

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephanie Tarapchak, D.O.,	:	
Petitioner	:	
	:	
v.	:	No. 1280 C.D. 2014
	:	SUBMITTED: February 20, 2015
Bureau of Professional and Occupational Affairs, State Board of Osteopathic Medicine,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
 JUDGE LEADBETTER**

FILED: July 9, 2015

Petitioner, Stephanie Tarapchak, D.O., acting *pro se*, petitions for review of a June 27, 2014 order of the State Board of Osteopathic Medicine that indefinitely suspended her license to practice osteopathic medicine and surgery for no less than three years, retroactive to April 11, 2012, and provided terms and conditions for reinstatement of her license no sooner than April 11, 2015. In addition, she seeks review of the Board's January 4, 2013 order that denied her petition to vacate the October 2011 consent agreement and order (2011 CAO).¹

¹ In *Tarapchak, D.O. v. Bureau of Prof'l and Occupational Affairs*, (Pa. Cmwlth., No. 141 C.D. 2013, filed March 4, 2013), we quashed Petitioner's petition for review challenging the (Footnote continued on next page...)

Finally, also before us for disposition is Petitioner's subsequent application to vacate the Board's June 27, 2014 order.² We affirm the Board's order of January 4, 2013, denying Petitioner's petition to vacate the 2011 CAO, vacate and remand the June 27, 2014 adjudication for further proceedings on the Commonwealth's petition for appropriate relief (PAR) and dismiss as moot Petitioner's application to vacate the June 27, 2014 adjudication.

Petitioner was licensed to practice as an osteopathic physician and surgeon in the Commonwealth of Pennsylvania. In October 2011, Petitioner and the Commonwealth entered into the 2011 CAO, which the Board approved and adopted. At that time, Petitioner was represented by counsel. The agreement reflects that, in January 2010, the Board's probable cause screening committee approved a petition to compel mental and physical examination of Petitioner to determine her fitness to practice osteopathic medicine. In February 2010, Pogos Voskanian, M.D., a psychiatrist, conducted such an examination, concluding that Petitioner was unable to practice osteopathic medicine with reasonable skill and safety absent an increased level of monitoring and a higher degree of involvement in treatment. In March 2010, he provided the Department of State with his evaluation, which he supplemented in November 2010. Based on those factual

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Board's January 2013 denial of her petition to vacate the 2011 CAO, concluding that the Board's order was interlocutory. That order is now appealable.

² On February 23, 2015, Petitioner filed an "application for relief in the nature of a motion to vacate the agency's order appealed from due to fraud and lack of jurisdiction, quash the petition for review for want of jurisdiction and remand with Petitioner's rights restored *nunc pro tunc* with full opportunity to appeal the hearing examiner's adjudication and order dated March 5, 2014." After the Board filed an answer thereto, this Court ordered that the application be decided with the merits of the above-captioned appeal. In large part, Petitioner's application is based on the Board's decision to review the hearing examiner's order as a proposed report under 1 Pa. Code, Chapter 35.

allegations, the 2011 CAO provided that the Board was authorized to suspend, revoke or otherwise restrict Petitioner's license under Section 15(a)(5) of the Osteopathic Medical Practice Act (Act).³ Accordingly, the 2011 CAO provided for suspension of Petitioner's license for no less than three years but immediately stayed the suspension in favor of no less than three years of probation, subject to specifically enumerated terms and conditions.

In April 2012, the Commonwealth filed a PAR alleging that Petitioner failed to comply with the following terms of the 2011 CAO: 1) submittal to an assessment/treatment evaluation by a Professional Health Monitoring Program (PHMP) approved provider; 2) abide by and obey all laws of the United States; 3) provide a specimen for drug testing when requested; 4) full compliance and cooperation with the PHMP; and 5) timely payment of costs associated with the 2011 CAO. In response, the Board's probable cause screening committee issued an April 2012 notice and preliminary order, vacating the stayed suspension of her license, terminating the period of probation and indefinitely suspending her license for no less than three years.

In May 2012, Petitioner filed a timely answer and request for a hearing on the Commonwealth's PAR. A hearing was scheduled for June 2012, but Petitioner's subsequent petitions to vacate the 2011 CAO as invalid/illegal led to numerous continuances.⁴ Ultimately, the Board denied her petition to vacate the

³ Act of October 5, 1978, P.L. 1109, No. 261, *as amended*, 63 P.S. § 271.15(a)(5). Section 15(a)(5) of the Act permits the Board to discipline a physician for "[b]eing unable to practice osteopathic medicine and surgery with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of drugs, narcotics, chemicals, or other type of material, or as a result of any mental or physical condition."

