STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
AUGUSTA
DOCKET NO. AP-14-49

PAUL GOSSELIN D.O.,
petitioner

v.

ORDER ON PETITIONER'S REQUEST FOR STAY

ANNE L. HEAD et. al.,
respondents

Oral argument was made on August 20, 2014 before the undersigned with regard to the petitioner's request for a stay pursuant to 5 M.R.S. Section 11004 concerning the respondent Maine Board of Osteopathic Licensure's (the "Board") decision to suspend the petitioner's medical license for at least a 90 day period for reasons articulated in the Board's Decision and Order dated July 17th, 2014 (R. 1-16). After carefully considering the arguments of counsel as well as reviewing the written arguments and record, the Court enters the following **Order** for the reasons set forth below:

1. Petitioner seeks a stay of the Board's decision pursuant to 5 M.R.S. Section 11004. Application for a stay of an agency decision is ordinarily made first to the agency itself. That did not happen in this case; however, the undersigned does not find the absence of such an application to be fatal to the petitioner's request to the Court for a stay because it seems self-evident that such a request to the Board would have been an exercise in futility.[1]

2. The undersigned may not substitute his judgment for that of an administrative board as long as there is any competent evidence in the record to support the Board's findings, *Seider v. Board of Examiners of Psychologists, 2000 ME 118,* even if the record contains inconsistent evidence or evidence contrary to the result reached by the Board. Accordingly, the Court's review of state agency decision-making is "deferential and limited." *Watts v. Board of Environmental Protection, 2014 ME 91.* The Court must affirm agency decisions unless it finds an abuse of discretion, error of law, or findings unsupported by substantial evidence from the record.[2] *Thacker v. Konover Dev. Corp.*, 2003 ME 30, ¶ 14, 818

[1] In other words, any application to the Board for the relief sought the Court deems "not practicable" (i.e. not feasible) under the circumstances of this case, *see* Section 11004 of Title 5 for more details.

[2] Under the statutory iteration, the Superior Court may only reverse or modify an administrative decision if it is:

A.2d 1013 (citation and quotation marks omitted). The petitioner bears the burden of proving that "no competent evidence supports the [agency's] decision and that the record compels a contrary conclusion." *Bischoff v. Maine State Ret. Sys.*, 661 A.2d 167, 170 (Me. 1995) (citation omitted). "Judges may not substitute their judgment for that of the agency merely because the evidence could give rise to more than one result." *Gulick v. Bd. of Envtl. Prot.*, 452 A.2d 1202, 1209 (Me. 1982) (citation omitted). Rather, the Court will defer to administrative conclusions when based on evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation and quotation omitted).

3. Questions of law, such as the constitutionality of a statute, are subject to de novo review. *Roberts v. Roberts*, 2007 ME 109, ¶ 6, 928 A.2d 776, 778; *Town of Frye Island v. State*, 2008 ME 27, ¶ 13, 940 A.2d 1065. "A strong presumption of constitutionality attaches to all statutes, which will be construed, where possible, to preserve their constitutionality." *Maine Milk Producers, Inc. v. Comm'r of Agric., Food & Rural Res.*, 483 A.2d 1213, 1218 (Me. 1984) (citations omitted). "Any party attacking the constitutionality of a state statute thus carries a heavy burden of persuasion." *Id.* "Before legislation may be declared in violation of the Constitution, that fact must be established to such a degree of certainty as to leave no room for reasonable doubt." *Orono-Veazie Water Dist. v. Penobscot Cnty. Water Co.*, 348 A.2d 249, 253 (Me. 1975) (citations omitted).

4. The petitioner is entitled to a stay only if he can affirmatively show in addition to irreparable injury to himself in the absence of a stay both a **strong** likelihood of success on the merits of his appeal and that a stay if granted would cause no substantial harm to the public. 5 M.R.S. Section 11004 (emphasis added).

