

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH D. MOWER, M.D.,
Appellant,
vs.
NEVADA STATE BOARD OF MEDICAL
EXAMINERS,
Respondent.

No. 42741

FILED

MAY 19 2006

JANET M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review of the Board of Medical Examiners' decision to revoke appellant's medical license. Eighth Judicial District Court, Clark County; David Wall, Judge.

Appellant Dr. Kenneth Mower was an emergency room physician at Desert Springs Hospital in Las Vegas, Nevada. In July 2002, a patient was brought to Desert Springs Hospital after an overdose of medication. The patient had an executed advance directive. Black's Law Dictionary defines "advance directive" as "[a] legal document explaining ones wishes about medical treatment if one become incompetent or unable to communicate."¹ After being admitted to the hospital, the patient's husband signed the necessary orders to classify her as a class III patient.

When a patient is classified as a class III patient, medical procedures are limited. More specifically, no attempts to prolong life are

¹Black's Law Dictionary 41 (7th ed. 2000).



permissible and diagnostic and therapeutic efforts are limited to those which increase comfort.²

Dr. Mower came on duty and received information from the patient's attending physician, including that she was a class III patient. Dr. Mower also spoke at length with the patient's husband about the desire to limit his wife's care to comfort care. After receiving this information, Dr. Mower took over as the patient's attending physician.

Later that evening, a nurse informed Dr. Mower that the patient was in distress. Dr. Mower examined the patient and found her to be unconscious, agitated, and struggling to breathe. A nurse notified Dr. Mower that the patient's respiratory rate was three to five beats per minute. Dr. Mower then issued a verbal order to a nurse to administer 10 milligrams of morphine through an IV to the patient. After that administration, a nurse informed Dr. Mower that the 10 milligram dose provided little relief. Dr. Mower then ordered the nurse to administer 10 milligram aliquots of morphine. In other words, the nurse was to administer 10 milligram increments of morphine, as needed, up to a total of 100 milligrams. Shortly after the nurse administered the morphine, the patient was pronounced dead.

After the incident, the director and chairman of the Desert Springs emergency department filed a complaint against Dr. Mower alleging malpractice in violation of NRS 630.301(4). Desert Springs then

²Class III status also includes the following: Analgesia is essential, oxygen and blood products are rarely given for comfort; medications, diagnostic tests, tube feeding or IV fluids should be avoided; the patient can be on or off a ventilator; and the patient is transferred to a non-telemetry bed.

terminated Dr. Mower's employment with the hospital. After Dr. Mower's termination, a hearing officer for respondent, the Nevada State Board of Medical Examiners held a hearing to review Dr. Mower's termination.

Dr. Jerry Calvanese, an emergency room physician in northern Nevada, testified as the Board's expert witness. Dr. Calvanese testified that, in his opinion, Dr. Mower's administration of morphine to a patient in the patient's condition fell below the standard of care. Dr. Calvanese testified that two pieces of information supported this opinion. First, the patient had ingested over 200 narcotic and tranquilizer pills earlier that day. Second, the patient's respiratory rate was abnormally low at three to five beats per minute. Given this combination of factors, any administration of morphine, and not just the second order for 10 milligram aliquots, could cease her respiration and cause immediate death. Thus, according to Dr. Calvanese, any administration of morphine to the patient fell below the standard of care.

After hearing evidence from both parties, the Board's hearing officer summarized the proceedings. This summary, along with a copy of the complaint, the exhibits, and the post-hearing briefs were forwarded to the six-member Board. The Board found that nothing in the record justified using morphine on the patient and that the patient had died after the morphine was administered. The Board then concluded that Dr. Mower's conduct constituted malpractice under NRS 630.301(4), revoked his license, and ordered him to pay all costs incurred in the disciplinary proceedings.

Dr. Mower filed a petition for judicial review of the Board's decision with the district court. The district court denied Dr. Mower's

petition and affirmed the Board's decision. Dr. Mower now appeals to this court.

DISCUSSION

Dr. Mower makes three arguments to support his contention that the district court erred in denying his petition for judicial review. First, Dr. Mower argues that the standard for revoking a medical license under NRS 630.348 violates his due process and equal protection rights. Second, Dr. Mower argues that the Board's decision to revoke his license was based on evidence insufficient to support a finding that he breached the standard of care in caring for the patient. Third, Dr. Mower argues that the Board's failure to produce potentially exculpatory materials was an abuse of discretion and violated his procedural and substantive due process rights.

NRS 630.348(2) does not violate Dr. Mower's equal protection rights

Dr. Mower claims that the preponderance of the evidence standard in this statute violates his equal protection rights. We disagree.

"Equal protection requires that no class of persons shall be denied the same protection of the law which is enjoyed by other classes in like circumstances. However, . . . a supportable classification between individuals is not unconstitutional so long as all persons similarly situated are treated alike."³ "Equal protection claims are reviewed under one of two levels of legal scrutiny."⁴ When claims involve a member of a suspect class or a fundamental right, they are subject to a strict scrutiny test,

³Reel v. Harrison, 118 Nev. 881, 886, 60 P.3d 480, 483 (2002) (internal citations omitted).

⁴Painter v. Abels, 998 P.2d 931, 940 (Wyo. 2000).

where the “inquiry is whether the action is necessary to support a compelling state interest.”⁵ If a claim does not involve a suspect class or fundamental right, the question is “whether the action bears a rational relationship to a legitimate state interest.”⁶

Because Dr. Mower’s argument does not involve a suspect class or fundamental right, we review this issue under the legal scrutiny of whether the standard in NRS 630.348 bears a rational relationship to a legitimate state interest. NRS 630.348(2) states that “[t]he Board shall not revoke a license issued pursuant to this chapter unless the Board finds by a preponderance of the evidence that the licensee committed a material violation of: (a) Any provision of NRS 630.161 or 630.301 to 630.3065, inclusive; or (b) Any condition, restriction or limitation imposed on the license.”

