hearing to review and consider the conclusions and recommended disciplinary sanction submitted by the Panel and to entertain argument from the State and Sokoloff.[23] The State advocated for permanent license revocation. Nevertheless, on April 1, 2008, the Board issued an Order adopting the Panel's recommendation for revocation of Sokoloff's license for one year from the date of the Board's final Order or the expiration of Sokoloff's probation period, whichever occurs last.[24] The Board further ordered that Sokoloff is prohibited from reapplying for his license during the period of revocation and that he "will be considered a new

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[21] *Id.* (emphasis added).

[22] The Panel does not have independent authority to take disciplinary action against the offending medical license holder. 24 *Del. C.* § 1734(a) states:

> (a) . . . If the hearing panel finds that any or all of the factual allegations made in the complaint are supported by the evidence it has considered, the Board, excluding members of the hearing panel and any investigative committee members, will consider the statement of the findings of the fact and conclusion of law made by the hearing panel at a formal hearing. Such formal hearing is to be held within 60 days after the issuance of the written statement of the hearing panel. At such formal hearing the Board shall meet to make its own conclusions of law and to determine what disciplinary action, if any, is appropriate based upon the findings of fact made by the hearing panel. A majority vote of no less than 6 board members who consider the matter shall be necessary in order for any disciplinary action to be taken. Upon the reaching of conclusions of law and determination of the appropriate disciplinary action, the Board shall issue a written opinion.

[23] *See* Board Revocation Order, at *1, 2.

[24] *Id.*, at *6.

applicant upon reapplication and the Board will review his application under the criteria then in effect for a new applicant . . . "[25]

Sokoloff re-applied for licensure on March 11, 2009, approximately three months after he completed probation, but less than one year before the revocation period mandated by the Board had elapsed.[26]

On July 21, 2009, the State, after reviewing the published Board Agenda, submitted a letter to the Board's Executive Director, explaining that the Board "may not grant a license to Keith Sokoloff at this time as his application is statutorily barred . . . "[27] The State explained that since Sokoloff had been convicted of crimes substantially related to the practice of medicine, the Board was statutorily barred from granting licensure under 24 *Del. C.* § 1720(b)(4), wherein an applicant must submit a sworn or affirmed statement that he has not committed a criminal offense. Moreover, in this instance, Sokoloff would be ineligible because 24 *Del. C.* § 1720(e)(4), which became effective on July 20, 2006, one day before Sokoloff was sentenced for his felonies, stipulates that:

> (e) The Board, by the affirmative vote of 12 of its members, may waive any of the requirements of this [licensing] section if it finds . . . the following by clear and convincing evidence:
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> . . .
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> (4) For waiver of a crime substantially related to the practice of medicine, more than 5 years have elapsed since the applicant has fully discharged of all imposed sentences. As used herein, the term

[25] *Id.*
[26] *See* Board Licensure Denial Order ("Board Order"), at *1.
[27] *Id.*, at *3.

> "sentence" includes, but is not limited to, all periods of modification of a sentence, probation, parole or suspension. However, sentence does not include fines, restitution or community service, as long as the applicant is in substantial compliance with such fines, restitution and community service.

The State argued that, pursuant to 24 *Del. C.* § 1720(e)(4), the earliest allowable date for Sokoloff's licensure would be December 13, 2013 because waiver of the requirements under § 1720(b), which includes the submission of a sworn statement that he has not been convicted of a crime substantially related to the practice of medicine, would occur only by an affirmative vote of 12 members *only after* "5 years had elapsed since the applicant has fully discharged of all imposed sentences."[28] Finally, the State requested that its letter be shared with the Board, and acknowledged that it was within the Board's discretion whether or not to permit the State to speak on the matter at the Board's meeting to discuss the matter.[29]

The Board met, as scheduled, on the same day and proposed to deny Sokoloff's application for licensure.[30]

On July 23, 2009, the Board informed Sokoloff by certified letter that it had proposed to deny his application under 24 *Del. C.* § 1720(b)(4) because he could not "submit a sworn statement that [he has] not been convicted of or ha[s] not admitted under oath…to having committed a crime substantially related to the

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[28] Board Order, at *4.
[29] July 21, 2009 State Letter to Board, at *1.
[30] *Id.*

practice of medicine;…[has] not unlawfully prescribed narcotic drugs; and [has] not been professionally penalized…"[31]

On July 29, 2009, Sokoloff requested a formal hearing. Correspondence was exchanged between Sokoloff's attorney and the Board prior to the hearing date.

