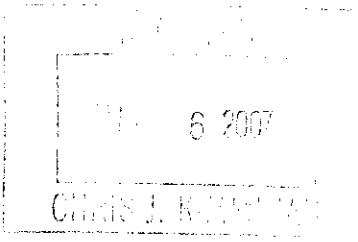

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. MICHAEL MILLER

CASE NO. C20064644

COURT REPORTER: NONE

DATE: August 6, 2007

PAUL W. PRATT,

Plaintiff/Appellant,

v.

ARIZONA BOARD OF CHIROPRACTIC EXAMINERS,

Defendant/Respondent.

ORDER

UNDER ADVISEMENT RULINGS ON CROSS-MOTIONS FOR RECONSIDERATION

Defendant Arizona Board of Chiropractic Examiners (hereinafter "Board") moves for reconsideration of the Court's July 5, 2007 Ruling to vacate the Board's Amended Decision and remand for further proceedings to consider the additional evidence presented to the Court. Plaintiff/Appellant, Paul Pratt, D.C., opposes the Board's motion and further requests several technical changes to the Court's Ruling. The Board's motion and Dr. Pratt's opposition were extensively briefed and argued to the Court. Dr. Pratt's request for technical changes was also addressed at oral argument.

The Board asserts that the Court made a "procedural error" in allowing the record to be supplemented with historical agency disciplinary information in the possession of the Board, but not part of the administrative record on review. The Board also argues that the Court "substituted its own judgment for that of the Board" when it did not affirm the Board's decision.

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Does A.R.S. § 12-910 Strictly Limit Judicial Review of An Agency Decision to the Administrative Record And, if Yes, Did the Board Waive Its Objection?

The Board argues that the Superior Court's review of an agency decision is strictly limited to the record of the administrative proceedings. Board Motion at 7. Specifically, the Board objects to any use of the verified discipline records it provided to the Court. *See* Board's Supplemental Information filed 4/12/07, including the supporting affidavit of the Board's Executive Director. The Board bases its argument on A.R.S. § 12-910(D), which provides that the "record in the superior court shall consist of the record of the administrative proceeding, and the record of any evidentiary hearing, or the record of the trial de novo."

The Board presented the evidence in response to the "opportunity to supplement the record" to answer the anecdotal evidence provided by Dr. Pratt. The anecdotal evidence primarily consisted of selected Board minutes showing discipline in similar cases. Dr. Pratt relied on the Board's minutes to support his argument that his penalty was much more excessive than the penalties given to other chiropractic physicians with similar advertising problems. March 26, 2007 Oral Argument Transcript at 21. As stated in the March 26, 2007 Minute Entry:

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> The Court will allow both sides the opportunity to supplement the record regarding the proportionality issue by providing cases from public record showing probation or more severe discipline for advertising. Ms. Cornelius is given until April 13, 2007, and Plaintiff's counsel is given until April 20, 2007, to provide either a complete survey or select cases. It is incumbent upon counsel to advise the Court whether they have attempted to do a complete survey – from what time period and what sources – or whether they want to use other cases anecdotally.

It was not an order, but neither party declined the opportunity to supplement the record. In fact, both parties provided an extensive analysis of the Board records. The supplementation was voluminous, occupying more than six volumes of the record filed in the Superior Court. As explained in detail in the July 5, 2007 Ruling, this Court concluded that the supplemented record demonstrated the Board's penalty decision was without substantial evidence and arbitrary.

Dr. Pratt responds that there was no procedural error and the Board waived any possible error when it 1) failed to object at the hearing, 2) failed to object to the March 26, 2007 Minute Entry, and 3) voluntarily produced its own records to support its position. Response at 7-10. In reply, the Board argues that its initial objection to the anecdotal evidence by Dr. Pratt should be considered for any evidence outside the administrative proceedings, even including the supplemental information it presented.

A party cannot wait until the court rules on the evidence before it makes an objection to it. *State v. Fulminante*, 161 Ariz. 237, 252, 778 P.2d 602 (1988). Further, the Board's earlier objection to other evidence cannot be transformed into a continuing objection, particularly where the Board produced the

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very evidence that it now argues is objectionable. *See Brown v. U.S. Fidelity and Guar. Co.*, 194 Ariz. 85, 88, ¶ 9, 977 P.2d 807 (App. 1998) (party who had earlier made an untimely motion in limine followed by a tactical decision to introduce the evidence itself, could not later claim error after an adverse verdict). The objection was waived.

