

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael N. Kessler,	:	
Petitioner	:	
	:	
v.	:	
	:	
Bureau of Professional and Occupational Affairs, State Board of Medicine,	:	No. 1564 C.D. 2012
Respondent	:	Argued: March 12, 2013

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
 HONORABLE ROBERT SIMPSON, Judge (P.)
 HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY PRESIDENT JUDGE PELLEGRINI	FILED: April 4, 2013
---	----------------------

Michael N. Kessler, M.D. (Dr. Kessler) petitions this Court for review of the Bureau of Professional and Occupational Affairs, State Board of Medicine’s (Board) July 25, 2012 final adjudication and order (FAO) revoking his license to practice medicine in the Commonwealth. There are three issues for this Court’s determination: (1) whether there was substantial evidence to support the Board’s revocation of Dr. Kessler’s license; (2) whether the Board’s FAO was issued in violation of Section 504 of the Administrative Agency Law (Law);¹ and, (3)

¹ 2 Pa. C.S. §504.

whether the Board's FAO violated Dr. Kessler's procedural and substantive due process rights under the United States (U.S.) and Pennsylvania Constitutions.² We affirm.

Dr. Kessler graduated from medical school in Connecticut in 1997. He was licensed to practice medicine in New York in 1999. In June 2001, he completed his internship/residency in New York. He became licensed and began a residency in child and adolescent psychiatry at Cambridge Health Alliance (CHA) in Massachusetts on July 1, 2001, where he worked with adolescent inpatients.

On July 8, 2001, Dr. Kessler was arrested in Massachusetts and charged with open and gross lewdness, a felony, as well as disorderly conduct. The charges stemmed from an incident in which Dr. Kessler was observed (by two males in their twenties) exposing his genitals and masturbating in his car in a donut shop parking lot. The disorderly conduct charge was subsequently dismissed. On August 1, 2001, Dr. Kessler was terminated from his CHA residency due to his arrest.

Because Dr. Kessler could not find a job, he returned to New York. Dr. Kessler completed employment applications for Brunswick Hospital Center (Brunswick) and Holliswood Hospital (Holliswood), but failed to mention CHA in

² Dr. Kessler included an additional issue, *i.e.*, whether the Board arbitrarily and capriciously disregarded Dr. Kessler's expert testimony, accepted the Board's expert testimony, and incorrectly cited a previous expert; however, that issue is subsumed in the first issue raised in this appeal.

his list of places he held privileges. He became employed at Brunswick on December 1, 2001. Despite the charges pending as to his July 2001 arrest, when completing paperwork to be added to Brunswick's group malpractice insurance policy, Dr. Kessler answered "no" to the question whether he had ever been arrested for a felony.

On November 13, 2001, Dr. Kessler was again arrested in Massachusetts and charged with open and gross lewdness and indecent exposure. The charges arose from allegations by two boys, ages 10 and 12, that Dr. Kessler was standing nude and masturbating in the front window of his mother's home.

Although the record reflects that Dr. Kessler started treatment with mental health professionals at a young age, in March 2002, he began treating with psychiatrist Marc Reubins, M.D. (Dr. Reubins) twice a week for anxiety, general life problems and the effect of his arrests and disciplinary actions.

On June 2, 2002, he was convicted of the November 2001 lewdness charge, and the indecent exposure charge was dismissed as a lesser-included offense. Dr. Kessler's Massachusetts medical license expired because it was not renewed, but he had "an inchoate right to renew." Hearing Examiner's Adj. and Order at ¶52.

On June 3, 2002, Dr. Kessler pled not guilty to the July 2001 lewdness charge, but admitted sufficient facts to warrant a finding of guilt.³ “[T]he matter was continued for one year without a finding.” Hearing Examiner’s Adj. and Order at ¶16.

In October 2002, in response to inquiries on his New York medical license renewal application, Dr. Kessler indicated that he had been disciplined by a hospital and that he had been arrested for a felony.

