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ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. MICHAEL MILLER BY: R. ST. GERMAINE, DEPUTY CASE NO. C20064644

COURT REPORTER: NONE DATE: July 5, 2007

PAUL W. PRATT,

Plaintiff/Appellant,

v.

ARIZONA BOARD OF CHIROPRACTIC
EXAMINERS,

Defendant/Respondent.

UNDER ADVISEMENT RULING

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Appellant, Paul Pratt, D.C., appeals the amended decision of the Arizona Board of Chiropractic Examiners (hereinafter "Board") dated July 21, 2006 (hereinafter "Amended Decision"). The Board found various violations relating to Dr. Pratt's advertising materials. Those violations included a failure to clearly designate himself as a Chiropractic Doctor/Physician, referencing a "confidential report", possessing skills that other health care practitioners do not possess, and disclosing the names of patients without first having obtained informed consent. There is no allegation that Dr. Pratt's care of patients was incompetent or that he posed a direct danger to the public. This is the first disciplinary action against Dr. Pratt in more than twenty-five years of practice. The advertising materials were brought to the attention of the Board by an anonymous complainant.

The Board issued a cease and desist order against false, deceptive or misleading advertising. It placed Dr. Pratt on probation for two years, including the following conditions: (a) In six months he

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must pass the National Board of Chiropractors Examiners Ethics and Boundaries Examination, (b) within 90 days, he must pass the Board's Jurisprudence Examination, and (c) he must provide to the Board a copy of all advertising. It also imposed a \$250 fine.

Appellant asserts the following assignments of error:

1. The Board violated Appellant's right to due process by providing him only four days working notice of the specific charges.
2. The Board violated Appellant's right to due process by failing to provide a fair and impartial forum.
3. The Board violated Appellant's right to due process by failing to provide fair notice of the standards he violated.
4. The Board violated Appellant's right of free speech in its application of A.R.S. § 32-924(A)(17).
5. The Board's amended decision was not supported by substantial evidence.
6. The Board's decision was arbitrary and capricious.
7. The Board's order for two years probation with additional terms was excessive.

The Arizona Chiropractic Society filed an amicus brief in support of Dr. Pratt, particularly focusing on due process, equal protection, and the absence of an impartial tribunal. The Arizona Chiropractic Society is a non-profit state association founded in 1991 to serve Arizona's chiropractic

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provider community.

The Board denies the assignments of error and requests that the Court affirm its decision based upon substantial evidence in the record.

Standard of Review

The role of the Superior Court in an administrative appeal is to determine whether the record contains substantial evidence to support the agency's ruling. *Berenter v. Gallinger*, 173 Ariz. 75, 77, 839 P.2d 1120, 1122 (App. 1992); *Havasu Heights Ranch and Development Corp. v. Desert Valley Wood Products, Inc.*, 167 Ariz. 383, 386, 807 P.2d 1119, 1122 (App. 1990). A.R.S. § 12-910(E) provides that on judicial review of an administrative decision:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The Court may not substitute its judgment for the considered judgment of the administrative agency. *Schillerstrom v. State of Arizona*, 180 Ariz. 468, 471, 885 P.2d 156 (App. 1994) (trial court finding that the Board failed to 'properly analyze' facts constituted impermissible substitution of judgment). A court must uphold the agency decision if there is "substantial evidence" supporting it. *Siler v. Arizona Department of Real Estate*, 193 Ariz. 374, 378, ¶ 15, 972 P.2d 1010 (App. 1998).

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Is The Board's Decision Supported By "Substantial Evidence?"

Although Appellant raises a variety of constitutional challenges to the Board's ruling, the threshold question under statutory law is whether the decision is supported by "substantial evidence." This issue requires a two-part analysis. First, is there substantial evidence that Dr. Pratt's advertising materials violated A.R.S. § 32-924(A)(5, 9, 13, 15, 17, & 18)? There was an extensive discussion between Dr. Pratt and the Board members during the Formal Interview about his advertising. On some points, Dr. Pratt conceded that he was not aware of the precise requirements (*e.g.*, placing a chiropractic designation next to his name even though the context identified him as a chiropractor). For other matters, he respectfully disagreed with the Board's interpretation of the advertising restrictions, but stated that he had discontinued the advertising in question and would follow the Board's directive regardless of his interpretation of the statute. The Court finds that there is substantial evidence supporting the conclusions of law that Dr. Pratt violated the restrictions relating to advertising. *See* Amended Decision, ¶¶ 11-17.

The second issue is whether the limitations on Appellant's license, particularly the term of probation and its conditions,¹ is supported by substantial evidence. An unsupported limitation on a

¹ The Board ruling also includes a "Cease and Desist" order that prohibits Dr. Pratt from "advertising in a false, deceptive, or misleading manner." Amended Decision at 6. Essentially, it prohibits Dr. Pratt from engaging in conduct that is already prohibited. *See* A.R.S. § 32-924(A)(13). The Court's ruling does not affect the Cease and Desist order.

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professional license can substantially affect a licensee's rights just as much as an unsupported finding that the licensee engaged in unprofessional conduct. *See Modi v. West Virginia Board of Medicine*, 195 W.Va. 230, 242, 465 S.E. 2d 230 (1995) (public reprimand, fine, and additional educational course constituted substantial prejudice on rights of licensee where the disciplinary action was not supported by the record). In addition, the Board should provide an articulated basis for its decision, including factual support that relies on more than the specialized knowledge of the board members. *See Cochran v. Board of Psychologists Examiners*, 171 Or. App. 324, 326, 15 P.3d 576 (2000) (psychologist board's conclusion that licensee offered improper opinion in court testimony must be reversed when the board fails to explain its decision).