On October 6, 2009, the Board held a public hearing (the "Board Hearing") on its proposal to deny Sokoloff's application for a certificate to practice medicine.[32] The only issue before the Board was the legal question of whether the provisions of § 1720(e)(4), regarding a five-year licensing disqualification for conviction of a crime substantially related to the practice of medicine, were applicable to Sokoloff's application.[33]

At the October 6, 2009 Board Hearing, Sokoloff, through his attorney, stated that "neither the State nor the Board's attorney stated that there was anything wrong with the Board's [Revocation] Order limiting the period of revocation to one year."[34] Sokoloff further argued that he relied on the Board's Revocation Order that "absent any misconduct, he should have been ready for readmission to practice medicine after that period of revocation for one year."[35] Sokoloff then opined that because the State failed to address the applicability of 24 *Del. C.* §

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[31] Board Order., at *1.
[32] *See* Propose to Deny Hearing Transcript.
[33] Board Order, at *3.
[34] *Id.*, at *4.
[35] *Id.*

1720(e)(4), *i.e.*, the requirement that for "waiver of a crime substantially related to medicine, more than 5 years have elapsed since the applicant has fully discharged of all imposed sentences . . . ," at the time the Board revoked Sokoloff's license for a period of one year, which was on April 1, 2008, the State was estopped from subsequently applying § 1720(e)(4) at Sokoloff's Board Hearing almost one year later.[36]

At the Board Hearing, counsel for Sokoloff pointed out that at the time of the April 1, 2008 License Revocation Hearing, "nobody – [neither the State nor the Board Deputy Attorney General] raise[d] the issue whether or not there was anything wrong with the decision of the Board to limit the period of revocation to one year . . . If it was an issue, why wasn't it raised?"[37] Sokoloff further argued that because the State did not challenge the one-year revocation ordered by the Board, the State should not now be permitted to raise issues about the Board's authority to order a one-year revocation: ". . . whatever contention the State had that the conduct of the Board was wrong, they had an obligation to do something about it, and not having done that . . . I believe that they are estopped to raise any question about the duration of the revocation."[38]

In the alternative, Sokoloff argued that the application of § 1720(e)(4)

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[36] *Id.*, at *4-5.
[37] Board Order, at *14-15.
[38] Board Hearing Transcript, at *14-15.

violates the *ex post facto* clause of the United States Constitution,[39] because restrictions "annexed to a criminal conviction cannot be the subject of a separate civil proceeding."[40]

The Board, as a threshold matter, rejected Sokoloff's *ex post facto* argument concerning the applicability of 24 *Del. C.* § 1720(e)(4) to his petition for licensure. Relying on *Hawker v. New York*,[41] the Board determined that the legislature's restriction on professional licensing requirements cannot violate the *ex post facto* clause because the purpose of such a restriction is regulatory, and not punitive.[42] The Board did note, however, that "the majority of the Board members believed that Sokoloff could reapply after 1 year and the Board would then have discretion after evaluating his circumstances to grant him a license."[43] The issue was reconciled by finding that § 1720(e)(4) was applicable to Sokoloff's case, because § 1720(e)(4) the Board was "legislatively mandated to apply the factors set forth in [§ 1720(e)(4)] before it [could] waive any of the disqualifications for a license set forth in 24 *Del. C.* § 1720(b)(4) . . .."[44]

The Board issued a decision on November 3, 2009, denying Sokoloff's

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[39] *Id.*, at *5 (Sokoloff relied on *In re Petition of State*, 603 A.2d 814 (1992), in support of his argument, where the Delaware Supreme Court found an *ex post facto* violation of a law that involved an assessment that was added after the defendant's criminal conduct).
[40] *Id.*
[41] 170 U.S. 189 (1898).
[42] *See* Board Order, at *7-9.
[43] *Id.*, at *9.
[44] *Id.*

application.[45] On April 16, 2010, Sokoloff timely appealed the Board's decision to this Honorable court. The Board is represented by the State Deputy Attorney General on appeal. Briefing is complete, and the appeal is ripe for decision.

