

STATE OF MICHIGAN
COURT OF APPEALS

BOARD OF PHARMACY,

Petitioner-Appellee,

v

ALVIN BERNARD GOLDSTEIN,

Respondent-Appellant.

UNPUBLISHED

January 15, 1999

No. 200403

Board of Pharmacy

Disciplinary Subcommittee

LC No. 96-000099

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Respondent appeals as of right a Board of Pharmacy Disciplinary Subcommittee (board) final order that revoked respondent's controlled substance and pharmacy licenses and fined respondent \$2000. We affirm.

The board revoked respondent's pharmacy license under MCL 333.17768(2)(d); MSA 14.15(17768)(2)(d), which provides that the board may revoke a person's pharmacy license if the person "has previously maintained a financial interest in a pharmacy . . . which . . . has had its . . . federal registration . . . revoked . . ." The board revoked respondent's controlled substance license under MCL 333.7311(1)(f); MSA 14.15(7311)(1)(f), which provides that the board may revoke a licensee's controlled substance license if the "licensee is not in compliance with applicable federal . . . laws."

Before turning to respondent's arguments, we must first determine the applicable scope of review of the board's final decision. Both respondent and petitioner contend that the scope of review is that found in § 106 of the Administrative Procedures Act (APA), MCL 24.306; MSA 3.560(206). However, the final decision rendered by the board in this case was rendered under article fifteen (occupations) of the Public Health Code (PHC), MCL 333.16101 *et seq.*; MSA 14.15(16101) *et seq.* Section 115(4) of the APA provides that § 106 of the APA does not apply to final decisions or orders rendered under article fifteen of the PHC. See MCL 24.315(4); MSA 3.560(215)(4). Thus, we conclude that § 106 of the APA does not provide the appropriate scope of review for this Court in this case.

Rather, we conclude that the applicable scope of review is found in the Michigan Constitution, which provides, in relevant part, as follows:

All final decisions, findings, ruling and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law.¹ This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. [Const 1963, art 6, § 28.]

Accord *Borchardt v Dep't of Commerce*, 218 Mich App 367, 369; 554 NW2d 348 (1996) (applying the scope of review found in Const 1963, art 6, § 28 to a board of pharmacy final decision).

We now turn to a consideration of respondent's arguments on appeal. Respondent first raises a due process issue. This is a question of law that this Court reviews de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Specifically, respondent contends that he requested oral argument before the board by a letter dated June 10, 1996, and that the request was denied. Respondent contends that the board's refusal to grant oral argument deprived him of a meaningful opportunity to be heard concerning "mitigating factors as they relate to potential sanctions." We disagree.²

Rudimentary due process requires notice of the nature of the proceedings, an opportunity to be heard at a meaningful time and in a meaningful manner, an impartial decisionmaker, and a written, although relatively informal, statement of findings. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997); *In re KB*, 221 Mich App 414, 419; 562 NW2d 208 (1997); *Verbison v Auto Club Ins Ass'n*, 201 Mich App 635, 641; 506 NW2d 920 (1993). What process is due in a particular case requires consideration of three distinct factors: (1) the interest that will be affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value that additional or substitute safeguards would have, and; (3) the government's interest, including the function involved as well as the fiscal and administrative burdens that the additional or substitute procedures would require. *In re KB, supra*.

The opportunity to be heard in a meaningful manner does not require a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). Specifically, the hearing should give a person an effective opportunity to defend by confronting any adverse witnesses and by being allowed to present in person witnesses, evidence and arguments. *Verbison, supra*; see also *Cummings, supra*.

In this case, the interest affected by the board's action is respondent's property interest in his licenses. However, respondent had a hearing before the board rendered its decision. At the hearing, respondent had an effective opportunity to confront the adverse witnesses against him and to present witnesses, evidence and arguments on his behalf. In particular, respondent's counsel informed the

hearing examiner that respondent was not disputing the alleged statutory violations and that what respondent was

looking for is something in mitigating circumstances rather than in complete denial or revocation of license. We're looking for something in the mitigating circumstances there for a probationary period rather than a revocation of license. I realize that it is not your position to give that recommendation; however, it is your position to give a findings [sic] to the Board itself, which will make the final recommendation.

Thus, respondent was able to make a record concerning mitigating circumstances at the evidentiary hearing in this case. Respondent also had an opportunity to petition the board for a rehearing of its final decision. In light of the pre- and post-deprivation procedural safeguards afforded respondent in this case, we believe that the probable value of additional "mitigating circumstances" oral argument before the board was slight. Thus, we conclude that there was little risk of an erroneous deprivation of respondent's interest. Finally, requiring additional oral argument before the board concerning mitigating circumstances in addition to the record made by respondent at the hearing would impose additional fiscal and administrative burdens on the board. Thus, after balancing the relevant factors, we conclude that the board's alleged refusal to allow respondent an opportunity to present oral argument concerning mitigating circumstances did not deprive respondent of due process. See also *Leonardi v Sta-Rite Reinforcing, Inc*, 120 Mich App 377, 381-382; 327 NW2d 486 (1982).