On December 13, 2002, the New York State Board for Professional Medical Conduct (New York Board) issued a statement of charges against Dr. Kessler for: (1) being terminated from CHA; (2) lying about his termination on the Brunswick application; (3) lying about his termination on the Holliswood application; (4) lying on his medical malpractice application; and (5) having been found guilty of the November 2001 lewdness charge. Dr. Kessler submitted to a psychiatric evaluation by Frederick Berlin, M.D. (Dr. Berlin). At a hearing before the New York Board on January 22, 2003, Dr. Berlin testified that Dr. Kessler “had a sexual disorder characterized by exhibitionism and an urge to be seen masturbating by young males.” Hearing Examiner’s Adj. and Order at ¶35. Dr. Reubins testified that Dr. Kessler “has a systemic disorder characterized by anxiety and depression.” Hearing Examiner’s Adj. and Order at ¶38. Forensic psychiatrist

³ According to the Hearing Examiner’s Adjudication and Order, “[u]nder Massachusetts Rules of Criminal Procedure, a defendant may plead not guilty, but admit to sufficient facts to warrant a finding of guilty. Official Notice of Mass. Ann. Laws R. Crim. P. Rule 12(a)(2) (2007)” Hearing Examiner’s Adj. and Order at ¶15.

Seymour Block, D.O. (Dr. Block) testified that Dr. Kessler “has an anxiety condition.” Hearing Examiner’s Adj. and Order at ¶39. The New York Board found Dr. Berlin’s testimony most convincing and, on February 13, 2003, with the exception of the malpractice application charge, it sustained the charges against Dr. Kessler and revoked his New York medical license.

Thereafter, Dr. Kessler obtained a license as a life, accident and health insurance broker in New York, Connecticut, New Jersey and Pennsylvania, which led to his ownership of K & L Agency. He was also employed with Aram Health and Disease Management of New Jersey (working to minimize increases in health insurance costs) and 123College.com (providing financial aid seminars for college-bound students). In addition, he acquired certification from the Internal Revenue Service as a federal and state income tax preparer.

On June 3, 2003, Dr. Kessler’s July 2001 lewdness charge was dismissed. On September 2, 2003, the Massachusetts Medical Board (Massachusetts Board) initiated disciplinary action against Dr. Kessler’s license based upon the July 2001 exposure incident, his conviction for the November 2001 exposure incident, and the New York Board’s license revocation. On advice of his counsel, Dr. Kessler did not attend the Massachusetts Board’s hearing. In November 2004, the conviction on his November 2001 lewdness charge was overturned on appeal and he was acquitted.⁴ On July 26, 2006, the Massachusetts

⁴ According to the record, the conviction was overturned not because the behavior did not occur, but because the evidence was insufficient to support a finding that the boys who witnessed Dr. Kessler were “alarmed or shocked,” which was required to sustain a conviction of open and **(Footnote continued on next page...)**

Board, with the knowledge that his conviction for the November 2001 exposure incident had been overturned, but having deemed his 2001 incident sexually exploitive in nature, revoked Dr. Kessler's right to renew his Massachusetts medical license because his behavior undermined public confidence, he lacked good moral character, and his ability to practice medicine was questionable.

In November 2006, Dr. Kessler submitted to the Board an Application for a License to Practice Medicine Without Restriction in the Commonwealth. By a January 23, 2007 letter, the Board provisionally denied the application pursuant to Sections 22 (relating to good moral character) and 41 (discipline by another state's licensing authority or found guilty of immoral or unprofessional conduct) of the Medical Practice Act of 1985 (MPA)⁵ because his licenses were revoked in Massachusetts and New York. Dr. Kessler appealed from the Board's denial. Following a hearing at which Dr. Reubins testified, the Board approved Dr. Kessler's application on December 21, 2007, subject to certain conditions and five years of probationary status. Dr. Kessler was issued License No. MD435080 to practice medicine and surgery. In September 2008, the Board vacated Dr. Kessler's probation.

(continued...)

gross lewdness. Reproduced Record (R.R.) at 33-34. *See Commonwealth v. Kessler*, 442 Mass. 770, 773-75, 817 N.E.2d 711, 714-15 (2004).