PARTIES' CONTENTIONS

Sokoloff contends that the Board committed legal error and violated his due process rights to a fair hearing before a fair tribunal when it permitted the State Deputy Attorney General to present argument and evidence at the Board Hearing. Sokoloff further argues that the Attorney General's simultaneous representation of the Board and the State at the hearing, and representation of the Board on appeal by the same Deputy Attorney General who participated in the Hearing presented a conflict of interest and was biased. In the alternative, Sokoloff asserts that the application of 24 *Del. C.* § 1720(e)(4) which he describes as a "five-year prohibition against practicing medicine" violated the *ex post facto* clause of the United States Constitution, specifically, because "assessments annexed to a criminal conviction cannot be the subject of a separate civil proceeding and are subject to an *ex post facto* restriction."[46]

The State maintains that the representation of the Board by a Deputy Attorney General and the presentation of evidence at the same Board Hearing by a different Deputy Attorney General, absent evidence of collusion, was not a conflict

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[45] *Id.*, at *10.
[46] *Id.*, at *4-5.

of interest, and, therefore, did not violate Sokoloff's due process rights. In addition, the State argues that Sokoloff waived all procedural due process claims by failing to object to any perceived procedural irregularities at the time of the hearing. Further, the State avers that the Board's application of 24 *Del. C.* § 1720(e)(4) was appropriately applied to Sokoloff. Finally, the State contends that Sokoloff's *ex post facto* argument is without merit, and that the Board was correct in rejecting his argument with regard to the application of § 1720(e)(4).

DISCUSSION

STANDARD OF REVIEW

The Superior Court has jurisdiction to review a decision of the Board on appeal pursuant to the Delaware *Administrative Procedures Act*.[47] The duty of the reviewing Court is to examine the record of the proceedings below to determine if (1) there is substantial evidence to support the Board's findings and conclusions and (2) the Board's decision is free from legal error.[48] In making its assessment, the Court is not authorized to make its own factual findings, assess credibility of witnesses or weigh the evidence.[49] Substantial evidence is greater than a scintilla and less than a preponderance.[50] If the Board's findings and conclusions are found to be based upon substantial evidence and there is no error of law, the Board's

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[47] 24 *Del. C.* §1736(b) and 29 *Del. C.* §10142.
[48] *Mooney v. Benson Mgmt. Co.*, 451 A.2d 839, 840 (Del. Super. 1982) (citing 29 *Del. C.* §10142; *Air Mod Corp. v. Newton*, 215 A.2d 434, 438 (Del. 1965)); *Bash v. Board of Med. Practice*, 579 A.2d 1145, 1149 (Del. 1989).
[49] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[50] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Cross v. Califano*, 475 F. Supp. 896, 898 (D. Fla. 1979)).

decision must be affirmed.[51]

DUE PROCESS CLAIMS

"[A] necessary element of any judicial review is that claims of unfairness in the administrative process be seriously addressed."[52] In order to prevail on a procedural due process claim, a party must demonstrate the existence of a protected property interest and show the deprivation of that interest without notice and opportunity to be heard.[53] This hearing must be conducted "at a meaningful time and in a meaningful manner."[54] A professional license is considered property that is afforded protection under the due process clause of the Fourteenth Amendment to the United States Constitution.[55] The United States Supreme Court has recognized that the due process protections of a fair trial before an unbiased tribunal apply to administrative adjudications as well as court proceedings.[56]

Sokoloff did not waive his due process rights at the Board Hearing

As a threshold matter, the Court must resolve the issue of fact concerning whether Sokoloff raised a timely objection to any procedural irregularities he