The preponderance of the evidence standard bears a rational relationship to the legitimate state interest of protecting the public. Protection of the public is the primary duty of the Board. A preponderance of the evidence standard bears a rational relationship to this legitimate state interest. Thus, we conclude that Dr. Mower’s equal protection rights were not violated.

NRS 630.348 does not violate Dr. Mower’s due process rights

Dr. Mower argues that the Board’s application of the preponderance of the evidence standard in NRS 630.348 violated his due process rights. We disagree.

⁵Id. (emphasis in original).

⁶Id.

“Generally, the right to practice medicine is a property right protected by the due process clauses of the United States and Nevada Constitutions, and a license to practice medicine may not be arbitrarily abridged or revoked.”⁷ Thus, due process rights apply to administrative hearings to revoke a medical license.⁸

In Minton v. Board of Medical Examiners, this court reiterated the standard to determine whether a given procedure safeguards an individual’s due process guarantees, stating:

[A] reviewing court must weigh: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that private interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.⁹

After balancing the above factors, we conclude that Dr. Mower’s due process rights were not violated by the Board’s application of the preponderance of the evidence standard because that standard adequately safeguards Dr. Mower’s individual due process guarantees.

⁷Minton v. Board of Medical Examiners, 110 Nev. 1060, 1082, 881 P.2d 1339, 1354 (1994).

⁸Id.

⁹Id. (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

The board's decision to revoke Dr. Mower's license, and the district court's subsequent denial of Dr. Mower's petition for judicial review of that decision, is supported by substantial evidence

Judicial review of an agency's final decision is confined to the record, and the burden of proof is on the party challenging the agency's decision.¹⁰ "This court's role in reviewing an administrative decision is identical to that of the district court: to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion."¹¹ In so doing, "this court is limited to determining whether substantial evidence exists in the record to support the administrative agency's decision."¹² Substantial evidence is evidence that "a reasonable [person] could accept as adequate to support a conclusion."¹³

Here, a reasonable person could accept the evidence before the Board as adequate to support the conclusion that Dr. Mower's administration of morphine to the patient fell below the standard of care. Although the board heard testimony from Dr. Mower's expert witnesses stating that his actions did not fall below the standard of care, Dr. Calvanese testified that the patient should not have been given morphine. The patient had ingested narcotics and tranquilizers earlier in the day of

¹⁰NRS 233B.135.

¹¹Clements v. Airport Authority, 111 Nev. 717, 721, 896 P.2d 458, 460 (1995).

¹²Id. at 722, 896 P.2d at 461.

¹³State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608 n.1, 729 P.2d 497, 498 n.1 (1986) (quoting Robertson Transportation. Co. v. Public Service Com'n, 159 N.W.2d 636, 638 (Wis. 1968)).

her admittance, and her respiratory rate was between three and five breaths per minute when the orders for morphine were given. Dr. Calvanese stated that any administration of morphine to an overdose patient with a respiratory rate of three to five breaths per minute can increase the risk of death because morphine depresses respiration. Dr. Mower's experts did not qualitatively rebut this opinion.

Again, this court is limited to reviewing the record that was before the Board to determine if substantial evidence exists to support the agency's decision. Because we conclude that a reasonable person could accept Dr. Calvanese's testimony as adequate to support the Board's decision to revoke Dr. Mower's medical license, we affirm the district court's denial of Dr. Mower's petition.

The Board's failure to produce potentially exculpatory materials did not violate Dr. Mower's procedural or substantive due process rights

NRS 233B.135(3) states that a "court may remand or affirm the final decision [of an agency] or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced" due to unlawful procedure¹⁴ or if the decision was characterized by an abuse of discretion.¹⁵ While we acknowledge that the Board has an obligation to produce potentially exculpatory evidence,¹⁶ we conclude that Dr. Mower was not prejudiced by the Board's failure to do so in this case. Dr. Mower contends that the Board failed to produce a statement by one of the nurses that

¹⁴NRS 233B.135(3)(c).

¹⁵NRS 233B.135(3)(f).

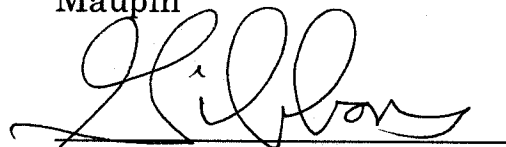
¹⁶See Mishler v. State of Nev. Bd. of Medical Examiners, 109 Nev. 287, 294, 849 P.2d 291, 295 (1993).

confirmed the fact that the patient was in distress and that the administration of the first 10 milligrams of morphine did not have a lethal effect. Dr. Mower also objects to the Board's failure to provide a statement by Dr. Jon Darden in which he expressed his view that he saw nothing wrong with providing the patient with some medications to ease her suffering. However, Dr. Mower was not prejudiced by the Board's actions in withholding these statements because the potentially exculpatory evidence did not serve to rebut Dr. Calvanese's opinion. Thus, we conclude that the Board's failure to produce potentially exculpatory materials did not violate Dr. Mower's procedural or substantive due process rights. Accordingly, we

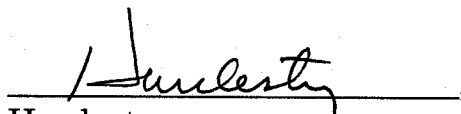
ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. David Wall, District Judge
Hutchison & Steffen, Ltd.
Bonnie S. Brand
Stephen D. Quinn
Clark County Clerk