⁵ Act of December 20, 1985, P.L. 457, *as amended*, 63 P.S. §§422.1-422.51a.

In October 2008, Dr. Kessler began practicing as a psychiatrist for ISL Psychiatric Services (ISL) in Pennsylvania.⁶ Because he felt that he did not have enough time with patients, he left ISL in June 2009 to work as the Associate Medical Director for Colonial Intermediate Unit 20, a school-based partial hospitalization program, in Northampton and Monroe counties. Between July 2009 and May 2011, Dr. Kessler provided psychiatric services in schools to children with various mental illnesses. From 2010 until it closed in March 2011, Dr. Kessler also covered by phone for the staff psychiatrist with Shawnee Academy, a residential treatment facility for children with severe mental illnesses. Thereafter, he was employed as a psychiatrist at Pocono Psychiatric Associates in East Stroudsburg treating mostly adults, but also two adolescent patients.

On November 13, 2010, Dr. Kessler was arrested in New Jersey on lewd behavior charges stemming from a report by three minor boys (two aged 14 and one age 15) who claimed Dr. Kessler was in a strip mall parking lot in his car and, as they approached, he turned his interior lights on, exposed himself and began to masturbate. When the boys yelled at him, he drove off, but they noted his license plate number and reported the incident to the police. On March 31, 2011, Dr. Kessler pled guilty to the lewdness charge and was sentenced to 90 days in jail (suspended), to pay a \$1,000.00 fine, and to continue psychiatric counseling for a year. The record of Dr. Kessler's plea "was ordered to 'be sealed and not utilized or not be evidential in any subsequent civil proceeding pursuant to New Jersey Court Rules 7:6-2.'" Hearing Examiner's Adj. and Order at ¶97 (quoting Dr.

⁶ Dr. Kessler did not practice medicine anywhere between June 2002 and October 2008.

Kessler's Answer and New Matter to the Order to Show Cause, Certified Record (C.R.) Item 12, Ex. C-2 at ¶74).

The Board ordered Dr. Kessler to undergo a mental and physical evaluation with forensic psychiatrist Pogos H. Voskanian, M.D. (Dr. Voskanian) on May 2, 2011. On May 9, 2011, Dr. Voskanian issued a 29-page report in which he concluded that Dr. Kessler's behaviors "suggested" pedophilia and exhibitionism, but he could not make a diagnosis of either. Dr. Voskanian stated that Dr. Kessler's condition is chronic and pervasive. Dr. Voskanian indicated that Dr. Kessler has chosen employment involving considerable contact with children and adolescents, and he does not accept responsibility for his inappropriate behaviors, instead blaming them on others' unfounded behaviors (i.e., fabrications by Massachusetts and New Jersey police, the mother of the children who witnessed his November 2001 exposure, and Dr. Berlin) and attempts to incriminate him. In Dr. Voskanian's opinion, Dr. Kessler is not able to practice psychiatry with reasonable skill and safety to patients.

On May 16, 2011, the Board issued an order to Dr. Kessler to show cause why the Board should not suspend, revoke or otherwise restrict his license and impose a civil penalty and costs pursuant to Section 41(5) of the MPA⁷ and Section 5(b)(5) of the Licensing Boards and Commissions Act.⁸ In the notice accompanying the order to show cause, the Board expressly stated: "You may lose

⁷ 63 P.S. §422.41(5).

⁸ Act of July 2, 1993, P.L. 345, *as amended*, 63 P.S. §2205(b)(5).

your license . . . to practice your profession or occupation.” C.R. Item 1. In the order to show cause, the Board stated: “If the Board finds that the factual allegations are true and correct, . . . the Board may, in its discretion, impose one or more of the following penalties: The revocation . . . of any licenses . . . , [and] the imposition . . . of the costs of investigation” *Id.* at 10. Dr. Kessler filed an answer and new matter to the order to show cause. A hearing was held on November 21, 2011, before a hearing examiner, at which the Board presented the testimony of Dr. Voskanian relative to his evaluation, and the testimony of Officer Marianne Wurtemberg regarding Dr. Kessler’s November 2010 lewdness incident. Dr. Kessler’s witnesses consisted of himself, Dr. Reubins, Dr. Block, Salisbury Behavioral Health colleague Tracy Mohr and Pocono Psychiatric Associates colleague Josephine Martin.