More important than waiver, the objection to supplementation based on A.R.S. § 12-910(D) and *Alexander v. Fund Manager*, 166 Ariz. 589, 804 P.2d 122 (App. 1990) is not well-founded for several reasons. First, Subparagraph D must be read in conjunction with the rest of the statute. A.R.S. § 12-910(B)[1] provides that the court "shall" admit evidence unless the exhibit was improperly withheld. The Board acknowledges that the supplementation concerns its own records and Plaintiff did not have access to the information until the Board provided it. The additional evidence may also be objected to if the admission causes substantial prejudice to another party. There is no prejudice to another party.

Second, the Board's reliance on *Alexander*, *supra*, for the proposition that "the superior court's review of an agency decision is limited to the agency record" is misplaced. Motion at 7. The dicta in *Alexander* is more specific: "The superior court's review of an agency decision is ***generally*** limited to the agency record." 166 Ariz. at 595 (emphasis added). Moreover, the Court finds that the guidance in

[1] A.R.S. § 12-910(B) provides: Relevant and admissible exhibits and testimony that were not offered during the administrative hearing shall be admitted, and objections that a party failed to make to evidence offered at the administrative hearing shall be considered, unless either of the following is true:
1. The exhibit, testimony or objection was withheld for purposes of delay, harassment or other improper purpose.
2. Allowing the admission of the exhibit or testimony or consideration of the objection would cause substantial prejudice to another party.

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Shaffer v. Arizona State Liquor Bd., *supra*, 197 Ariz. at 409, ¶ 17, is more helpful:

> The court, as before, defers to the administrative decision if substantial evidence supports it. If, on the other hand, the court concludes that the new or ***additional evidence*** is such that, had it been introduced in the administrative proceedings, no reasonable fact finder would have reached the administrative decision, then the latter is not supported by substantial evidence. The superior court may accordingly 'reverse, modify or ***vacate and remand the agency action***.' A.R.S. § 12-910(E).

(Emphasis added.)

Statute and case law specifically anticipate that there will be matters in which new evidence shall be admitted by the Superior Court. In those instances, the Superior Court's review is not limited to the record of the administrative proceeding.

Did The Court Substitute Its Judgment In Place Of The Board's Decision?

The Board argues that based on the evidence presented to the Board in the administrative proceedings, any ruling by the Superior Court that does not affirm the Board's decision constitutes substituted judgment. In support of its argument, it primarily relies upon *Schillerstrom v. State of Arizona*, 180 Ariz. 468, 885 P.2d 156 (App. 1994); *Shaffer v. Arizona State Liquor Bd.*, 197 Ariz. 405, 4 P.3d 460 (App. 2000); and, *Degroot v. Arizona Racing Commission*, 141 Ariz. 331, 686 P.2d 1301 (App. 1984). For the reasons discussed below, this Court cannot agree that the case law cited by the Board requires affirmance of the Board's decision as a matter of law.

The Board agrees that the standard of review stated in the Court's Ruling was correct. Board Motion at 5. The Board does not dispute the Court's conclusion that the supplemented record appears to

show that Dr. Pratt received far more serious discipline than other licensees for the same or similar violations relating to advertising. *See* Board Motion at §§ I and III. Instead, the Board appears to argue that discipline imposed in similar matters is irrelevant and cannot be considered. Alternatively, it argues that the Board does take into consideration discipline in other cases and the Court's reference to the supplemented record constitutes re-weighing the evidence.

As has been noted in the context of another chiropractic decision, "the practice of a profession is a right, not just a privilege." *Schillerstrom*, *supra*, 180 Ariz. at 471. The *Schillerstrom* court relied upon *Application of Levine*, 97 Ariz. 88, 90-91, 397 P.2d 205 (1964) (attorney admission dispute), which held that the right to practice a profession cannot be treated as a matter of grace or favor. The Arizona Supreme Court has recently ruled that to "avoid discipline by whim or caprice," it is necessary to ensure that there is some degree of proportionality. *In Re Dean*, 212 Ariz. 221, 225, ¶ 24, 129 P.3d 943 (2006). As the Board correctly notes, this does not mean that "charges similar in nature must result in identical penalties." *Bishop v. Law Enforcement Merit System Council*, 119 Ariz. 417, 422, 581 P.2d 262 (App. 1978). Additionally, even though proportionality review is an imperfect process, it nonetheless serves a necessary purpose. *Cf., In Re Owens*, 182 Ariz. 121, 127, 893 P.2d 1284 (1990) (recognizing that although no two cases are identical, the court will review similar matters to determine if comparable discipline is warranted).

