

Appellate Court Case Number
A08-85

STATE OF MINNESOTA
IN COURT OF APPEALS

George Marita Obara,

Petitioner.

vs.

Minnesota Department of Health,

Respondent.

PETITIONER'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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ISSUES PRESENTED

I Was Petitioner deprived of substantive and procedural due process when the Minnesota Department of Health disqualified him from providing nursing services without a formal hearing based solely on his conviction for a statutorily proscribed offense, without any consideration of the facts and circumstances underlying Petitioner's conviction or evaluating the actual likelihood that Petitioner might endanger patients by providing nursing services?

II. Are Minn. Stat § 245C.14 and 245C.15 overbroad by requiring Petitioner's disqualification upon conviction of a particular criminal offense without consideration of the facts and circumstances underlying the crime?

PROCEDURAL AND FACTUAL HISTORY

Petitioner George Marita Obara ("Petitioner" or "Obara") is licensed as a registered nurse. On October 9, 2006, Petitioner and his wife became embroiled in a domestic dispute. The following day, October 10, 2006, Obara was charged in Hennepin County District Court with making terroristic threats and third degree assault. Both are felony offenses.

As a result of these charges, the Minnesota Department of Health ("Respondent" or "MDH") disqualified Obara from a position having direct contact with persons receiving services from facilities licensed by MDH. Petitioner sought reconsideration by MDH and on April 24, 2007, Respondent issued a directive denying Petitioner's request (A.1). Petitioner filed an appeal and demanded a hearing before a Human Services Judge. Apparently Obara was allowed to continue working at a registered nurse during this period but was monitored by other employees and did not provide direct care to patients.¹

Petitioner was tried by a jury on June 6-7, 2007. At the conclusion of his trial, the jury convicted Obara of third degree assault and making terroristic threats. On July 18, 2007, Petitioner received a 120 day sentence as a result of this conviction. Petitioner was directed to serve thirty-five (35) days of this sentence at the Hennepin County Workhouse with the balance spent on electronic home monitoring. Obara was also placed on probation by the sentencing Judge.² On June 19, 2007, Human Service Judge DuFresne stated that she was suspending the administrative appeal filed by Obara "until the question of the appeal of the criminal matter has ripened." Judge DuFresne's directive added "in September I will ask Mr. Obara to provide evidence of an appeal in the criminal matter. If an appeal has been filed, I will continue this

¹ There is no allegation that Obara ever abused or mistreated a patient in his care.

² Additional information regarding the charges against Petitioner and his sentence may be found in file number A07-1689 which is currently pending before this court.

matter until the appeal is decided.” (A.3).

Petitioner timely filed an appeal which is pending before this court (file number A07-1689.) Nonetheless on September 11, 2007, DHS issued another order disqualifying Petitioner from providing services (A.4). Petitioner again sought reconsideration by the commissioner and on November 14, 2007, MDH issued an order reconfirming Petitioner’s disqualification and prohibiting Obara from “direct contact with or access to persons receiving services...” from facilities licensed by MDH (A.10). This directive stated that the November 14, 2007, decision was a “final agency decision” subject to review only by this court. Obara’s criminal conviction was the sole basis for the disqualification which effectively prohibited Obara from working as a registered nurse. Respondent has now challenged that decision in this proceeding.

ARGUMENT

I. THE MDH DECISION DEPRIVED PETITIONER OF DUE PROCESS

MDH’s decision was predicated on petitioner’s criminal conviction. Minn. Stat. § 245C.14 Subd.(a)(1) mandates that MDH disqualify an individual from direct contact with persons receiving services for:

A conviction of or admission to one or more crimes listed in § 245C.15, regardless of whether the conviction or admission is a felony, gross misdemeanor, or misdemeanor level crime.

Minn. Stat. § 245C.14 Subd.1(b) adds “no individual who is disqualified... may be retained in a position involving direct contact...”