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[51] *Mooney*, 451 A.2d at 840 (citing 29 *Del. C.* §10142; *Air Mod Corp.*, 215 A.2d at 438); *Bash*, 579 A.2d at 1149.
[52] *Blinder, Robinson & Co. v. Bruton*, 552 A.2d 466, 472 (Del. Supr. 1989).
[53] *See Pravetz v. State Bd. of Med. Practice*, No. 02A-09-014-RSG, 2003 WL 21203304, at *6 (citations omitted).
[54] *Slawik v. State*, 480 A.2d 636, 645 (Del. 1984) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).
[55] *Villabona v. Board of Med. Practice of the State*, No. 03A-09-007-WLW, 2004 WL 2827918, at *6 (Del. Super. 2004).
[56] *See Withrow v. Larkin*, 421 U.S. 35 (1975); *Carousel Studio v. Unemployment Ins. Appeals Bd.*, No. 89A-AU-7, 1990 WL 91108, at *1 (Del. Super. 1990) ("[A]dministrative hearings, like judicial proceedings, are governed by fundamental requirements of fairness which are the essence of due process, including fair notice of the scope of the proceedings and adherence of the agency to the stated scope of the proceedings.").

perceived during the Board Hearing, thereby waiving his procedural due process rights.[57]

The United States Supreme Court has defined waiver as “an intentional relinquishment or abandonment of a known right or privilege.”[58] Waiver will not be implied based on silence or ambiguous acts.[59] Specifically, the State argued that Sokoloff waived his procedural due process claims at the time of the Board Hearing by “arguing the merits of his claims without objecting to what he perceives to be procedural irregularities.”[60]

In support of its contention that Sokoloff waived his procedural due process rights by arguing the merits of his claims, the State relies upon the Delaware Superior Court’s decision of *In re 244.5 Acres of Land*.[61] In *244.5 Acres of Land*, the Court found that a plaintiff had waived its procedural due process claim “by showing up and arguing the merits of the cause without ever mentioning that they believed procedural irregularities existed . . . .”[62] In this case, however, Sokoloff expressly contended, before presenting his *ex post facto* argument, that the State should not have been permitted to present argument regarding the application of 24

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[57] *Tuckman v. Aerosonic Corp.*, 394 A.2d 226, 230 (Del. Ch. 1978) (citing *Michener v. Johnston*, 141 F.2d 171, 175 (9th Cir. 1944) (“Waiver is a question of ultimate fact rather than of law.”)).
[58] *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).
[59] *Id.* at *5 (citing *Vechery v. Hartford Accident & Indem. Ins. Co.*, 121 A.2d 681, 685 (Del. 1956) and *Faill v. Faill*, 303 A.2d 679, 682 (Del. Super. 1973) (“[A] party’s silence is never sufficient to establish a waiver where the party had no duty to speak.”)).
[60] State Answering Brief, at *33.
[61] 2001 WL 1469155, at *5 (Del. Super 2001).
[62] *Id.*

Del. C. § 1720(e)(4) to Sokoloff's case, particularly because the State failed to raise the issue during or immediately after the Board Revocation Hearing, and that § 1720(e)(4) should therefore not apply to Sokoloff's case.[63]

Because Sokoloff raised timely concerns about what he perceived to be procedural irregularities on the record at the Board Hearing, there can be no reasonable implication that Sokoloff intended to wholly waive any future procedural due process claims concerning the presentation of argument by the State. Accordingly, the merits of Sokoloff's claims are discussed below.

Sokoloff's right to a fair hearing was not violated.

Sokoloff alleges that the Board committed legal error in permitting the State to present evidence about 24 *Del. C.* § 1720(e)(4) at the October 6, 2009 Board Hearing. Specifically, Sokoloff argues that the State's presentation at the Board Hearing was improper in that it "wholly changed the Board's learned judgment that Sokoloff be issued his medical license."[64]

Licensing board hearings are governed by the Delaware *Administrative Procedures Act* ("DAPA").[65] Pursuant to 29 *Del. C.* § 10125, the Board, "[i]n connection with such hearings . . . may be empowered to . . . [i]ssue subpoenas for witnesses and other sources of evidence, either on the agency's initiative or at the

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[63] Board Hearing Transcript, at *11,14-15.
[64] Sokoloff Opening Brief, at *13.
[65] 29 *Del. C.* § 10161(a)(4).