⁴ On May 31, 2012, Petitioner filed her first petition to vacate the 2011 CAO. She filed a praecipe to withdraw that petition on July 30, 2012. Two days later, however, she filed another
(Footnote continued on next page...)

2011 CAO and remanded the matter to a hearing examiner to hold a formal hearing on the Commonwealth's PAR.⁵ Board's January 4, 2013 Order, Certified Record (C.R.), Item No. 25 at 408. In so doing, the Board determined as follows:

At its October 25, 2012 meeting, the Board deliberated [Petitioner's] brief and exhibits as well as the Commonwealth's reply brief and exhibits. [She] variously asserts: that the Board acted outside of its statutory authority by imposing a three-year suspension on her license; that her due process rights were violated when she was not able to challenge the expert's report; that the terms and conditions of the consent agreement at issue here were not clearly spelled out; that she entered into the consent agreement under duress; that the doctrine of laches applies to this matter; that a fraud was perpetrated on her; and, that she was discriminated against in seeking rights to relief.

[Petitioner] in her brief variously misapplies the law, ignores inconvenient facts, draws unsupported conclusions, and generally appears to be suffering from "buyer's remorse" for having signed the consent agreement. *The Board has closely examined the record before it, and sees no reason to grant a hearing.* [Petitioner] had the opportunity for a hearing on the charges in the OSC [order to show cause], but instead opted to sign the consent agreement. [She] had the advice of counsel when signing the consent agreement. Further, there does not appear to be any substantive error which has harmed [her].

Id. at 407-08 (emphasis added). Petitioner's February 2013 petition for review to this Court followed.

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petition to vacate, which she did not withdraw. August 1, 2012 Petition to Vacate, Certified Record (C.R.), Item No. 20 at 270-87; Reproduced Record (R.R.) at 22-39.

⁵ Petitioner mistakenly believes that the Board remanded the matter for a hearing on her petition to vacate the 2011 CAO. The Commonwealth's PAR, however, was the subject of the remand order.

In March 2013, this Court quashed Petitioner's petition for review challenging the Board's January 2013 denial of her petition to vacate the 2011 CAO, concluding that the Board's order was interlocutory.⁶ *Tarapchak, D.O. v. Bureau of Prof'l and Occupational Affairs*, (Pa. Cmwlth., No. 141 C.D. 2013, filed March 4, 2013). Subsequently, the Pennsylvania Supreme Court denied her petition for allowance of appeal.⁷ Following a lift of the stay imposed due to the pendency of the latter petition, the Department of State issued a notice of hearing for January 17, 2014. November 8, 2013 Notice of Rescheduled Hearing, C.R., Item No. 43 at 540. Having determined that Petitioner did not request a continuance, the hearing examiner held the hearing in her absence.

On March 5, 2014, the hearing examiner issued an adjudication and order, concluding that the Commonwealth had met its burden of proving the allegations in its PAR. In addition, noting the respective dispositions concerning Petitioner's petition to vacate the 2011 CAO, the hearing examiner concluded as

⁶ The order provided as follows:

NOW, March 4, 2013, upon review of respondent's "motion to dismiss" and petitioner's answer thereto, and it appearing that the January 4, 2013 order of the [Board], denied petitioner's petition to vacate as invalid/illegal the parties' October 6, 2011 [CAO] and remanded the matter for a hearing on the Bureau's [PAR], and it further appearing that the January 4, 2013 order is not a final order pursuant to Pa. R.A.P. 341 nor a collateral order pursuant to Pa. R.A.P. 313 because it is not separate from and collateral to the main cause of action and will not evade appellate review, the motion to dismiss is **GRANTED** and the petition for review is quashed. *See generally* 20 *West's Pa. Appellate Practice*, §341:3.1 (all previous interlocutory orders become appealable upon entry of final order).

Tarapchak, (Pa. Cmwlth., No. 141 C.D. 2013, filed March 4, 2013).