The catalogue of offenses which result in disqualification under Minn. Stat. § 245C.15 Subd.2 include terroristic threats and third degree assault.³ For an individual convicted of these

³ Minn. Stat § 245C.15 Subd.2 requires disqualification for a panoply of offenses including possession of shoplifting gear, identity theft, receiving stolen property, issuance of dishonored checks, credit card fraud, financial transaction fraud, felon in possession of a firearm, criminal vehicular homicide, wrongfully obtaining public assistance, food stamp fraud or arson.

offenses of Minn. Stat. § 245C.15 mandates the disqualification last for at least fifteen (15) years. To implement the disqualification, Minn. Stat. § 245C.18 directs any license holder to “remove a disqualified individual from his or her employment. If a licensee believes his or her disqualification is unwarranted, Minn. Stat. § 245C.21 permits a licensee to seek reconsideration of the disqualification by the commissioner. In Petitioner’s situation the commissioner’s reconsideration decision is not subject to a fair hearing under Minn. Stat. § 245C.27 Subd.1 because Minn. Stat. § 245C.29 Subd. 2 (a)(2) makes conviction for an offense meeting “the definition of any of the crimes listed in § 245C.15” a “conclusive determination constituting a final agency decision” which can only be reviewed by this court.⁴

Petitioner contends this statutory scheme denied him both procedural and substantive due process. The U.S. and Minnesota Constitutions contain provisions safeguarding an individual’s right to due process. These provisions are co-extensive and Minnesota Appellate Courts have emphasized that “the due process protections granted in the United States and Minnesota Constitutions are identical.” *Fosselman v. Commissioner of Human Services*, 612 N.W.2d 456, 461 (Minn. App. 2000), see also *Sartori v. Harnischfeger Corp.*, 432 N.W. 2d 448, 453 (Minn. 1988).

At its starting point, every due process challenge, whether procedural or substantive, requires a litigant demonstrate that the challenged regulation or statute affects a recognized liberty or property interest. *American Mfrs Mut Ins. Co v Sullivan*, 526 U.S. 40 (1999). The ability to hold meaningful private employment is considered to be both a liberty and property right under the U.S. Constitution. *Greene v. McElroy*, 360 U.S. 474 (1959), *U.S. v. Robel*, 389

⁴ Minn. Stat. § 245C.30 permits MDH to grant a “time limited” variance of disqualifications of certain license holders under conditions “that minimize the risk of harm to people receiving services”.

U.S. 258 (1967). Minnesota courts have specifically held that the right to practice medicine or nursing professions are a protected property right warranting Constitutional protection.

Humenansky v. Minnesota Bd. of Medical Examiners, 525 N.W. 2d. 559 (Minn. App. 1994), review denied; *Fosselman v. Commissioner of Human Services*, 612 N.W. 2d. at 461.

A. The disqualification decision deprived Petitioner of procedural due process.

Recognizing that a citizen's right to employment is a protected Constitutional interest this court has previously held that MDH disqualification proceedings "are subject to the requirements of procedural due process." 612 N.W. 2d at 461. At its core:

The fundamental requirement of due process is the opportunity to be heard at meaningful time and in a meaningful manner.

Matthews v. Eldridge, 424 U.S. 319, 333 (1976).

In *Matthews*, the U.S. Supreme Court established a three part test to ascertain whether a particular process met this Constitutional standard. In this instance a detailed analysis of these standards is unnecessary because in *Fosselman v. Commissioner of Human Resources*, this court already decided that a similar mechanism failed to meet the demands of procedural due process. In *Fosselman*, MDH disqualified two registered nurses and a qualified mental retardation professional from providing services based on allegations of maltreatment. The nursing professionals sought administrative review and, as here, the Commissioner affirmed the disqualification.

