STATE OF MICHIGAN

INGHAM COUNTY CIRCUIT COURT

ROBERT L. ALEXANDER, M.D.,

Petitioner,

v

File No. 92-72838-AA

MICHIGAN DEPARTMENT OF COMMERCE, BOARD OF MEDICINE,

Hon. James R. Giddings

Respondent.

Max R. Hoffman (P23199)
Farhat, Story & Kraus, P.C.
Attorneys for Petitioner
Suite 3, 4572 S. Hagadorn Rd.
East Lansing, MI 48823
517/351-3700

Howard C. Marderosian (P17080)
Assistant Attorney General

ORDER OF REMAND VACATING SUPERSEDING FINAL ORDER

At a session of said Court held in the Ingham County Circuit Courtrooms, City Hall, Lansing, Michigan, on this 18 day of October, 1993.

PRESENT: HONORABLE JAMES R. GIDDINGS, CIRCUIT JUDGE

This matter having returned to this Court after remand upon Petitioner's Petition for Review of the Superseding Final Order of Respondent Michigan Department of Commerce, Board of Medicine, both parties having filed

briefs and made oral argument, and the Court having reviewed the record of the proceedings below and being fully apprised in the premises; consistent with the written Opinion issued by the Court on September 20, 1993;

IT IS ORDERED:

1. The Superseding Final Order on Remand dated August 21, 1992, is vacated.

2. The matter is remanded to the Michigan Department of Commerce, Board of Medicine, and the Board is instructed to provide reasons for the Board's choice of sanction and fine consistent with Section 85, 1969 PA 368, as amended; MCL 24.285; MSA 3.560(185).

JAMES R. GIDDINGS

JAMES R. GIDDINGS, CIRCUIT JUDGE

COUNTERSIGNED:

BRENDA HOLLERN

Deputy Clerk

A TRUE COPY
CLERK OF THE COURT
30th JUDICIAL CIRCUIT COURT

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

ROBERT L. ALEXANDER, M.D.,

Petitioner,

DOCKET NO. 92-72838-AA

-vs-

OPINION

BOARD OF MEDICINE,
MICHIGAN DEPARTMENT OF COMMERCE,

Respondent.
_____/

Before the Court is an appeal from the Michigan Department of Commerce and a superseding final order of the Board of Medicine in a license revocation case. Petitioner, Robert L. Alexander, M.D., does not challenge that aspect of the order finding him in violation of the Public Health Code (the Code), MCL 333.1101 et seq; MSA 14.15(1101) et seq. Petitioner contends, rather, that revocation of his medical license and imposition of a $50,000 fine was arbitrary, capricious and an abuse of the Board's discretion. Alternatively, Petitioner complains that such sanctions were made upon unlawful procedure. Both assertions are premised on the Administrative Procedures Act of 1969 (the APA), MCL 24.201 et seq; MSA 3.560 (101) et seq.

In September of 1988 Petitioner was convicted in federal court and sent to prison pursuant to 21 USC 841(a)(1) and 846 for distribution of controlled substances and conspiracy with intent to distribute controlled substances. Shortly thereafter, the Attorney General initiated disciplinary proceedings in which several preliminary adjournments were granted and the parties stipulated that Petitioner's license to practice medicine would be

surrendered until the conclusion of the hearing process. Then, on December 20, 1989, an administrative hearing took place while Petitioner remained incarcerated. At that hearing the federal indictment, jury verdict and order of judgment and commitment in Petitioner's criminal case were made part of the administrative record. Petitioner's counsel offered no evidence, presumably because he was not prepared to proceed in his client's absence.

The hearing officer's proposal for decision (PFD) recited findings of fact and conclusions of law regarding only the alleged violations of the Code. The PFD contained neither a recommended sanction nor any reference to an appropriate one, apparently in compliance with Respondent's promulgated rule, 1980 AACS, R 338.979(3). The Board then modified the PFD to conclude that Petitioner had violated subsections (a), (b)(i), (b)(v), (b)(vi), (c)(iii) and (c)(iv) of section 16221 of the Code, MCL 333.16221; MSA 14.15(16221). Each such violation allows the Board to impose a sanction ranging anywhere from probation to revocation of license and a fine. Id. The Board ordered the revocation of Petitioner's license and imposed a $50,000 fine. Petitioner then sought review of the Board's final order as authorized by section 101 of the APA, MCL 24.301; MSA 3.560(201).