request of any party."[66] The Board also has the power to exclude evidence it deems to be "plainly irrelevant, immaterial, insubstantial, cumulative and . . . privileged."[67]

Licensing board hearings are also controlled by constitutional due process requirements.[68] "[A]dministrative hearings, like judicial proceedings, are governed by fundamental requirements of fairness which are the essence of due process, including fair notice of the scope of the proceedings and adherence of the agency to the stated scope of the proceedings."[69]

The Board was thus entitled to consider any evidence it determined to be relevant, material, substantial, non-cumulative and non-privileged in deciding whether to grant Sokoloff's petition for a medical license. The relevancy of the application of the five-year licensing restriction to Sokoloff is not disputed by the parties. Thus, the Board acted within its discretion to allow legal argument concerning the applicability of the five-year ban during the October 6, 2009 Board Hearing.

Sokoloff also complains that the Board was unfairly persuaded by the State. Without presenting evidence to establish that the Board had initially decided to *grant* his application, Sokoloff concluded that the Board completely relied on the

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[66] 29 *Del. C.* § 10125(b)(1).
[67] 29 *Del. C.* § 10125(b)(3).
[68] *Carousel Studio v. Unemployment Ins. Appeals Bd.*, 1990 WL 91108, at *1 (Del. Super 1990).
[69] *Id.*

State's interpretation of Delaware law as "the law of the case and as tying the Board's hands."[70] As this Court is not permitted to weigh evidence, determine credibility of witnesses or make its own factual findings or conclusions, it must defer to the Board's judgment if as there is satisfactory proof to support the Board's factual findings.[71] Here, Sokoloff's contention is belied by the fact that the Board initially proposed to deny Sokoloff's application because "he could not submit a sworn statement that he has not been convicted of . . . a crime substantially related to medicine."[72] So too, it is uncontested that the State, having presented evidence at Sokoloff's evidentiary hearings in early 2007, adamantly sought out and argued for *permanent* revocation of Sokoloff's medical license, which the Panel and Board rejected. Indeed, such rejection indicates that the Board was not unduly persuaded or overwhelmed by the presentation of the State. Furthermore, the Board acknowledged and clarified that legal questions were to be directed to the Board Deputy Attorney General, not the State Deputy Attorney General presenting argument.[73]

Because this Court finds that there is substantial evidence on the record to support the Board's ultimate decision to deny Sokoloff's application for a certificate to practice medicine, the Board's decision must be affirmed.

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[70] *Id.*
[71] *See Johnson v. Chrysler*, 213 A.2d 64, 66-67 (Del. 1965).
[72] Board Order, at *1 (quoting 24 *Del. C.* § 1720(b)(4)).
[73] *See* Transcript of Propose to Deny Hearing, at *25-26.

Sokoloff's due process challenge of commingling of roles within an administrative agency hearing fails to overcome the presumption of honesty and integrity of the Board.

Sokoloff questions the propriety of conducting a hearing where a Deputy Attorney General represents the Board and another Deputy Attorney General presents evidence.

As a practical matter, it is not unusual for administrative agencies which perform both investigative and adjudicative functions to commingle roles.[74] An administrative agency may sometimes act as "litigant, lawyer and judge in the initial determination of the matter before it [and advocate in support of its own decision] before the reviewing court…"[75]

The United States Supreme Court squarely addressed the issue of the commingling of functions within an administrative agency in *Withrow v. Larkin*.[76] In *Withrow*, the Court validated the decision of a state examining board which had investigated and eventually decided to revoke a physician's license because of his professional misconduct.[77] The Court pointed out that the mere possibility of some bias on the part of an adjudicator is not sufficient to raise a constitutional violation.[78] Instead, the party alleging bias must "convince that, under a realistic

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[74] *See Blinder, Robinson & Co. v. Bruton*, 552 A.2d 466, 472 (Del. 1989).
[75] *Id.* (quoting *Application of Wilm. Suburban Water Corp.*, 211 A.2d 602, 605 (Del. 1965)).
[76] 421 U.S. 36 (1975).
[77] *Id.* at 38-42.
[78] *See Blinder*, 552 A.2d 466 at 473.

appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.[79]

The Court went on to note that a constitutionally unacceptable risk exists in situations where the adjudicator "has a pecuniary interest in the outcome" and in cases where the adjudicator "has been the target of personal abuse or criticism from the party before him."[80] The party alleging unconstitutional bias in a case where an administrative agency acts in both an investigative and adjudicative role must "overcome a presumption of honesty and integrity in those serving as adjudicators."[81]

The Delaware Supreme Court adopted this holding in *Blinder Robinson & Co. v. Bruton*.[82] In *Blinder*, two different representatives of the Delaware Department of Justice both prosecuted and adjudicated a violation of the *Delaware Securities Act*.[83] The Court found that absent specific evidence of bias, "the mere prosecution of a case by one Deputy Attorney General, before another Deputy

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[79] *Id.* (quoting *Withrow*, 421 U.S. at 47) (emphasis supplied).
[80] *Withrow*, 421 U.S. at 47 (citations omitted).
[81] *Id.*
[82] 552 A.2d 466 (Del. 1989).
[83] 6 *Del. C.* §§ 7301-28.

Attorney General acting in an adjudicative capacity, is not sufficient to overcome the strong presumption set forth in *Withrow*."[84]

The *Withrow* presumption of honesty and integrity has not been overcome here. Sokoloff's allegations that the State's involvement in this matter "simply appears questionable," resulting in a "rampant appearance of impropriety that offends traditional notions of due process" are not supported by the record.[85] There is no indication in the record that the Board Deputy Attorney General "advised [the Board] that revocation of Sokoloff's license with permissible reapplication in one year was the best procedural course of action," as alleged in Sokoloff's Opening Brief.[86] The implication that the State and Board then colluded to withhold information from the Board with respect to the newly-enacted five-year waiver bar until after Sokoloff submitted his application for a new medical license, absent *any* support, cannot stand.

Moreover, Sokoloff's reliance upon *Texaco Refining & Marketing., Inc. v. Assessment Board of Appeals of the City of Delaware City,*[87] in support of his position that the Delaware State Bar Association Committee on Professional Ethics has interpreted Delaware's Professional Conduct Rules to prohibit one office from representing the State while simultaneously acting as advisor to an appeals board,

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[84] *Id.* at 473.
[85] Sokoloff Opening Brief, at *14-15 n.6.
[86] *Id.*
[87] 579 A.2d 1137 (Del. Super 1989).

is misplaced.[88] In *Texaco*, the court found that two attorneys employed by the office of the City Solicitor acting as both city solicitor and the appellate board's own retained attorney in a property tax assessment appeal thereby denying a property owner the right to a fair hearing before that board. The City, represented by the Board, had a direct pecuniary interest in a higher property tax assessment.[89] In the instant case, the Board of Medical Practice in a disciplinary proceeding has no such interest and derives no pecuniary benefit from imposing sanctions in the form of a license revocation.

Because Sokoloff has failed to establish evidence tending to suggest that the Board had any improper motive in denying Sokoloff's application for licensure, he is unable to overcome the *Withrow* presumption of honesty and integrity. Accordingly, Sokoloff's due process claim must fail.

EX POST FACTO CLAIM

This Court is also being asked to determine whether the Board was bound by the five-year disqualification period in 24 *Del. C.* § 1720(e)(4). The Board concluded that 24 *Del. C.* § 1720(e)(4) was applicable to Dr. Sokoloff and that he was required to establish that five years had elapsed since he had fully discharged of all his imposed sentences before the Board could issue a waiver for a license under §1720(e).

[88] *See* Sokoloff Opening Brief, at *15-17.
[89] *Id.*

Dr. Sokoloff asserts that the application of 24 *Del. C.* § 1720(e)(4) is impermissible under the *ex post facto* clause of the United States Constitution.[90] Sokoloff contends that § 1720(e)(4) violates *ex post facto* because the law is retroactive and triggered only by a criminal conviction. Moreover, Sokoloff maintains that the Board cannot *now* deny his application based on a statutory time restriction forbidding waiver of certification requirements for five years because the Board, State, Sokoloff, and Sokoloff's retained attorney were seemingly unaware that § 1720(e)(4) had been in effect for approximately two years (June 2006) when they sanctioned Sokoloff in 2008.