Dr. Kessler testified that 90% of the statement he wrote at the police station concerning the November 2010 incident in New Jersey was untrue and was based on a story fed to him by one of the officers. He claims that he only pled guilty to the charge because he did not have the money to defend the case; if found guilty, he could serve jail time; and he understood that the plea could not be used in a civil case and, therefore, would not affect his medical license. At the time of the hearing, in his practice at Pocono Psychiatric Associates, Dr. Kessler occasionally treated children and adolescents.

Dr. Reubins, who has treated Dr. Kessler since April 2002 for chronic social phobia, testified that Dr. Kessler “suffers from a paraphiliac [sic] disorder,” but he “found no clinical indication at all in the years I’ve treated him” that Dr.

Kessler suffers from pedophilia or exhibitionism. R.R. at 38. Although he acknowledged that Dr. Kessler could pull the wool over his eyes, in his entire career, he has never found anyone with provocative thoughts or fantasies in those areas who had not made them evident during treatment. Dr. Reubins maintained that in order to be pervasive, such behavior would have to be seen at times, but the only evidence of such episodes for Dr. Kessler has been “legally insufficient.” *Id.* at 38; *see also id.* at 42. Dr. Reubins stated that only Dr. Kessler’s phobia and anxiety have had a devastating effect on his ability to practice medicine. He opined that if Dr. Voskanian’s opinion was correct, he “would expect that there would be boundary violations present,” and there would have been patient complaints. *Id.* at 39. Dr. Reubins stated: “I don’t see anything that Dr. Voskanian sees.” *Id.* at 39. He stated that simply because Dr. Kessler has three times put himself into these situations does not mean that he suffers from pedophilia or exhibitionism; rather, “I believe there is some compelling something that has gotten him so close to that behavior that he’s been accused of it.” *Id.* at 43. Dr. Reubins testified that Dr. Kessler is “far more stable” than he was when Dr. Reubins first met him. *Id.* at 41. He explained that his social phobia is diminished, as evidenced by his holding a job and managing patients.

Dr. Block, who testified about Dr. Kessler before the New York Board, likewise disagreed with Dr. Voskanian’s diagnosis, stating that in order for Dr. Kessler to have those tendencies, he would have to experience recurrent, ongoing thoughts, fantasies and desires that he did not exhibit during his nearly eight-hour evaluation over three days with Dr. Block. Because they were resolved in Dr. Kessler’s favor, Dr. Block did not consider the July and November 2001

incidents, and stated that only the New Jersey incident is evidence of any kind of abnormal behavior. Dr. Block concluded:

[W]e don't have any indication that there is pedophilic behavior, there's nothing in exhibitionism. Even if we look at the Massachusetts 2001 versus the 2010, we have nine years of not a blip on the screen. We have no incidents of patients['] complaints, no malpractice suits It just doesn't follow that someone who's showing this level of competence should be disqualified to function as a psychiatrist because of a single episode in New Jersey, even with a history that has been discounted.

R.R. at 50. Dr. Block agreed that Dr. Kessler suffers from chronic social phobia, and shares Dr. Reubins' concern as to why Dr. Kessler "gets into these predicaments." *Id.*

Ms. Mohr is a community mental health triage nurse who worked with Dr. Kessler for approximately one year in 2008 when she was the clinical supervising director for Salisbury Behavioral Health (Salisbury). She explained that as Salisbury's treating psychiatrist, Dr. Kessler would treat patients two days per week, make medication adjustments, and advise on therapeutic modalities and behaviors. Salisbury's patients ranged in age from 18 to 76. Ms. Mohr said that, although she no longer works with Dr. Kessler, she still consults with him, and has referred patients to him "because I think he's that good." R.R. at 52. She pronounced that "[h]e's an excellent doctor. He's probably one of the best psychopharmacologists I have ever seen," and that her opinion of Dr. Kessler was shared by the community. *Id.* at 53. Despite hearing the evidence against Dr. Kessler, her opinion of him had not been diminished.