The employees then challenged the underlying process alleging that MDH's failure to conduct any form of evidentiary hearing before issuing the disqualification order violated their right to procedural due process. This court agreed and held that due process required an evidentiary hearing before disqualification. *Fosselman v. Commissioner of Human Services*, 612 N.W. 2d. 465. This court particularly criticized the statutory framework for labeling certain

matters “conclusive” during the reconsideration process. 612 N.W. 2d at 463. These criticisms are equally pertinent here where Obara has been deprived of any meaningful opportunity to be heard with respect to the basis for his disqualification.

B. Petitioner’s disqualification deprived him of substantive due process.

Presumably Respondent will allege that *Fosselman* is distinguishable from the instant appeal because Petitioner’s disqualification relied on a different statutory basis. Unlike *Fosselman*, Petitioner is not accused of patient maltreatment. Instead, Petitioner’s disqualification is predicated on his criminal conviction. While the nurses in *Fosselman* disputed the maltreatment allegations, Petitioner does not deny that he was convicted of third degree assault and making terroristic threats. Here, Petitioner challenges the legitimacy of his conviction but does not dispute the fact that he was convicted.⁵ In essence, MDH may argue that any formal hearing would be meaningless because § 245C.14 and 245.15 compel disqualification upon conviction.

This argument is of limited effect because Petitioner is also challenging the inevitable character his disqualification on substantive due process grounds. Although an individual has a constitutionally protected right to pursue his or her profession this ability is subject to reasonable government regulation. *Conn v. Gabbert*, 526 U.S. 286 (1999), *Friedman v Rogers*, 440 U.S. 1 (1979), rehearing denied 441 U.S. 917. For example, a state can legitimately impose education requirements on medical professionals. *Graves v. State of Minnesota*, 273 U.S. 425 (1926). Due process affords not only a procedural guarantee of fairness to Petitioner but likewise protects his substantive liberty and property interest in employment against

⁵ As a consequence, Petitioner alleges that the disqualification was premature. MDH had ample remedies available to temporally assure patient’s safety while allowing the criminal appeal to proceed. See *Fosselman*, 612 N.W. 2d. 464, 465.

unconstitutional restriction by MDH. See *Kelly v. Johnson*, 425 U.S. 238 (1976). In essence, substantive due process recognizes that there are limits on what government may do in both its legislative and executive capacities. *County of Sacramento v. Lewis*, 523 U.S. 833 (1988).

Substantive due process looks beyond the procedures employed by the state and considers whether the government's actions are substantively reasonable and appropriate.

...under the rubric of substantive due process [the Constitution] protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.

Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992), *Daniels v. Williams*, 474 U.S. 327, 331 (1986), *Flowers v. City of Minneapolis*, 478 F. 3d. 869, 873 (8th Cir. 2007), *In re Linehan*, 594 N.W. 2d 867 (Minn. 1999), Cert denied 528 U.S. 1049.

In this arena, the court must consider whether the challenged statute impacts individuals in an arbitrary or capricious manner. *Minneapolis Auto Parts Co Inc v City of Minneapolis*, 572 F. Supp. 389(D.Minn. 1983). In making this judgment, history and tradition are the starting point of substantive due process inquiries. *Lawrence v. Texas*, 539 U.S. 558 (2003). The court must search for "a rational continuum which broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints..." *Moore v City of East Cleveland, Ohio*, 431 U.S. 499, 501 (1977). Petitioner concedes the state has a legitimate role in regulating medical and nursing services. Respondent also readily agrees that assuring patient safety is a fundamental objective of that authority.

Unfortunately, mandating Petitioner's disqualification when he has not been accused of patient mistreatment does not serve to foster that objective. Minn. Stat. § 245C.14 and 245C.15 compelled Petitioner's disqualification upon conviction for an enumerated offense. The statutory scheme left MDH with no discretion to determine that disqualification was inappropriate and did not permit MDH to meaningfully evaluate of the facts of each individual

case. Moreover, an examination of the plethora of criminal convictions compelling disqualification reveals that some of the offenses bear little or no connection with patient safety. For example, it is puzzling how wrongfully obtaining public assistance, issuing dishonored checks, receiving stolen property, or maintaining a spring gun are crimes likely to endanger patient safety in clinical setting. Medical professional who write bad checks or place spring guns at their lake homes may show poor judgment but there is no sensible basis for concluding that conviction for these offenses make licensees prone to display similar lapses when treating patients. This is particularly true, in situations such as this one, where MDH had no evidence that Petitioner mistreated a patient during his job history.

