

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 18, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-2394
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-437

**IN COURT OF APPEALS
DISTRICT IV**

JOHN RIEGLEMAN, D.C.,

PETITIONER-RESPONDENT,

v.

**STATE OF WISCONSIN CHIROPRACTIC EXAMINING BOARD
AND DEPARTMENT OF REGULATION AND LICENSING,**

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Dodge County:
DANIEL W. KLOSSNER, Judge. *Reversed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. The State of Wisconsin Chiropractic Examining Board and the Department of Regulation and Licensing appeal a circuit court order which reversed the Board's imposition of a six-month suspension of John Riegleman's license and ordered the Board to adopt the thirty-day suspension

proposed by the administrative law judge. The circuit court concluded that the Board had prejudged Riegleman's case because it rejected a proposed settlement as too lenient and subsequently imposed the same six-month suspension the prosecutor had recommended as a counter-settlement offer. We conclude, however, that the record does not show a due process violation and that the Board's decision was reasonable based on the facts before it. Accordingly, we reverse the order of the circuit court and reinstate the six-month suspension ordered by the Board.

BACKGROUND

¶2 This disciplinary action arose from Riegleman's treatment of Donald Pfeifer in 1993 and 1994. Riegleman does not dispute that he saw and treated Pfeifer sixty-three times over a span of about nine months; that Pfeifer continuously complained of pain in his left hip and buttocks area during the visits; that Riegleman never asked Pfeifer to remove his pants so that he could inspect the swollen area, instead attempting to treat Pfeifer by spinal manipulation through his clothes; that Pfeifer ultimately consulted another chiropractor who referred him to a medical doctor after his first visit; and that diagnostic imaging revealed that Pfeifer was suffering from multiple myeloma and plasmacytoma, from which he died in 1998. Riegleman maintains, however, that he had no obligation to refer Pfeifer to a medical doctor and that his continued treatment was appropriate because Pfeifer presented symptoms that could be treated by chiropractic methods in addition to problems which should have been treated medically. Riegleman points to the fact that the second chiropractor treated Pfeifer twenty-seven times while Pfeifer was also seeing medical doctors.

¶3 The Department filed a disciplinary complaint alleging that Riegleman had violated WIS. ADMIN. CODE § Chir 6.02(8) (excessive treatment of a patient); § Chir 6.02(1) (practice constituting a substantial danger to the health, welfare or safety of a patient); § Chir 6.02(12) (knowingly falsifying patient records); § Chir 6.02(9) (failing to conduct a competent assessment, evaluation or diagnosis as a basis for treatment); § Chir 6.02(3) (substantial departure from the standard of care ordinarily exercised by a chiropractor); and § Chir 6.02(17) (failure to exercise a reasonable degree of supervision over subordinate employees).

¶4 Riegleman and the attorney acting as prosecutor on the Department's behalf engaged in settlement negotiations and proposed a stipulation under which Riegleman would accept a reprimand for keeping inadequate patient records, would pay partial costs of the proceeding and would in the future obtain signed informed consent forms from patients that demonstrate Riegleman explained that chiropractic care deals only with the alignment of the spine and is not a treatment or cure for any symptom, disease or condition other than vertebral subluxation. The Board rejected the proposed stipulation. An advisor to the Board, acting as liaison, informed the prosecutor that the Board had considered a reprimand inadequate.

¶5 Based on his understanding of the Board's objections, the prosecutor proposed an amended stipulation under which Riegleman would admit that he had kept inadequate records, that his treatment represented a substantial departure from the standard of care ordinarily exercised by chiropractors, and that his treatment constituted a substantial danger to the health and welfare of his patient. Riegleman also would serve a six-month suspension and pay partial costs of the proceeding. Riegleman rejected the amended stipulation.

¶6 An administrative law judge then heard the case and found that Riegleman knew or should have known that his treatment of Pfeifer was ineffective with regard to Pfeifer's complaint of chronic hip pain because Pfeifer's condition had steadily deteriorated during the course of treatment. The ALJ concluded that Riegleman had engaged in excessive treatment of a patient contrary to WIS. ADMIN. CODE § Chir 6.02(8), and that he had engaged in a practice which constituted a substantial danger to the health, safety and welfare of the patient contrary to § Chir 6.02(1), but that there was insufficient evidence to sustain the other charges. The ALJ proposed suspending Riegleman's license for thirty days and assessing the costs of the proceeding against him.

¶7 The Board adopted the ALJ's factual findings and agreed with his conclusions that Riegleman had engaged in excessive treatment of a patient and that he had engaged in a practice which constituted a substantial danger to the health, safety and welfare of the patient. However, the Board modified the proposed suspension to six months because it felt that a thirty-day suspension would unduly minimize the seriousness of Riegleman's behavior and be insufficient to protect the public, rehabilitate Riegleman and deter Riegleman and other chiropractors from similar conduct. The Board further explained that Riegleman's conduct was aggravated by his contention in the disciplinary proceedings, contrary to representations he made in advertisements, that he was not attempting to treat his patients' pain.