Ms. Martin, an addiction counselor who works with Dr. Kessler at Pocono Psychiatric Associates, testified that she always heard good things about Dr. Kessler's treatment of his patients. She maintained that they were "very pleased with their service" from him. R.R. at 54. She was not aware of any patient complaints. She referred patients to him, and he eventually became like a mentor to her. Despite hearing the evidence against Dr. Kessler, her opinion of him had not changed.

On April 11, 2012, based upon the evidence at the hearing, the hearing examiner adopted Dr. Voskanian's conclusion. The hearing examiner recognized that "[r]egardless of the lack of a diagnosis or an agreement among the experts, the hearing examiner finds that the mental state of [Dr. Kessler] is such that it manifests itself in inappropriate behavior," that concerned even Dr. Reubins. Hearing Examiner's Adj. and Order at ¶37. The hearing examiner concluded that Dr. Kessler is unable to practice medicine with reasonable skill and safety to patients by reason of illness and, therefore, is subject to disciplinary action. However, because Dr. Kessler's incidents have not taken place in a practice setting and there are no record complaints about his professional conduct, the hearing examiner ordered that Dr. Kessler's license be placed in probationary status for five years, subject to certain terms and conditions, including that he shall not treat individuals under the age of 18 unless another adult is present.

On May 2, 2012, the Board issued a notice of intent to review the hearing examiner's decision which authorized the parties to file briefs. The notice stated: "The Board may substitute its own findings for those of the hearing

examiner, and/or may impose greater or lesser sanction than that imposed by the hearing examiner . . . without taking additional evidence or hearing additional argument beyond that presented in the written briefs.” C.R. Item 17.

On July 25, 2012, the Board adopted the hearing examiner’s findings of fact and conclusions of law and incorporated them by reference in its FAO. The Board also adopted the hearing examiner’s discussion appearing from page 23 through the end of the first full paragraph on page 37. However, the Board disagreed with the hearing examiner’s conclusion that Dr. Kessler should continue to treat patients. The Board, instead, gave greater weight to Dr. Voskanian’s testimony and held, as the hearing examiner did, that regardless of the lack of definitive expert diagnosis, Dr. Kessler’s “mental state has manifested itself in inappropriate behavior.” FAO at 3. Having weighed the number and seriousness of Dr. Kessler’s offenses and his disciplinary history, the Board concluded that because he is unable to practice with reasonable skill and safety to patients, his license was revoked effective August 24, 2012. The Board also imposed the \$7,358.39 investigation costs on Dr. Kessler. Dr. Kessler appealed to this Court.^{9,10}

⁹ This Court’s scope of review in an appeal of an order of the State Board of Medicine is limited to determining whether necessary findings of fact are supported by substantial evidence, whether constitutional rights have been violated, or whether an error of law was committed. *Telesford v. Bureau of Professional & Occupational Affairs*, 916 A.2d 1218, 1221 n.8 (Pa. Cmwlth. 2007).

¹⁰ Dr. Kessler filed an applications with this Court to stay the Board’s order arguing that without his services, the Monroe, Pike and Carbon County communities will be underserved pending this appeal. By order dated September 20, 2012, this Court denied the application.

Dr. Kessler first argues that there was no substantial evidence to support the Board's revocation of his license under Section 41(5) of the MPA. We disagree. Section 41(5) of the MPA provides, in relevant part:

The [B]oard shall have authority to impose disciplinary . . . measures on a [B]oard-regulated practitioner for . . . (5) [b]eing unable to practice the profession with reasonable skill and safety to patients by reason of illness . . . or if he or she is or shall become mentally incompetent. . . .

