OAH 21-0901-39937

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF CHIROPRACTIC EXAMINERS

In the Matter of the Chiropractic License of Connor Reed Ginder, D.C. License No. 6829	**ORDER DENYING LICENSEE'S MOTIONS TO DISMISS AND TO EXCLUDE WITNESSES AND ORDER ON MOTION IN LIMINE**

This matter came before Administrative Law Judge Kimberly Middendorf upon Licensee's motions to dismiss and to exclude certain witnesses (the Motions) and the Complaint Panel's Motion in Limine (Panel's Motion). The hearing record on all motions closed on May 24, 2024, upon receipt of Licensee's response to the Panel's Motion.

Jamal A. Zayed and Erin Farmer, Assistant Attorneys General, appeared on behalf of the Complaint Panel (Panel) of the Minnesota Board of Chiropractic Examiners (Board). Thomas Jensen, Lind, Jensen, Sullivan & Peterson, P.A., appeared on behalf of Connor Reed Ginder, D.C. (Licensee).

Based on the submissions of the parties, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

ORDER

1. The Licensee's Motions are **DENIED**.

2. Licensee concedes that evidence of breast augmentation and sexual history will not be offered, and therefore the Panel's Motion on those issues is **MOOT**. The Judge agrees with Licensee that the Panel's Motion to exclude Licensee's witnesses is premature.

3. This matter will proceed to an evidentiary hearing as set forth in the Second Prehearing Order.

Dated: May 28, 2024

KIMBERLY MIDDENDORF
Administrative Law Judge

MEMORANDUM

This matter concerns allegations made by four patients that Licensee engaged in unprofessional conduct in the provision of chiropractic treatment.[1] Patient #1 alleged that inappropriate conduct occurred during chiropractic treatment between August 2022 and September 2022. From late 2021 to early 2022, Patient #2 is alleged to have experienced misconduct while seeing Licensee for chiropractic treatment. Patient #3 allegedly sought treatment from Licensee beginning in 2020 and continuing to March 2023, when she was subjected to inappropriate conduct. From approximately March 2023 through February 2024, Patient #4 saw Licensee for chiropractic treatment and allegedly experienced unprofessional conduct.[2]

Licensee argues that the adjudicative procedure established by Minn. Stat. § 14.50-14.69 (MAPA), and the Board's suspension order, unconstitutionally deprive Licensee of his right to a jury trial and further deprives him of his constitutional due process rights to conduct discovery into the backgrounds of the complainant and other patients who allege improper conduct by Licensee. Therefore, Licensee argues that this proceeding, and the Board's suspension order, should be dismissed and the suspension order vacated. In the alternative, Licensee claims that the testimony of Patients 2-4 should be excluded as duplicative.[3]

The provisions of MAPA describe the role of administrative law judges in ensuring agency compliance with the law in specific cases – a body of law that includes statutory and constitutional provisions. A "contested case" under MAPA is a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."[4] Moreover, the MAPA obliges initiation of a contested case whenever an agency is "required by law" to do so[5] – a phrasing that is not limited to state statute or rule, but includes a wider range of protections.

Unlike Article VI judges in the state court system, administrative law judges are part of the executive branch. Accordingly, administrative law judges have no power to declare a statute unconstitutional. These are powers that are only accorded to judges in the judicial branch.[6] No one in this case has cited authority for an administrative law judge's subject-matter jurisdiction over facial challenges to a statute's validity; nor could they. Licensee's motion to dismiss on the grounds that the statutes that govern chiropractic professional standards or those that give him due process rights are per se unconstitutional is denied because it seeks relief that the Administrative Law Judge is not empowered to provide.

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[1] *See* Notice and Order for Hearing on Temporary Suspension (Apr. 5, 2024).
[2] *Id.*
[3] Licensee's Memorandum in Support of Motion for Dismissal or Witness Exclusion (Licensee Mem.) (May 10, 2024) at 1.
[4] Minn. Stat. § 14.02, subd. 3 (2022).
[5] Minn. Stat. § 14.57 (a) (2022).
[6] *Neeland v. Clearwater Memorial Hospital,* 257 N.W.2d 366 (Minn. 1977) (observing that "the constitutional issue was not and could not have been presented to or passed upon by the administrative bodies below.").*See In re On-Sale Liquor License, Class B.*, 763 N.W.2d 359, 371 (Minn. App. 2009); *see e.g., In re Rochester Ambulance Service,* 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993).