¶8 Riegleman sought judicial review pursuant to WIS. STAT. §§ 227.53 and 446.05(1) (1999-2000),¹ alleging that: (1) "[t]he Board's participation in the

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

settlement negotiations influenced the Board's final decision and allowed the Board to consider facts not contained in the record," and (2) the Board's conclusion that Riegleman had violated the administrative code was arbitrary, based on an erroneous view of the law and unsupported by substantial evidence in the record.

¶9 Although the circuit court admitted that there was no direct evidence in the record as to "what Board members may or may not have said in their closed session" while discussing the initial proposed stipulation, the circuit court inferred from a letter the prosecutor sent to Riegleman and from the Board's actions that the Board had engaged in prejudgment, thus violating Riegleman's right to a fair and impartial hearing. The circuit court reversed the Board's decision on due process grounds and remanded with directions that the Board impose the thirty-day suspension proposed by the ALJ, without addressing Riegleman's other challenges to the Board's decision.

STANDARD OF REVIEW

¶10 Judicial review of administrative proceedings pursuant to ch. 227 is confined to the administrative record, with the exception of alleged procedural irregularities for which evidence may be presented in the circuit court. WIS. STAT. § 227.57(1). We apply a mixed standard of review in considering due process issues. We will sustain the circuit court's findings of historical fact unless they are clearly erroneous, but we will independently consider whether those facts show a violation of constitutional rights. *State v. McMorris*, 213 Wis. 2d 156, 165, 570 N.W.2d 384 (1997).

¶11 Additionally, we review the administrative agency's decision rather than that of the circuit court. *Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256,

260, 306 N.W.2d 79 (Ct. App. 1981). We will not substitute our judgment for that of the agency as to the weight of the evidence on any disputed finding of fact, so long as the fact is supported by substantial evidence in the record. WIS. STAT. § 227.57(6); *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989). We will reverse only if we determine that the agency acted outside of the discretion accorded to it by law or otherwise acted contrary to a constitutional or statutory provision or the agency's own rules or practice. Section 227.57(8).

ANALYSIS

¶12 The central issue on appeal is whether the Board violated Riegleman's due process rights by "prejudging" his case during the settlement negotiations. The right to due process is protected by the Fourteenth Amendment to the United States Constitution and by art. I, § 1, of the Wisconsin Constitution. Due process is a matter of fundamental fairness which requires that an individual be given a meaningful opportunity to present his or her case. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976). A due process violation may be established by showing that a decision-maker was biased rather than impartial. *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 24-25, 498 N.W.2d 842 (1993). However, we accord agency decision-makers a presumption of honesty and integrity. *Id.* at 29-30.

¶13 Riegleman argues that the Board prejudged his case because it rejected the initial proposed stipulation and then disregarded the ALJ's recommendation in favor of the same sanction the prosecutor had proposed as a counter-stipulation prior to the hearing. However, there was uncontradicted testimony from a Board member that there was "quite a bit of disagreement"

among Board members as to the appropriate sanction following the hearing, with opinions ranging from accepting the ALJ's one-month recommendation to revoking Riegleman's license. The Board member testified that "minds changed" during the Board's thirty to forty minute discussion of the case, until the Board finally came to a consensus that six months would be appropriate. This process of discussing the merits of the case does not reflect prejudice.

¶14 It is true that the Board gave preliminary consideration to the merits of the case in order to determine whether the proposed settlement was acceptable. However, due process is a flexible concept which varies in its procedural requirements depending on the circumstances of the case. *See Gilbert v. Homar*, 520 U.S. 924, 930 (1997). The Board's action cannot be considered apart from the practical reality of the nature of settlement negotiations. The Board's careful explanation of why the ALJ's proposed sanction was inadequate shows that it did indeed take the ALJ's subsequent factual findings and opinion into consideration, and was not merely affirming a decision which it had already reached prior to the hearing. That the Board's ultimate determination was in line with its initial view does not establish a *per se* due process violation.

¶15 Although the parties dispute whether we should reach the merits of the Board's decision, as a matter of judicial economy, we choose to do so. *See Ashleson v. LIRC*, 216 Wis. 2d 23, 26, 573 N.W.2d 554, 558 (Ct. App. 1997). We are satisfied that the Board's determination reflects a reasonable application of the relevant law to the facts of record. There was sufficient evidence for the Board to conclude that Riegleman improperly led Pfeifer to believe that Riegleman could relieve Pfeifer's hip pain, long after Riegleman should have known that was not true. The Board's imposition of a six-month suspension was well within its authority.

¶16 In light of our decision, we need not address the parties' arguments regarding the circuit court's authority to direct the Board to impose a specific sanction on remand. The Board's decision is hereby reinstated.

By the Court.—Order reversed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