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Although the Board seems to take a legal position in its Motion For Reconsideration that the discipline imposed in similar cases has no relevance or impact on the discipline in a pending case, the actual practice of the Board is to conduct a proportionality analysis based on institutional memory of the members and internal Board policies. *See* March 26, 2007 Oral Argument Transcript at 14-15. Therefore, to the extent that the Board now argues discipline in other cases can never be considered by the agency or the reviewing court, this Court finds that this position is contrary to Arizona Supreme Court authority (*e.g., In Re Dean, supra*) and the Board's own practice.

The Board's final argument is that the evidence produced during the administrative proceeding is sufficient to support the term of two years of probation and the attendant conditions. Conspicuously, the Board does not argue in its Motion For Reconsideration that its sanction is appropriate when considered in light of the supplemented record. The Court, however, must view the totality of the record in determining whether to vacate and remand. A.R.S. § 12-910(E); *Shaffer, supra*, at ¶ 17.

The Court will not repeat here the factual analysis that lead to the conclusion that the Board's penalty decision was not supported by substantial evidence, and it constituted an abuse of discretion. *See* Ruling at 5-6. In simple terms, where a chiropractic physician with more than twenty-five years of experience, having no patient complaints and no prior discipline, is given a substantial penalty without explanation far in excess of other chiropractors for similar advertising violations, it shows a failure of substantial evidence and an abuse of discretion. The Board might have substantiated the penalties with

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an explanation, such as aggravating factors or a refusal by Dr. Pratt to comply with the Board's orders, but the undisputed evidence appears to be that Dr. Pratt is and has been compliant. Additionally, the fact that Dr. Pratt's advertising violated the licensing code does not, by itself, support a penalty in excess of those imposed on other licensees. *In Re Dean, supra*, ¶ 25.

Finally, the Board acknowledges that there are no Arizona cases reviewing the decision of a trial court to vacate an agency decision and remand for reconsideration in view of additional evidence. In every case cited by the Board or Dr. Pratt, the trial court either reversed the agency decision or remanded the matter with instructions to impose lesser discipline. This Court's Ruling remands the matter to the Board with directions to consider the supplemented record, but specifically omits any instruction to reach a particular result. Ruling at 7-8. In the absence of direct Arizona authority, this Court was guided by the reasoning in *Modi v West Virginia Board of Medicine*, 195 W.V. 230, 465 S.E. 2d 230 (1995). *See* Ruling at 5. In that case, the trial court found that the medical board had made inaccurate findings of fact and incorrect conclusions of law, and simply vacated the agency order. The *Modi* appellate court held the trial court erred because "in addition to reversing the Board order [it] should have also remanded the cause to the Board for reconsideration of the issues and an appropriate, reviewable order." *Id.* at 238. The reasoning by the *Modi* court is consistent with A.R.S. § 12-910(E) and dicta in Arizona case law. *Shaffer, supra*, at ¶ 17.

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For the foregoing reasons, the Board's Motion For Reconsideration[2] is ***denied***.

Appellant/Plaintiff's Motion For Reconsideration/Clarification

Dr. Pratt requests that the Court expand its Ruling to include Paragraphs 18, 21, and 22 of the Board's Amended Decision. Alternatively, he requests a clarification as to whether the $250 fine still applies, as well as the ancillary provisions to the probation term. The Board opposes Dr. Pratt's Motion For Reconsideration on the basis that its Amended Decision should be affirmed without any changes.

IT IS HEREBY ORDERED ***denying*** Dr. Pratt's Motion For Reconsideration to enlarge the July 5, 2007 Ruling.

IT IS FURTHER ORDERED ***clarifying*** the Ruling as follows:

1. The Ruling does not affect the cease and desist order in Paragraph 18 (all "Paragraph" citations refer to the Board's Amended Decision);
2. The two-year term of probation ordered in Paragraph 18 is vacated and remanded for reconsideration;
3. Paragraph 19 is vacated and remanded for reconsideration;
4. Paragraph 21 imposing a $250 fine is affirmed;

[2] The Board does not present direct authority regarding its objection to the amicus brief by the Arizona Chiropractic Society, which is denied without further comment. *See also*, Dr. Pratt's Response at 10.

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