

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-063

AUGUST TERM, 2007

Glenn A. Myer	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Superior Court
	}	
Office of Professional Regulation	}	DOCKET NO. 52-1-06 Wncv
	}	

Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Appellant Glenn A. Myer appeals from a superior court order affirming disciplinary action by the Vermont Board of Pharmacy. Appellant contends the law and evidence fail to support the Board's findings and conclusions in several separate respects. We affirm.

Appellant received a B.S. from the University of Pittsburgh in 1982 and thereafter worked as a pharmacist in Maine, Massachusetts, and Pennsylvania before moving to Vermont. He applied for and received a Vermont license as a pharmacist in 2001, and worked in several pharmacies before becoming the managing pharmacist at the Village Pharmacy in Stowe. In June 2005, the State initiated summary suspension proceedings against appellant based on allegations that he had misrepresented himself as a doctor of pharmacy and mishandled a number of prescriptions by, among other things, providing controlled substances to persons without a prescription. Following a hearing in June 2005, the Board summarily suspended appellant's license pending further disciplinary proceedings. Thereafter, the State filed a formal specification of charges, and the Board held a hearing over four days in August 2005. In a 24-page decision in September 2005, the Board concluded that appellant had engaged in unprofessional conduct by misrepresenting himself to be a doctor of pharmacy, issuing prescription drugs without a prescription, committing numerous dispensing errors, allowing tasks to be performed by unqualified pharmacy employees, and intentionally failing to disclose a prior conviction on his license application. The Board found that a number of additional allegations had not been established by a preponderance of the evidence. The Board imposed a one-year suspension and probationary conditions, including supervision for the first year of practice after reinstatement by another licensed pharmacist in good standing.

The Board's decision was affirmed on administrative appeal, and appellant then appealed to the superior court. In November 2006, the court issued a written decision, affirming the Board's decision in all respects. This appeal followed.

Although appellant has raised eight separate claims on appeal, several are redundant and will therefore be addressed jointly.¹ First, appellant contends the Board erred in finding that he purported to have a Pharm.D degree (doctor of pharmacy) when, in fact, his degree qualifies only as a bachelor of science degree. Appellant argues that he never “regularly” misrepresented his credentials and that he “mistakenly” believed he had the training “equivalent” to a Pharm.D. Appellant does not dispute the Board’s finding that neither passing the California Board examination nor completing a period of training at Boston City Hospital justified his claim that he had a Pharm.D degree. Nor does appellant dispute the Board’s finding that he regularly referred to himself as Dr. Myer, that he represented himself to the Board as Dr. Myer in an unrelated matter, or that he wrote to the Board using the title “Pharm.D.” after his name. There was thus ample evidence to support the Board’s finding that appellant held himself out as having a doctor of pharmacy degree and to justify its conclusion that appellant’s behavior constituted dishonest and unprofessional conduct. See Brody v. Barasch, 155 Vt. 103, 111 (1990) (holding that psychologist’s “failure to represent accurately his competence, education, training and experience” supported finding of unprofessional conduct).

Appellant next contends the Board erred in finding that he improperly delegated to two employees tasks that could be performed only by registered pharmacy technicians. Appellant argues that the governing statutes and rules fail to clearly distinguish between the tasks that may be performed by registered pharmacy technicians and those that may be performed by unregistered pharmacy staff. In order to ensure the proper handling of prescription drugs, the statutory scheme provides that persons who have submitted an application and been approved by the Board as registered pharmacy technicians “may perform packaging and other nondiscretionary tasks only while assisting and under the supervision and control of a pharmacist.” 26 V.S.A. § 2042(b). The statute defines a pharmacy technician specifically in terms of the tasks that such a person may perform, by providing that it “is an individual who performs tasks relative to dispensing only while assisting, and under the supervision and control of, a licensed pharmacist.” Id. § 2022(13). “Dispensing” is defined in part as “the preparation and delivery of a prescription drug pursuant to a lawful order of a practitioner in a suitable container appropriately labeled for subsequent administration to or use by a patient.” Id. § 2022(5).