5. Hearing before the Board was originally set for June 12th, 2014 by Notice of Adjudicatory Hearing dated May 14th, 2014. (R. 24, 25.) The Notice was quite specific in setting forth six instances of alleged misconduct by the petitioner arising out of an investigation of events that occurred on March 7, 2013. (R. 35.) At the request of the petitioner the hearing was continued to July 10th, 2014. (R. 30.) After taking testimony for most of the day on July 10th, 2014, the Board determined that petitioner had not violated 32 M.R.S. § 2591-A(2)(A) by answering "no" to the question on his renewal application asking whether since his last application he had been arrested or convicted of anything other than a minor traffic violation. However, the Board determined that the petitioner had committed unprofessional conduct in violation of 32 M.R.S. § 2591-A(2)(F) by answering "no" to the question set out above. (R. 15.)

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(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by bias or error of law;
(5) Unsupported by substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion.

5 M.R.S.A. § 11007(4)(C).

6. The Board also determined that petitioner had violated 32 M.R.S. § 2591-A(2)(H) by self-prescribing in circumstances that did not warrant self-treatment. The Board also found a violation of 32 M.R.S. § 2591-A(2)(B) by undertaking habitual substance abuse that result in or was foreseeably likely to result in his performing services in a manner that endangered the health or safety of his parents. The Board also determined that the petitioner had committed unprofessional conduct by practicing osteopathic medicine after ingesting various controlled substances. Finally, the Board determined that the petitioner had violated a standard of professional behavior by having various controlled substances in his system without having a valid prescription to account for same being detected in his system. (R. 15.)

7. As a result, the Board voted unanimously to suspend the petitioner's license for 450 days, but also determined that a stay of the suspension could be granted after 90 days if the petitioner demonstrated "successful completion" of various "conditions of probation"... *see* R. at 15-16 for more details.

8. Although the Board made its findings at the end of the hearing, the Decision and Order was dated July 17th, 2014, one week after the hearing. (R. 16.)

9. At oral argument petitioner made various arguments concerning why the Court should grant petitioner a stay of the Board's Order pending determination of the petitioner's appeal of the Order. Most if not all of the arguments centered around the alleged denial of petitioner's due process rights by the process utilized by the Board in making its decision coupled with alleged bias and prejudice against the petitioner by both the Board as well as the process utilized. The undersigned will discuss only those arguments that the undersigned finds some basis to make.[1]

10. The Court does respectfully take issue with the Board's finding that the petitioner committed "unprofessional conduct" when he answered in the negative on his renewal application as to whether he had been **arrested** or **convicted** of anything other than a minor traffic violation. There is **no** evidence in the record that petitioner had been "arrested" or "convicted" of anything at the time he made out the renewal form. Indeed, it can be argued that petitioner was less than completely candid when he failed to include as part of his answer that he had been **charged** with operating under the influence, but the fact remains that he was not arrested, much less convicted, of the crime. If this finding constituted the sole rationale for the Board's decision, the Court would grant the petitioner's request for a stay. However, unfortunately for petitioner the Board found multiple reasons for its decision that the undersigned finds were supported by competent evidence produced at petitioner's hearing.

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[1] For example, petitioner argued that it was evidence of bias and lack of due process that the Board itself initiated the complaint process against the petitioner, ignoring the fact that 32 M.R.S. § 2591-A(1) specifically authorizes the Board "on its own motion" to investigate a complaint. Thus, there is no reason for the undersigned to discuss this aspect of petitioner's argument further.

11. The undersigned acknowledges that a licensee should have the opportunity to rebut the evidence establishing a standard allegedly violated and the right to construct a defense based on the standard. *Board of Overseers of the Bar v. Lefebvre, 1998 ME 24.* Petitioner argues that the Board never produced any evidence identifying the standard of professional behavior that petitioner was alleged to have violated, thus violating petitioner's rights pursuant to 5 M.R.S. § 9052(4)(B) as well as petitioner's due process rights under the state and federal constitutions.