Next, respondent raises an argument premised on § 16232 of the PHC, MCL 333.16232(3); MSA 14.15(16232)(3), which provides as follows:

A disciplinary subcommittee shall meet within 60 days after receipt of the recommended findings of fact and conclusions of law from a hearings examiner to impose a penalty.

Respondent notes that in this case the hearing examiner's recommended findings of fact and conclusions of law (hereinafter the hearing examiner's proposed decision) is dated May 17, 1996, while the board's final decision is dated September 6, 1996. Respondent contends that the board thus violated § 16232(3). Respondent contends that accordingly the board lacked jurisdiction in this case. This is a question of law that we review de novo. *Cardinal Mooney, supra*.

Section 16232(3) requires that the board meet within sixty days "after receipt" of the hearing examiner's proposed decision. In this case, the hearing examiner's proposed decision indicates that it was issued and entered on May 17, 1996. There is no indication in the record concerning when the board actually received the hearing examiner's proposed decision.³ However, although the board's final decision is dated September 5, 1996, the decision itself indicates that the board considered respondent's case "at a regularly scheduled meeting held in Lansing, Michigan, on July 17, 1996." Thus, unless we are to infer that the board received the hearing examiner's proposed decision the same day that it was filed and entered, i.e., on May 17, 1996, we cannot say that the board violated § 16232(3) by meeting more than sixty days after receipt of the hearing examiner's proposed decision.

We decline to make such an inference and thus reject respondent's basic premise that the board violated § 16232(3).

Alternatively, even assuming a violation of § 16232(3), we note that in *Department of Consumer & Industry Services v Greenberg*, 231 Mich App 466, 469; 586 NW2d 560 (1998), this Court recently held that a violation of § 16232(3), particularly where a respondent has failed to allege any prejudice, does not require dismissal of an administrative complaint. In so holding, this Court reasoned that the use of "shall" in § 16232(3) is permissive and that this subsection is primarily a disciplinary guideline. *Id.* In light of *Greenberg*, we thus reject respondent's argument that the sixty-day time period specified in § 16232(3) is jurisdictional.

Finally, respondent claims that the board's final decision to revoke his licenses is not supported by competent, material and substantial evidence on the whole record.⁴ Because a hearing was apparently required in this case,⁵ we will review this claim. See 1963 Const, art 6, § 28. However, as previously discussed in this opinion, because § 106 of the APA does not apply in this case, we decline to consider respondent's additional arguments that the board's final decision was arbitrary, capricious and an abuse of discretion. See MCL 24.306; MSA 3.560(206) and MCL 24.315(4); MSA 3.560(215)(4).

After reviewing the record in this case, we conclude that petitioner's exhibit one, which was the federal Drug Enforcement Administration decision revoking the federal registration of respondent's pharmacy, provides the requisite competent, material and substantial evidence to support the board's final decision to revoke respondent's pharmacy and controlled substance licenses. *Borchardt, supra* at 374.

In summary, we conclude that the board's final decision was authorized by law and supported by competent, material and substantial evidence. *Id.* at 373-374.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Stephen J. Markman
/s/ Michael R. Smolenski

¹ MCL 333.16237(6); MSA 14.15(16237)(6) provides that "[a] final decision of a disciplinary subcommittee rendered on or after January 1, 1995, may be appealed only to the court of appeals. An appeal filed under this subsection is by right."

² We have reviewed the administrative record in this case and find no June 10, 1996, letter requesting oral argument. However, respondent raised this issue in his petition for rehearing. Thus, we will address this issue.

³ Petitioner notes on appeal that the hearing examiner's proposed decision gave an aggrieved party twenty days to file exceptions to the proposed decision and then gave the opposing party another

twenty days to file a response. Petitioner contends that the hearing examiner's proposed decision could not be transmitted to the board until such exceptions and response were filed. Petitioner notes that respondent filed exceptions to the proposed order in this case on approximately May 28 and 30 1996, and that petitioner filed a response on June 12, 1996. Petitioner contends that the hearing examiner's proposed decision could therefore not have been transmitted to the board before June 12, 1996, and that the board's July 17, 1996, meeting was thus within sixty days of its receipt of the hearing examiner's proposed decision. However, because petitioner has provided no record support or legal authority for its contention that the proposed decision could not be transmitted to the board until any exceptions and responses were filed, we have not relied on this argument in resolving this issue.

⁴ In his statement of the questions presented, respondent also contends that the board's final decision to assess a \$10,000 fine against respondent's pharmacy is likewise not supported by competent material and substantial evidence. However, petitioner's case against respondent's pharmacy, Frank's Corner Pharmacy, was a separate case brought under board docket number 96-0098 and the pharmacy has not appealed the board's final decision in that case. Thus, we have no jurisdiction to hear this claim. See, generally, MCR 7.203. In any event, the record in this case indicates that with respect to the pharmacy the board entered a superseding final order on December 19, 1996, that rescinded an earlier order and assessed a \$5000 fine against the pharmacy.

⁵ See, e.g., MCL 333.16232(1); MSA 14.15(16232(1) and MCL 333.17768(2); MSA 14.15(17768(2).