On September 30, 1991, this Court vacated the Board's final order and remanded with instructions that a supplemental hearing take place so that Petitioner could be present and offer evidence in mitigation of the sanction imposed. The transcript of the supplemental hearing reveals that Petitioner was suffering from a manic-depressive bipolar disorder during the period of his

repeated violations. Such record reflects that Petitioner was largely unaware of his psychological illness since it was not properly diagnosed until he was in prison. The record also includes a responsibility study which concluded that Petitioner's disease caused him to misuse his professional judgment. In addition, some community leaders and licensed physicians testified as to Petitioner's rehabitation and remission of his illness, advocating restoration of Petitioner's license to practice.

The supplemental record was sent directly to the Board apparently in conformity with section 81(1) of the APA, MCL 24.281(1); MSA 3.560(181)(1), the agency-reads-the-record exception to the required PFD. On August 21, 1992, Respondent issued its superseding final order, which said that the evidence adduced at the supplemental hearing was "considered" by the Board. That order reinstated the prior order of license revocation and fine without fully articulating the Board's reasons for the discipline imposed -- except for its determination that Petitioner violated the Code.

The matter now returns to this Court after remand. Petitioner seeks review of the Board's superseding final order as authorized by section 101 of the APA, cited supra. Specifically, the scope of review in section 106 of the APA, MCL 24.306; MSA 3.560(206), provides in part:

> "(1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

* * *

"(c) Made upon unlawful procedure resulting in material prejudice to a party.

* * *

"(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion."

Petitioner invokes each of the quoted reasons for vacating the Board's order, saying first that it is arbitrary, capricious and an abuse of the Board's discretion, then asserting that it is also the product of unlawful procedure.

Traditionally, courts have "allowed a significant degree of discretion to [an] agency when it is acting within the scope of [its] authority." Kelly v Liquor Control Comm, 131 Mich App 600, 603; 345 NW2d 697 (1983). More precisely, the applicable standard of review requires that "[a] board's decision to revoke a license should not be disturbed absent an abuse of discretion." Kieffer v Bd of Medicine, 142 Mich App 825, 830; 371 NW2d 462 (1985), citing DeHart v State Bd of Registration in Podiatry, 97 Mich App 307; 293 NW2d 806 (1980). This standard is described in Marrs v Bd of Medicine, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting Spalding v Spalding, 355 Mich 382, 384-85; 94 NW2d 810 (1959), as follows:

> "'The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the

exercise of reason but rather of passion or bias.'"

Petitioner argues in essence that the record adduced at the supplemental hearing was of such a nature that the Board's reaffirmation of its prior order of license revocation and fine had to be an abuse of discretion. However, Respondent correctly points to the following determinative passage from Marrs, supra, p 694:

> "Our review of the record does not lead us to conclude . . . that the Board of Medicine failed to consider the numerous mitigating factors present in this case. The fact that the board was not sufficiently persuaded by the mitigating factors to impose [a lesser sanction] does not mean that the board did not consider the factors. Rather, it may mean that the board considered the proven violations, themselves, so grave as to warrant being dealt with severely." (Emphasis added.)

Thus, absent any evidence of abuse a reviewing Court must not disturb the Board's choice of sanction since there may be reasons, not enunciated on the record, to support it. Not surprisingly, Respondent now asserts that it "simply was not convinced that a diminution in sanction was warranted" given Petitioner's several violations.

Mindful of the authority enunciated in Marrs and having found no apparent abuse on the record, the Court determines that the Board's action was within the scope of its authority. The Court further concludes that the Board's action was not an abuse of discretion even though the superseding final order merely said that the mitigating evidence was "considered" and then reaffirmed the prior order of revocation and fine. However, this Court

cannot discern from either the record or the superseding final order whether the Board's choice of sanction was "based on fact and logic indicating a well-reasoned exercise of judgment." Atkins v Dep't of Social Services, 92 Mich App 313, 326; 284 NW2d 794 (1979).

Respondent's imposition of one sanction among several possible sanctions without stating all pertinent reasons for such choice on the record places this Court at a distinct disadvantage. For one thing, reversal of that choice and imposition of a different sanction would be an inappropriate substitution of the Court's judgment for that of the agency. See Triantafillou v Liquor Control Comm, 322 Mich 670, 673-74; 34 NW2d 471 (1948) (reviewing court erred by substituting its judgment for that of the agency where the sanction imposed was clearly within the agency's scope of authority and where there was no showing that the agency abused its discretion); Bessinger v Dep't of Corrections, 142 Mich App 793, 797; 371 NW2d 868 (1985) (reviewing court erred by modifying the agency-imposed sanction absent "clear and articulable grounds" for the court's intervention).

For another, it would be equally untenable to uphold the Board's chosen sanction only because the Court cannot ascertain from the superseding final order whether an abuse has occurred. That would in effect give Respondent complete and unfettered discretion since the imposition of a sanction void of supportive reasoning on the record could not be subjected to "meaningful," albeit limited, review. See Consumers Power Co v Public Service Comm, 78 Mich App 581, 585; 261 NW2d 10 (1977).