Appellant does not dispute the Board’s finding that one of the employees in question, J.B., was directly involved in counting pills and handling prescriptions and the other, J.F., was asked to count pills. The Board’s finding that these tasks constituted the “preparation” of a prescription drug within the meaning of the statute is a reasonable construction of the term and was sufficient to put appellant on reasonable notice that these were tasks to be performed only by a registered pharmacy technician. See Vt. Agency of Nat. Resources v. Irish, 169 Vt. 407, 411 (1999) (due process requires notice sufficient to “give the person of ordinary intelligence a reasonable opportunity to know what it prohibited.” citation omitted). Appellant’s reliance on Walgreen Co. v. Selcke, 595 N.E.2d 89 (Ill. App. Ct. 1992) is misplaced. There, the court held that “dispensing” did not include handling the cash register for sales of prescription drugs in sealed packages, handing the packages to customers,

¹ While we agree with the State’s threshold assertion that appellant’s claims are very summarily briefed, we conclude that most are adequate to consider on the merits.

or occasionally fetching bottles from the shelf for the pharmacist. *Id.* at 95. Counting out pills or other direct handling of prescription drugs, as occurred here, was specifically not at issue in that case. *Id.* at 92. Appellant also appears to challenge the Board’s finding that he violated Board rules by leaving J.B. alone in the pharmacy on more than one occasion. The Board’s rules provide, however, that a pharmacist “shall remain on the premises during the meal/rest break,” and there was evidence that appellant left the premises in the care of J.B. 9 Code of Vt. Rules, Pharmaceutical Care, Pt. C., § 18.2.4. Accordingly, we find no basis to disturb the Board’s findings.

Appellant next claims that the Board erred in finding that he intentionally failed to disclose a 1997 Pennsylvania conviction for harassment in response to a question on his 2001 pharmacist license application as to whether he had “ever been convicted of a crime or traffic violation.” Appellant asserts that he did not disclose the offense because he thought that it was less serious than a misdemeanor and therefore was not reportable as a crime, or, alternatively, because he believed the conviction had been expunged in some manner. The Board noted that the offense was punishable by up to 90 days in jail, that appellant had served 23 days, and that his appeal of the conviction had been characterized by a Pennsylvania court as “utterly frivolous.” In light of the record evidence, we discern no basis to disturb the Board’s finding that appellant’s claims were not credible and that he had engaged in intentional misrepresentation and unprofessional conduct by failing to report the offense. *Bigelow v. Dep’t of Taxes*, 163 Vt. 33, 35 (1994) (administrative board’s findings supported by credible evidence will not be set aside); *Grievance of V.S.E.A.*, 162 Vt. 277, 280 (1994) (evidentiary weight and credibility of witnesses are matters within an administrative board’s discretion).

Appellant also claims that there is no evidence to support the Board’s finding that he “had a bad attitude” or that he selectively ignored laws. Contrary to appellant’s claim, however, these conclusions are supported by the Board’s findings, which in turn, are supported by the evidence. *Morin v. Essex Optical/ The Hartford*, 178 Vt. 29, 30 (2005).

Finally, appellant contends the Board’s one-year suspension and probationary requirements are arbitrary and capricious, asserting that there was no evidence of willful or intentional misconduct, harm to the public, or expert testimony as to what constitutes professional misconduct, and that the sanction was disproportionate compared to sanctions imposed on other pharmacists. Regulatory boards such as the Board of Pharmacy enjoy broad discretion to impose an appropriate sanction if there is a showing of unprofessional conduct, and we will not disturb its ruling absent a showing of abuse of that discretion. *Devers-Scott v. Office of Prof’l Regulation*, 2007 VT 4, ¶ 10. Appellant has shown no such abuse. As noted, the Board’s findings of unprofessional conduct, including willful misconduct in several instances, are amply supported by the record evidence. As to the question of expert testimony, appellant failed to raise this issue before the Board and therefore did not preserve it for review on appeal. *In re Whitney*, 168 Vt. 209, 215 (1998). Furthermore, the Board— comprised principally of licensed pharmacists— may apply its own expertise and technical knowledge to evaluate the evidence. See *Braun*, 167 Vt. at 115 (holding that board comprised primarily of professionals in the field “has the power to apply its own expertise in evaluating the evidence”). As to the claim of disproportionate sanctions, appellant cites Board proceedings against two pharmacies both of which are distinguishable as involving stipulated consent orders to sanctions.

See Devers-Scott, 2007 VT at ¶ 55 (in rejecting claim of disproportionate administrative sanction, we observed that “[a] stipulated consent order is not persuasive precedent for a contested case such as this one”). More importantly, “we have long held that in regard to professional conduct decisions, each case must be resolved in the light of all its own circumstances and, except in the broadest sorts of policy concerns, there is no precedential value between cases.” Id. (internal citation and quotation omitted). The Board’s findings here that appellant intentionally misrepresented his credentials, withheld information about a prior conviction, and permitted unregistered employees to perform unauthorized tasks amply support the Board’s discretionary decision to impose a one-year sanction and probationary conditions, including supervision.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

John A. Dooley, Associate Justice