12. Due process can require a licensing board to identify and receive evidence on a particular standard applicable to an "unprofessional conduct" charge; however, such specificity is not required where the alleged conduct is "blatantly illegal or improper." *Balian v. Board of Licensure in Medicine, 1999 ME 8.* Although deviation from the standard of care must ordinarily be established by expert testimony, Cox v. Dela Cruz, 406 A.2d 620, 622 (Me.1979), an exception will lie where the trier of fact can readily determine without expert assistance whether the defendant's conduct departed from the standard of care. *Department of Human Services v. Earle, 481 A.2d 175 (Me. 1984).*

13. In this case there was competent evidence for the Board to conclude that the petitioner practiced medicine after consuming a battery of controlled substances as well as taking medication for which he did not have a valid prescription.

14. The undersigned finds that the petitioner has not shown sufficient evidence of either structural or actual bias in the decision-making process of the Board or the Board itself that would justify a stay in this matter. Although an administrative process "may be infirm if it creates an intolerable risk of bias or unfair advantage..." *Gashgai v. Bd. of Registration in Med., 390 A.2d 1080 (Me. 1978),* a combination of investigative and adjudicatory functions in administrative proceedings as was the case here "generally does not violate due process absent some further showing of bias or the risk of bias. *Zegel v. Board of Social Worker Licensure, 2004 ME 31; Withrow v. Larkin, 421 U.S. 35 (1975).*

15. With respect to the other arguments made by petitioner, the undersigned finds that it was not an abuse of discretion for the Board to decline petitioner's request to continue the hearing **for a second time**. The undersigned also finds that any concerns regarding the "chain of custody" of petitioner's urine sample and resulting certified lab report would go to the weight the Board should give to such evidence rather than to its admissibility. Petitioner's argument that the admission of the lab report violated 5 M.R.S. § 9057(5) is equally unpersuasive, as petitioner could have easily subpoenaed the chemist involved if he chose to do so.[4]

[4] This argument begs the question as to whether, regardless of the admissibility of the lab report, whether there was sufficient evidence separate and apart from the report as to petitioner's use of drugs so as to support the Board's findings regarding same, such as the police testimony and

16. Although the undersigned finds that the question of whether the Board could find that petitioner had engaged in "habitual substance abuse" based upon the evidence presented during the hearing is perhaps not as clear cut as the other issues petitioner raises, the Court finds that there was competent evidence in the record to support such a finding, and thus the undersigned is not going to substitute his judgment on this issue for that of the Board. Finally, the petitioner acknowledged during the hearing that he was not in any condition to practice medicine on the morning in question, and that to do so would endanger the health and safety of his patients. (R. 53.)

17. According to 10 M.R.S. §8008, "(T)he sole purpose of an occupational and professional regulatory board is to protect the public health and welfare. A board carries out this purpose by ensuring that the public is served by competent and honest practitioners and by establishing minimum standards of proficiency in the regulated professions by examining, licensing, regulating and disciplining practitioners of those regulated professions. Other goals or objectives may not supersede this purpose." The undersigned agrees with the respondent that petitioner has failed to show that a stay "would cause no substantial harm" to the public. Although the events that lead to the Board's actions took place over a year ago, the respondent argues, and the undersigned concurs, that petitioner has offered no evidence that he has taken **any** steps to address the reasonable concerns raised by his conduct. Indeed, there was no evidence presented at the hearing that petitioner had undergone a substance abuse evaluation, as required by the terms of his deferred disposition, "as soon as possible", months after having agreed to do so.

18. Although the Court acknowledges that petitioner will undoubtedly suffer "harm" as a result of the Board's decision, how long that "harm" lasts, to at least some degree, is up to the petitioner. The undersigned is satisfied that petitioner has not shown even a "likelihood", much less a "strong likelihood" of success at this juncture, such that the request for a stay of the Board's decision to suspend petitioner's license must be, and is, **denied.**

The Clerk is directed to incorporate this Order by reference into the docket for this case, pursuant to Rule 79(a), Maine Rules of Civil Procedure.

Date: August 21, 2014

BY Robert E. Mullen

Robert E. Mullen, Justice
Maine Superior Court

video, the testimony of the drug recognition expert, the petitioner's admission during the hearing that he was in no condition to practice medicine on the day in question, etc.