⁷ *Tarapchak, D.O. v. Bureau of Prof'l and Occupational Affairs*, (Pa., No. 352 MAL 2013, filed October 9, 2013).

follows: “In short, she was completely unsuccessful in her challenge to the validity of the 2011 [CAO], and so its terms and conditions remain intact.” June 27, 2014 Adjudication and Order at 22 n.6. After initially issuing a March 10, 2013 “notice of intent to review” the hearing examiner’s order, the Board adopted her adjudication and order as final in June 2014. Petitioner’s petition for review and subsequent application to vacate the Board’s order followed.

On appeal, Petitioner argues that the Board failed to properly dispose of the issues that she raised in her petition to vacate the 2011 CAO and that she was not afforded a fair opportunity to be heard at the January 2014 hearing regarding her alleged violations of that agreement. In addition, she maintains that the Board’s order adopting as final the hearing examiner’s adjudication and order should be vacated due to fraud and lack of jurisdiction. We hold that the Board properly disposed of her petition to vacate the 2011 CAO by virtue of its January 4, 2013 order, but failed to afford her a fair opportunity to be heard at the January 17, 2014 hearing on the Commonwealth’s PAR. Accordingly, we affirm the Board’s January 4, 2013 order denying Petitioner’s petition to vacate the 2011 CAO, vacate and remand the June 27, 2014 adjudication for further proceedings on the Commonwealth’s PAR and dismiss as moot Petitioner’s application to vacate the June 27, 2014 adjudication. In support, we set forth the following analysis.

Because any determination on our part that the petition to vacate the 2011 CAO requires further action below would necessarily affect the Board’s adjudication that Petitioner violated that agreement, we first address Petitioner’s arguments that neither the hearing examiner nor the Board made a proper disposition of that petition. We conclude that the Board did not err in denying the petition to vacate the 2011 CAO on its merits and in denying Petitioner’s request

for a hearing on that petition.⁸ In rendering its decision, the Board examined the record before it, including the 2011 CAO. The terms of that agreement afford Petitioner the right to a formal hearing only when the terms of the agreement are allegedly violated, not when she wishes to attack the terms themselves. The 2011 CAO provides: “If [Petitioner] submits a timely answer [to the Commonwealth’s PAR] and request for a formal hearing, the Board or a designated hearing examiner shall convene a formal hearing within forty-five (45) days” 2011 CAO, ¶ 28(v) at 14; Reproduced Record (R.R.) at 15.

Further, as for attacking the terms of the 2011 CAO, it provides: “[Petitioner] agrees, as a condition of entering into this Agreement, not to seek modification of it at a later date without first obtaining the express written concurrence of the Prosecution Division of the Department of State.” *Id.*, ¶ 8 at 17; R.R. at 18. In summary, the 2011 CAO constituted a settlement of the Commonwealth’s case against Petitioner whereby she “knowingly and voluntarily waiv[ed] the right to an administrative hearing” on the charges in the order to show cause, at a time when she was represented by counsel. *Id.* ¶ 6 at 17; R.R. at 18. Accordingly, we conclude that the Board did not err in refusing to hold a hearing on her petition to vacate the 2011 CAO and in denying it on the merits. We turn now to determining whether Petitioner suffered a deprivation of due process where

⁸ After the Board disposed of Petitioner’s petition to vacate the 2011 CAO in January 2013, Petitioner sought redress with this Court and the Supreme Court. The respective courts’ treatment of her petition may have led to some confusion, even on the part of the Board. Specifically, the Board in its June 2014 adjudication determined that, by virtue of her appeal to this Court and the Supreme Court, Petitioner was completely unsuccessful in her challenge to the validity of the terms of the 2011 CAO. Her challenge was unsuccessful not because there was no merit to her petition to vacate, but because she was attempting to appeal from an interlocutory order. *See supra* note 5.

the hearing examiner concluded that an email from a non-attorney did not constitute a continuance request and, consequently, held the formal hearing on the Commonwealth's PAR in Petitioner's absence.⁹

With regard to continuances, the notice of rescheduled hearing provided, in pertinent part, as follows:

Requests for continuance of hearings shall be in writing, timely filed, stating the facts on which the application rests and whether the other participants agree or disagree. Requests for continuance should be made no later than 10 days prior to the hearing except in *emergency circumstances*. No request for continuance will be granted except for good cause shown.

November 8, 2013 Notice of Rescheduled Hearing, C.R., Item No. 43 at 540 (emphasis added).