63 P.S. §422.41(5).

Here, despite testimony that Dr. Kessler has a good reputation in his field and that no professional complaints have been filed against him, the record evidence shows that on at least three occasions in three distinct locations and times, Dr. Kessler exposed himself in the presence of young boys/men in public. His conduct related to these incidents and his manner of reporting them to other state medical boards has led to his inability to practice in Massachusetts and New York.¹¹ Dr. Voskanian testified that Dr. Kessler's professional contact with children and adolescents, together with his apparent desire for young boys to see him exposed and the fact that he does not accept responsibility for his inappropriate behaviors, makes him unable to safely practice medicine. Neither

¹¹ The Board specifically noted "[t]he conclusions of Dr. Berlin, the psychiatrist who examined [Dr. Kessler] in 2003 in preparation for [Dr. Kessler]'s New York hearing. Dr. Berlin testified that [Dr. Kessler] had a sexual disorder characterized by exhibitionism and an urge to be seen masturbating by young males. . . ." FAO at 4.

Dr. Reubins nor Dr. Block agreed with Dr. Voskanian's conclusion, but did opine that Dr. Kessler suffered from a social phobia and anxiety, and expressed concern about why Dr. Kessler has repeatedly placed himself in situations that resulted in criminal charges for exposure.

The Board adopted the hearing examiner's findings of fact and conclusions of law and incorporated them by reference in its FAO.¹² The Board also adopted most of the hearing examiner's discussion, disagreeing only with his conclusion that since Dr. Kessler's misconduct did not occur in a practice setting, he should keep his license. The Board stated:

[T]he Board assumes the hearing examiner intended to preemptively protect minors should [Dr. Kessler's] inappropriate conduct expand into his practice. The Board finds this approach insufficient to protect the public and the integrity of the profession.

The Board gives the greater weight to the testimony of Dr. Voskanian and concludes that [Dr. Kessler] is unable to practice with reasonable skill and safety to patients. . . . In determining the appropriate sanction, the Board considers the number and seriousness of violations and any evidence of an aggravating or mitigating character. In this case there is only one charge; that [Dr. Kessler] cannot practice safely. Considering the seriousness of this matter and [Dr. Kessler's] disciplinary history in the Commonwealth and the history of actions against [Dr. Kessler] in other states, which serve as factors to

¹² "The Board is the ultimate fact finder and may accept or reject the testimony of any witness in whole or in part, and this Court is bound by the Board's credibility determinations." *Gleeson v. State Board of Medicine*, 900 A.2d 430, 435 (Pa. Cmwlth. 2006), *appeal denied*, 591 Pa. 685, 917 A.2d 316 (2007).

aggravate the sanction that might be imposed, the Board concludes that [Dr. Kessler's] license must be revoked.

FAO at 4-5.¹³

“Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support [a] conclusion.” *Taterka v. Bureau of Professional & Occupational Affairs*, 882 A.2d 1040, 1044 n.4 (Pa. Cmwlth. 2005). There is relevant evidence in this case that a reasonable mind might accept as adequate to support the conclusion that Dr. Kessler is unable to practice medicine with reasonable skill and safety to patients due to illness. Thus, there was substantial evidence to support the Board's revocation of Dr. Kessler's license and we will not accede to Dr. Kessler's request to reweigh the evidence presented to the Board.

Dr. Kessler next argues that the Board's FAO was issued in violation of Section 504 of the Law.¹⁴ We disagree. Section 504 states, in pertinent part, that “[n]o adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.” 2 Pa. C.S. §504. Section 16.51 of the Board's

¹³ The Board noted that pursuant to Section 43 of the MPA, 63 P.S. §422.43, Dr. Kessler may apply for reinstatement in five years.

¹⁴ While Dr. Kessler cites to Sections 501 through 504 of the Law in his appellate brief, he limits his argument to Section 504 of the Law. We will not address the application of Sections 501, 502 or 503 of the Law because Dr. Kessler failed to develop any argument in this regard. Pa. R.A.P. 2119; *Rapid Pallet v. Unemployment Compensation Board of Review*, 707 A.2d 636, 638 (Pa. Cmwlth. 1998).