Dr. Pratt argued in his papers and at oral argument that he was treated disproportionately. Specifically, other chiropractic physicians with the same violations were either given a much less serious form of discipline, such as an advisory letter (which is a non-disciplinary action), or allowed the opportunity to correct the advertising with the incentive that the complaint would be dismissed. Counsel for the Board argued that the conclusion that Dr. Pratt was unfairly treated was not supported by the record, but she acknowledged that the Board did not have evidence to contradict the anecdotal evidence presented by Dr. Pratt. Upon joint request, the Court permitted the parties to supplement the record based on a full review of similar cases decided by the Board. The parties produced and argued a large volume of information regarding past cases. Although the facts from similar cases did not match Dr.

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Pratt's violations exactly, it is clear that Dr. Pratt received a much more serious penalty than all of the other licensees. The next most serious case involved only eighteen months probation. Many of the licensees did not receive probation.

On its face, 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 without any rational basis. Amicus Arizona Chiropractic Society argues that the disproportionate treatment was due to similar advertising violations by the Board members themselves. The transcript, particularly at the Motion For Reconsideration oral argument, indicates that advertising has become a very difficult and contentious issue. For example, many allegedly improper advertisements are placed on the Internet with or without knowledge of the chiropractic physicians by third parties. However, the evidence was not sufficiently detailed or thorough that this Court could determine a reason or motivation by the Board for the seemingly disproportionate disciplinary sanction.

The much harsher discipline imposed on Dr. Pratt is especially glaring in light of a variety of mitigating factors. First, this was the only disciplinary violation by Dr. Pratt in twenty-five years of practice. It was not related to his competence as a chiropractic physician. In fact, as one Board member observed, "His enthusiasm and education to the profession is admirable. I feel the same way, though, that his passion may be getting a little bit carried away with his interactions and with the advertising . . ." May 11, 2006 Hearing Transcript at 47. The purpose of discipline by a licensing body is to protect the

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public rather than punish the licensee. *See* Session Laws 1982, Chap. 320, § 1; *cf.*, *Matter of Schwartz*, 176 Ariz. 455, 458, 862 P.2d 215 (1993).

Second, there was no suggestion of criminal or intentional wrongdoing. The Board specifically rejected the allegation that Dr. Pratt had knowingly made a false or misleading statement. May 11, 2006 Hearing Transcript at 52. Finally, it appears that Dr. Pratt had already stopped using the improper advertising as soon as he learned about the anonymous complaint. This was not an instance of repeated violations in the face of Board orders. To the contrary, Dr. Pratt firmly indicated his willingness to follow all directions by the Board.

It is clear that the Board gave little, if any, consideration to similar cases. Counsel for the Board required considerable time to compile the discipline information from other matters to supplement the record. Obviously, the Board did not have the supplemental information in aggregate form at the time it issued its Amended Decision.

Although a reviewing court is authorized to allow liberal supplementation of the record (*see* A.R.S. § 12-910(B)), this remedy has the potential of placing the court in the position of substituting its judgment for that of the Board. In instances such as the case at bar, where the administrative agency has not had the opportunity to review information submitted by supplement to the record, it is important that the Board be given the opportunity to review its decision in light of the new evidence. *Shaffer v. Arizona St. Liquor Bd.*, 197 Ariz. 405, 409, ¶ 17, 4 P.3d 460 (App. 2000). More important, if the Board

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confirms its conclusion that a two-year term of probation with additional requirements is appropriate, it will also have the opportunity to articulate its reasons for imposing more harsh discipline on Dr. Pratt than on other licensees. For instance, why was Dr. Pratt not given the same opportunity provided to many other licensees to correct the advertising violations as a means to remedy the problem and to mitigate the disciplinary sanction? Was a two-year term necessary in view of the much shorter deadlines for examination and Dr. Pratt's voluntary withdrawal of the offensive advertising? Is it true that the anonymous complaint was made by another chiropractor and should that fact be considered in determining whether the advertising violation constituted a public safety issue?

For the foregoing reasons, the Court finds that the Amended Decision, ¶ 19, was not supported by substantial evidence, particularly in view of the much less serious discipline imposed on licensees with similar advertising violations. The Court further finds that although probation may be an available disciplinary action for advertising violations, the Board's failure to articulate its reasons for the much more serious penalty imposed on Dr. Pratt constituted an abuse of discretion.

IT IS HEREBY ORDERED vacating the Amended Decision, ¶ 19, and remanding the matter to

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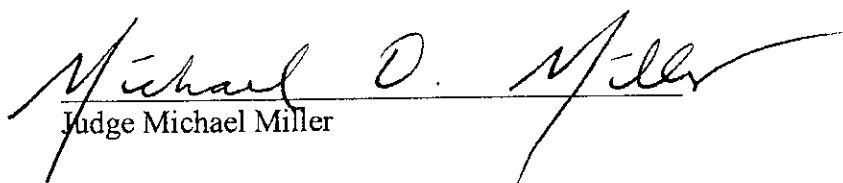
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the Board with directions to consider appropriate discipline action in light of discipline imposed on other licensees for similar matters and the fundamental objective to protect public safety.

Dated this 5th day of July 2007



Judge Michael Miller

cc: Hon. Michael Miller

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