An *ex post facto* or retroactive law is one that imposes punishment for acts committed at a time when such acts were not punishable, or one that adds a new punishment to that then prescribed.[91] However, retroactive laws which are not substantively criminal in nature, specifically those laws outlining changes in procedural and administrative regulations, are not considered to violate the *ex post facto* doctrine.[92]

"Legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of [the police power of that State]."[93] The State legislature has authority to prescribe "regulations as, in its judgment, will

[90] Art. I. § 9 cl. 3.
[91] *Ex Parte Garland*, 71 U.S. 333 (1866).
[92] *In re Petition of State*, 603 A.2d 814, 816 (Del. 1992) (citations omitted).
[93] *Hawker v. People of New York*, 170 U.S. 189, 194-200 (1898).

secure or tend to secure them against the consequences of ignorance, and incapacity as well as of deception and fraud."[94]

Furthermore, the United States Supreme Court has upheld the right of State legislatures to set out qualifications which must be met by physicians before entering the medical practice.[95] In *Meffert v. State Board of Medical Registration & Examination*, the Court responded to an *ex post facto* challenge brought by a physician whose license was revoked by the Kansas State Board of Medical Examiners for acts that he committed *prior to the enactment of a statute that created the Board itself.*[96] The Court affirmed the revocation, noting that "[t]he revocation of a license to practice medicine for any of the reasons mentioned in the statute was not intended to be, nor does it operate as, a punishment, but as a protection to the citizens of the state."[97]

The Delaware Superior Court implemented this rationale in *Bash v. Board of Med. Practice*.[98] *Bash* involved an *ex post facto* challenge, brought by a psychiatrist, against the application of an amendment to the Board's rules and regulations to incidents that occurred five years before the enactment of the new statute.[99] In *Bash*, a psychiatrist's license was temporarily suspended pursuant to a statute specifically prohibiting "exploitation of the doctor/patient privilege for

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[94] *Id.* at 194 (quoting *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).
[95] *See Meffert v. State Bd. of Med. Registration & Examination*, 72 P. 247, 251 (1903), *aff'd*, 195 U.S. 625 (1904).
[96] *Id.* 72 P. at 248 (emphasis added).
[97] *Id.* at 251.
[98] 579 A.2d 1145, 1153 (Del. Super. 1989).
[99] *Id.* at 1153.

personal gain or sexual gratification"[100] The Court held that "dishonorable, unethical or professional conduct [constitutes] grounds to suspend or revoke a licensee's privilege to practice medicine."[101] In support of this holding, the Court relied on the *Meffert* principle that the revocation or withholding of a medical license pursuant to a law requiring a "certain standard of morals of the physician" is in no sense a "punishment."[102]

Similarly, in *Galena v. Commonwealth of Pennsylvania*,[103] a physician argued that the application of a law that provided for an automatic ten-year license suspension that was enacted after his convictions was an additional punishment prohibited by the *ex post facto* clause.[104] The *Galena* Court, citing *Hawker*, rejected this argument and upheld the applicability of the statute because it was the intent of the legislature to protect its citizens through regulation of professional qualifications, not to punish the offender.[105]

So too, the Court in *Hawker v. People of New York*[106] further addressed the issue of reformation and re-licensure, deciding that it is within the legislature's powers to regulate:

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[100] *Bash v. Board of Med. Practice*, 579 A.2d 1145, 1147 (Del. Super. 1989).
[101] *Id.* (citing 52 *Del. Laws*, Ch. 323, § 5).
[102] *Id.* (citing *Meffert*, 72 P. at 251).
[103] 551 A.2d 676 (Pa. Commw. Ct. 1988).
[104] *Id.*
[105] *Id.* at 679.
[106] 170 U.S. 189 (1898).