As a result, this disciplinary process is constitutionally infirm. Substantive due process requires not only that the government's goals be legitimate but that the legislative action have a real and substantial relation to that objective. *Railroad Retirement Board v Alton R. Co.*, 295 U.S. 330 (1935). If the legislative framework adopted fails to meet that standard it is arbitrary, capricious and violates the substantive due process rights of the citizens it affects. *Richardson v Belcher*, 404 U.S. 78 (1971), *614 Co v Minneapolis Community Development Agency*, 537 N.W. 2d 400 (Minn. App. 1996) *Lamusga v. Commissioner of Public Safety*, 536 N.W. 2d. 644 (Minn. App. 1995), review denied, *Grussing v. Kavam Implement Co*, 478 N.W. 2d. 200 (Minn. App. 1991).

Here, demanding disqualification merely upon conviction of a particular offense makes the statute's effect arbitrary and capacious. For example if Petitioner had successfully entered into a plea negotiation which stayed imposition of sentence he might have escaped the draconian effects of this statute. The facts underlying Obara's behavior would not have changed nor would the related public safety concerns be diminished. However, the statute's impact on Petitioner would be dramatically altered. This broad brush statutory vehicle effectively places licensees at

the mercy of the vicissitudes of the criminal justice system without recourse to measured individual risk analysis by MDH. It potentially allows individuals engaging in egregious conduct to escape disqualification if assigned an understanding prosecutor while subjecting persons committing less serious infractions to disqualification if assigned a zealous and rigid prosecutor.

Another irrational aspect of the statute is the length of the disqualification period. There is no legitimate basis for concluding that licensees convicted of crimes cannot rehabilitate themselves in less than the fifteen (15) years- the disqualification period required by Minn. Stat. § 245C.15 Subd. 2. Although there are no reported cases considering this issue, this court may find guidance by analogy in forfeiture decisions. When a forfeiture results in a sanction “grossly disproportional to the gravity of a Defendant’s offense” it is unconstitutional. See *US v Bajakajian*, 524 U.S. 321, 336 (1998).⁶ In this instance the sanction meted out to Petitioner, appears on the surface to be grossly disproportionate to the nature of his conviction. While Petitioner does not minimize the gravity of the charged offenses, even if his conviction is sustained, the sentencing judge felt that confinement of only 35 days was appropriate. Stripping Obara of his profession for a period of 15 years seems blatantly excessive in comparison to Petitioner’s criminal sentence.

II. THE DISQUALIFICATION IMPOSED BY MINN. STATS § 245C.14 AND 245C.15 IS OVERLY BROAD.

A related constitutional concept is overbreadth. A government purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade protected freedoms. *Griswold v.*

⁶ In forfeiture actions, grossly disproportionate sanctions violate the excessive fines clause of the Constitution. *U.S. v. Bajakajian*, 529 U.S. at 334.

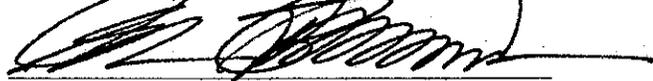
Connecticut, 381 U.S. 479 (1965), *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). Because Minn. Stat. § 245C.14 and 245C.15 require disqualification for a host of different offenses the process appears to violate this constitutional admonition. The statutory scheme exposes many individuals to disqualification for behavior which has, on the surface, little if any relationship to patient safety. This affords an independent basis for invalidating the statute at least insofar as it applies to Petitioner.

CONCLUSION

For the above stated reasons Petitioner requests that his disqualification be set aside.

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