Regulations, 49 Pa. Code §16.51, provides that “[u]nless otherwise ordered by the Board, disciplinary matters shall be heard by a hearing examiner.” Section 16.53(c)-(e) of the Board’s Regulations, requires the hearing examiner to: “hear the evidence submitted and arguments of counsel and render a decision[;]” “record his decision in the form of an adjudication and order, supported by findings of fact and conclusions of law[;]” and, “provide copies of the adjudication and order to the Board, along with the transcript of the evidence.” 49 Pa. Code §16.53(c)-(e).

Section 16.57 of the Board’s Regulations, 49 Pa. Code §16.57, states:

(a) Unless otherwise ordered by the Board, the decision of the hearing examiner becomes final 20 days after its issuance.

(1) Upon application for review by any party **or upon the Board’s own motion, the Board will review the hearing examiner’s decision.**

(2) **The Board will review the entire record and, if it deems it advisable, may hear additional testimony** from persons already deposed or from new witnesses as well as arguments of counsel to make a Board decision.

(3) Additional testimony will be taken as soon as practicable.

(4) The Board will issue its final decision, along with its findings of fact and conclusions of law, which will be sent by mail to the parties involved.

(b) Unless otherwise ordered by the Board, neither the filing of an application for review nor the Board’s own notice of intent to review will stay the hearing examiner’s decision. (Emphasis added).

Moreover, this Court has held that “[i]t is well-settled that the Board is empowered to assess the seriousness of [a practitioner’s] offenses differently than the hearing examiner did based on the same undisputed facts and to impose a harsher sanction than that recommended by the hearing examiner.” *Telesford*, 916 A.2d at 1221 n.7.

In its notice and accompanying order to show cause, the Board warned Dr. Kessler that it could revoke his license. In accordance with its Regulations, the Board notified Dr. Kessler and reviewed the hearing examiner’s decision. The Board’s notice expressly informed Dr. Kessler that it may substitute its own findings and impose greater sanctions, even without taking new evidence. Ultimately, the Board’s FAO was based substantially on the hearing examiner’s findings and conclusions, differing only as to the weight afforded Dr. Voskanian’s testimony and the conclusion, which the Board is authorized to do. Thus, the Board’s FAO was not issued in violation of Section 504 of the Law.

Finally, Dr. Kessler argues that the Board’s FAO violated his procedural and substantive due process rights under the U.S. and Pennsylvania Constitutions. We disagree. The U.S. and Pennsylvania Constitutions prohibit the deprivation of any person’s property without due process of law. U.S. Const. amend. XIV, §1; Pa. Const. art. 1, §1. This Court has acknowledged that “the holder of a valid and existing professional license has a property interest in such license.” *Brown v. State Board of Pharmacy*, 566 A.2d 913, 915 (Pa. Cmwlth. 1989). However, “[t]he due process requirements of the constitution are fulfilled so long as the accused is made sufficiently aware of the charges against him so that

he may have an adequate opportunity to prepare a defense.” *Goldberg v. State Board of Pharmacy*, 410 A.2d 413, 416 (Pa. Cmwlth. 1980).

The Board is not bound by the hearing examiner’s sanction. *Telesford*. In fact, the Pennsylvania Supreme Court has expressly held that where, as here, the facts are undisputed, and the record reflects that the practitioner was given a full and fair opportunity to present his evidence and arguments to the hearing examiner, procedural due process does not require that he be given additional notice and another hearing before the Board imposes a harsher sanction. *Telang v. Bureau of Professional & Occupational Affairs*, 561 Pa. 535, 541-44, 751 A.2d 1147, 1151-52 (2000). Thus, the Board’s FAO did not violate Dr. Kessler’s procedural and substantive due process rights under the U.S. and Pennsylvania Constitutions.

Accordingly, the Board’s order is affirmed.

DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael N. Kessler,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
	:	
Bureau of Professional and	:	
Occupational Affairs,	:	
State Board of Medicine,	:	No. 1564 C.D. 2012
Respondent	:	

ORDER

AND NOW, this 4th day of April, 2013, the Bureau of Professional and Occupational Affairs, State Board of Medicine's July 25, 2012 final adjudication and order is affirmed.

DAN PELLEGRINI, President Judge