Licensee's claim that his matter should be heard in district court and decided by a jury is misplaced.[7] The Panel correctly observes that the Minnesota Supreme Court has held that a trial by jury is not guaranteed in every instance.[8] In *Riley v. Jankowski*, the Minnesota Court of Appeals held that administrative proceedings before a judge, and without a jury trial, do not violate Article I, Section 4 of the Minnesota Constitution.[9] That constitutional provision "does not apply to rights and remedies later created by the legislature" after Minnesota adopted its Constitution in 1857.[10]

Licensee also fails to establish that the proceeding against him violates due process. The United States and Minnesota Constitutions guarantee due process.[11] Due process protections restrain a government from actions that deprive a person of liberty or property and "include reasonable notice, a timely opportunity for a hearing, the right to be represented by counsel, an opportunity to present evidence and argument, the right to an impartial decisionmaker, and the right to a reasonable decision based solely on the record."[12] The requirements of due process are measured according to the nature of the government function involved and whether private interests are directly affected.[13] The due process rights required are adequate notice of a hearing, a reasonable opportunity to be heard and present evidence, and the availability of appellate review.[14]

Licensee argues he is being subjected to a "doubly abusive process" in this contested case, but the record demonstrates he has been afforded the procedural safeguards to which he would be entitled in "real civil practice[.]"[15] Here, Licensee has notice of the hearing and the allegations against him. He has vindicated his right to counsel and has been given adequate time to prepare his defense. Licensee has the opportunity to present evidence and argument. Testimony will be taken under oath and subject to cross examination. The decision will be made upon the record and subject to appellate review. Licensee has pointed to no process due him under the law but denied under MAPA.

Licensee appears to hold the erroneous belief that his constitutional right to due process is violated unless he is permitted unfettered discovery. Licensee is allowed to conduct discovery by any means "available pursuant to the Rules of Civil Procedure for

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[7] *See State v. S.L.H.,* 755 N.W.2d 271 (Minn. 2008).

[8] *See State v. Weltzin*, 630 N.W.2d 406, 410 (Minn. 2001) (holding that trial by jury is not required in cases where there is no possibility of incarceration); Panel's Memorandum in Opposition of Licensee's Motion (Panel Mem.) (May 20, 2024) at 2.

[9] 713 N.W.2d 379, 396 (Minn. Ct. App. 2006) (observing that Article I, Section 4 of the Minnesota Constitution "is intended to continue, unimpaired and inviolate, the right to trial by jury as it existed in the Territory of Minnesota when our constitution was adopted in 1857[.]"

[10] *Id.*

[11] U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7.

[12] *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559, 565 (Minn. App. 1994), review denied (Minn. Feb. 14, 1995).

[13] *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712, 715 (Minn.1978).

[14] *Id.*; *Jankowski*, 713 N.W.2d at 394. Indeed, full due-process protections are not constitutionally mandated in quasi-judicial proceedings of an agency. *See In re North Metro Harness, Inc.*, 711 N.W.2d 129, 136 (Minn. Ct. App. 2006) ("The due-process rights required are simply reasonable notice of a hearing and a reasonable opportunity to be heard.").

[15] Licensee Mem. at 9-10.

the District Court of Minnesota."[16] The Rules of Civil Procedure do not furnish litigants with rights to engage in the kind of fishing expedition Licensee proposed and was denied by prior order.[17] Indeed, Licensee would not have an unlimited right to discovery even in a criminal proceeding with his freedom at stake.[18] Nevertheless, Licensee requested and was granted subpoenas to depose the four patients who reported Licensee's alleged misconduct. Further, Licensee requested and was granted subpoenas for the hearing presence of eleven witnesses of his choosing.

Licensee argues that the patients are the real parties in interest in this matter, and contends that in district court, he could obtain an order for an independent mental examination of the complainants under Minn. R. Civ. P. 35 to search for impeachment material. That rule provides:

> In an action in which the physical or mental condition or the blood relationship of a party, or of an agent of a party, or of a person under control of a party, is in controversy, the court in which the action is pending may order the party to submit to, or produce such agent or person for a physical, mental, or blood examination by a suitably licensed or certified examiner. The order may be made only on motion for good cause shown[.][19]

A hope to discover impeachment material or that a complainant is "psychotic" is not good cause to order an intrusive mental examination under the rule.[20] Licensee further complains that he has not been able to access the patients' social media posts because they are not parties. It must be noted that Licensee never requested a subpoena for such information and cannot blame the administrative process for his failure to make such a request.

Contrary to Licensee's characterizations, the Panel argues that it seeks to establish that Licensee has failed to comply with the professional standards the Board is charged with ensuring.[21] This is not a civil action for damages but rather an exercise of Minnesota's police power. Accordingly, the Panel is not a mere nominal party to this matter. The Panel alleges that Licensee violated a standard of professional conduct with respect to four of his patients. Each patient has potentially relevant testimony regarding the treatment she received. Licensee has not established any basis for the exclusion of any of the complaining witnesses, under the U.S. or Minnesota Constitutions, MAPA, the contested case rules, or any other law. Licensee's motions are **DENIED**.

K. J. M.

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[16] Minn. R. 1400.6700, subp. 2.
[17] Order on Licensee's Requests for Subpoenas for Production of Documents (May 6, 2024); *see Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982).
[18] *Ramsey Cnty. v. S. M. F.,* 298 N.W.2d 40, 42 (Minn. 1980) (holding that defendant's interrogatories intruding on the right to privacy were too broad); *see also In re B.H.*, 946 N.W.2d 860, 870 (Minn. 2020) (reversing district court's denial of motion to quash subpoena because holding otherwise would cause irremediable harm to the alleged victim and would have a chilling effect on the reporting of crimes).
[19] Minn. R. Civ. P. 35.01.
[20] Licensee Mem. at 11.
[21] Panel Mem. at 3-4.