On January 9, 2014, the prosecuting attorney received an email from Joseph Pilchesky, Petitioner's significant other, stating that she was arrested on

⁹ We reject the Commonwealth's argument that Petitioner waived this issue by raising it for the first time in her petition for review. Although we have determined that our decision on the merits renders moot Petitioner's application to vacate the Board's order based on its decision to review the hearing examiner's order as a proposed report under 1 Pa. Code, Chapter 35, we briefly reference the application as support for our determination that Petitioner did not waive her due process argument.

Within days of the March 5, 2014 adjudication, the Board entered a March 10 "notice of intent to review" the hearing examiner's order. Although the Board noted that it would be proceeding under 1 Pa. Code, Chapter 35, it was unclear whether its notice vitiated the time periods and obligations for applications for rehearing and/or reconsideration outlined in the March 5 adjudication or constituted some sort of an overlay. In that regard, the March 10 notice referenced written briefs, but was silent regarding the parties' obligations set forth with great detail in the March 5 adjudication. Accordingly, any purported defects that Petitioner raised in her application regarding the March 10 notice were not "harmless error," as suggested by the Commonwealth, because her failure to pursue the due process issue below formed the basis for its waiver argument. Given the unnecessary confusion engendered by the Board's March 10 notice, we conclude that Petitioner preserved her due process issue by raising it for the first time in this Court.

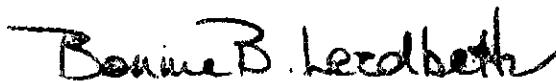
January 2, that it was unlikely that she would be able to make bail and that she would not be present at the January 17 hearing. The attorney forwarded the email to the hearing examiner. At the hearing, the prosecuting attorney stated that he checked the website of the Administrative Office of Pennsylvania Courts the afternoon before the hearing and confirmed that Petitioner remained incarcerated. Acknowledging the email but concluding that no continuance request had been filed, the hearing examiner conducted the hearing in Petitioner's absence. In her subsequent adjudication, she noted that there was no indication that Mr. Pilchesky was an attorney and that, in any event, he did not request a continuance on Petitioner's behalf. June 27, 2014 Adjudication and Order at 6.

Petitioner argues that Mr. Pilchesky's notice to the hearing examiner of her inability to attend the hearing due to her incarceration was tantamount to a continuance request and that, accordingly, the hearing examiner erred in holding the hearing in her absence. She represents that, pursuant to a grand jury investigation, the Office of Attorney General arrested her on January 2, and that, for the first ten days, she was placed in the medical block and unable to make contact with the outside world. Petitioner's Brief at 8 and 12.

Although the specifics of Petitioner's incarceration are not of record, we conclude that the undisputed timing of the events could be construed as "emergency circumstances" warranting a determination that the email constituted a continuance request and good cause for the request. In addition, notwithstanding the fact that Mr. Pilchesky is not an attorney, it is evident from the adjudication that at least one past continuance request was granted based on one of his emails

during an unrelated period when Petitioner was incarcerated.¹⁰ Petitioner, therefore, could have reasonably relied on past practice. Consequently, although we in no way condone continuance requests by non-attorneys and acknowledge that the grant or denial of such requests is a matter of discretion,¹¹ we conclude that the timing of Petitioner's imprisonment and the past practice regarding emails from Mr. Pilchesky constitute an abuse of the hearing examiner's discretion not to consider the email a continuance request and, impliedly, to deny such a request. *See Thomas v. Unemployment Comp. Bd. of Review*, 543 A.2d 600, 602 (Pa. Cmwlth. 1988) (incarceration not good cause for denial of continuance request where claimant had constitutional right to attend hearing and there was no prejudice to non-requesting party and witnesses). We conclude, therefore, that the hearing examiner's decision to proceed with the hearing constituted a deprivation of Petitioner's due process.

Accordingly, we affirm the Board's order of January 4, 2013, denying Petitioner's petition to vacate the 2011 CAO, vacate and remand the June 27, 2014 adjudication for further proceedings on the Commonwealth's PAR and dismiss as moot Petitioner's application to vacate the June 27, 2014 adjudication.



BONNIE BRIGANCE LEADBETTER,
Judge

¹⁰ In pertinent part, the adjudication provides: "[B]y Order dated May 31, 2013, the matter was continued yet again, without any opposition from the Commonwealth, based on a request made on [Petitioner's] behalf via email from Pilchesky because of [her] unavailability for the hearing due to her having been incarcerated on a child support issue." June 27, 2014 Adjudication at 5.

¹¹ *Blackledge v. Pa. State Police*, 435 A.2d 309, 311 (Pa. Cmwlth. 1981).