> [O]ne who has violated the criminal law may thereafter reform, and become in fact possessed of a good moral character. But the legislature has power…to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule made the absolute test does or does not exist.[107]

Thus, State legislatures may add, alter or eliminate professional licensing requirements based "upon the judgment of the [legislature] as to [the law's] necessity."[108] The discretion in setting out the nature and extent of the qualifications lies with the legislature, and not with the Courts.[109]

It should also be noted that waiver under § 1720(e)(4) is discretionary.[110] The language used in subsection (e) is permissive in effect: "The Board, by the affirmative vote of 12 of its members, *may* waive any of the requirements. . . of this section. . .."[111] However, subsection (e) continues with the caveat "*if* [the Board finds the following by clear and convincing evidence: . . . (4) For waiver of a crime substantially related to the practice of medicine, more than 5 years have elapsed since the applicant has fully discharged of all imposed sentences."[112]

Furthermore, the Board's Order specifically stated that Sokoloff was permitted to apply in accordance with the requirements *then in place*.[113] By including, "then in place," the Board's Order clearly intended to abide by the

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[107] *Hawker*, 170 U.S. at 197.
[108] *Id.* at 195.
[109] *Id.* (emphasis added).
[110] 24 *Del. C.* § 1720(e)(4).
[111] 24 *Del. C.* § 1720 (e) (emphasis added).
[112] *Id.*
[113] Board Order, at *34.

licensing requirements in effect at the time Sokoloff reapplies for licensure. Had the Board instead written "Sokoloff is permitted to reapply pursuant to the requirements *currently in place*," or "*now in effect*," the result would be no different. Because subsection (e)(4) had been in effect for almost *two years* before Sokoloff's license revocation, coupled with the fact that subsection (e)(4) has remained in effect and is still in effect today, there is no reasonable interpretation that the Board's Revocation Order would omit or was an attempt to circumvent the applicability of subsection (e)(4).

Finally, Sokoloff is correct in pointing out that 24 *Del. C.* § 1720(e)(4) is a retroactive law. In effect, *all* qualifications are retroactive.[114] For instance, to receive a certificate to practice medicine in the State of Delaware, a person must, among other requirements, "[h]ave a working ability to read, write, speak, understand, and be understood in the English language,"[115] have a legally sufficient medical degree from an accredited institution,[116] and must have had "satisfactorily completed an internship or equivalent training in an institution,"[117] *prior to* being issued a certificate to practice medicine. Further, once an individual

[114] *Ex Parte Garland*, 71 U.S. 333, 353 (1866).
[115] 24 *Del. C.* § 1720(b)(1).
[116] 24 *Del. C.* § 1720(b)(2).
[117] 24 *Del. C.* § 1720(b)(3).

is qualified, "he must live up to that rule which qualified him [in the first instance]."[118]

An increased restriction on licensure requirements for individuals convicted of crimes substantially related to medicine clearly encompasses inquiry into and regulation of the character of individuals licensed to practice medicine. Sokoloff has been unable to establish that subsection 24 *Del. C.* § 1720(e)(4) carries with it a punitive effect. Absent evidence tending to show that subsection (e)(4) actually inflicts punishment, rather than merely sets out another qualification, Sokoloff's *ex post facto* claim must fail. The Court is thus in agreement with the decision of the Board to reject Sokoloff's *ex post facto* claim.[119]

Furthermore, notwithstanding the foregoing, the Board would still have been required to deny Sokoloff's application for licensure based on the fact that Sokoloff applied for licensure less than "one (1) year from the date of the [Public Order of the Board] or the expiration of Dr. Sokoloff's period of probation for his criminal convictions, *whichever occurs last*"[120] and the fact that "Dr. Sokoloff is prohibited from re-applying for licensure during the period of revocation."[121] Sokoloff's argument that the Board's Public Order sanctioned him to only a one-year license revocation is not sufficient to support a finding of legal error.

[118] *Garland*, 71 U.S. at 353.
[119] Board Order, at *9.
[120] *Id.*
[121] *Id.*

CONCLUSION

Based on a careful review of the record below, this Court finds that the Board did not commit legal error and that its decision is supported by substantial evidence. The decision of the Board of Medical Practice is AFFIRMED.

It is So ORDERED.

/s/ Diane Clarke Streett
Diane Clarke Streett
Judge

DCS/mja
Original to Prothonotary