That could also jeopardize the fundamental notion that justice requires the sanction to fit the violation. Moreover, due process and the APA function to protect against the erroneous deprivation of property interests. Nowhere are such considerations more pronounced or directly implicated than when the degree of deprivation, e.g., choice of sanction, is at issue. For these reasons, Petitioner's second argument is compelling.

Petitioner argues in the alternative that the choice of sanction was not in compliance with section 85 of the APA, MCL 24.285; MSA 3.560(185), and therefore was made upon unlawful procedure. Section 85 provides in part:

> "A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them [and] [e]ach conclusion of law shall be supported by authority or reasoned opinion."

Thus, Petitioner intimates that section 85 requires Respondent to make findings of fact with respect to the mitigating evidence. According to Petitioner, Respondent should evaluate the facts and circumstances as to the violations and the offender and then incorporate such findings into a well-reasoned exercise of judgment on the record so as to support the Board's choice of one sanction over others. This Court agrees.

Although Marrs, supra, suggests that the Board's reasons for imposing a particular sanction need not be made part

of the administrative record, that precise issue was not before the Supreme Court in that case. Where that issue has been decided the authorities are clear that, like any agency's final decision maker, the Board "'must articulate with clarity and precision its findings and the reasons for its decisions. The importance of this requirement is inherent in the doctrine of judicial review which places only limited discretion in the reviewing court.'" Viculin v Dep't of Civil Service, 386 Mich 375, 405; 192 NW2d 449 (1971), quoting WAIT Radio v Federal Communications Comm, 135 App DC 317, 320; 418 F2d 1153 (1969). Accord Luther v Alpena Bd of Education, 62 Mich App 32, 37; 233 NW2d 173 (1975), which also quotes the same passage from WAIT Radio.

Only by carefully analyzing the Board's findings and rationale regarding the sanction imposed can this Court determine whether the agency abused its discretion. As was stated in Consumers Power Co, supra, "[b]efore this court can decide if the commission's ruling was supported by 'competent, material and substantial evidence on the whole record,' we must be informed of the nature of [the] evidence." Likewise, this Court cannot realistically determine whether the Board's imposition of a particular sanction was an abuse of discretion unless the administrative record reflects all of the findings and the full rationale which support the Board's choice.

Respondent's only rebuttal is essentially that section 85 of the APA does not apply to the Board's choice of sanction. Specifically, Respondent states that "[n]owhere in the [APA] is there a requirement that separate and distinct findings be made

concerning sanctions. Logic dictates that it is the findings of fact and conclusions of law which form the basis and rationale of the sanctions imposed." Respondent's reasoning is flawed.

The Board's choice of sanction is intrinsic to its final decision and therefore must be made in compliance with section 85 of the APA. The express findings of fact and conclusions of law, which exclusively concern Petitioner's violations of the Code, cannot logically form the sole basis for the sanction imposed. The mitigating evidence must also be incorporated into the Board's rationale for decision so as to reflect a sanction "based on fact and logic indicating a well-reasoned exercise of judgment." Atkins, supra. Only then can this Court assess whether the Board's exercise of discretion was reasonable. Here, however, the order is silent as to the evidence adduced at the supplemental hearing on remand.

The record developed on remand suggests that Dr. Alexander's capacity to exercise his professional judgment was substantially diminished as a result of the bipolar disorder and that such diminished capacity was involuntarily induced. The testimony further conduces to the conclusion that Petitioner's disease is now under control due to proper medications and that his apparent rehabilitation could justify reentry into medical practice. The Board must therefore make findings of fact regarding this evidence and relate such findings to its choice of sanction in accordance with section 85 of the APA. This is especially so where, as here, the hearing officer made no findings, drew no conclusions and issued no PFD regarding the

evidence offered in mitigation.

In addition, the Board's order reflects that Petitioner's anticipated application for license restoration is conditioned on a $50,000 fine being paid in full. Since the license itself is probably Dr. Alexander's only means to accumulate any appreciable wealth, this condition appears highly irregular. Neither the Code nor Respondent's promulgated rules lend any direct support for the condition required by the Board. The Code does, however, expressly permit the Board to impose conditions such as the completion of designated courses or training and certification thereof. MCL 333.16245 to 333.16249; MSA 14.15(16245) to 14.15(16249). Indeed, the Code suggests that a physician whose license is revoked may under certain circumstances reapply at "reasonable intervals to demonstrate that he or she can resume competent practice in accordance with standards of acceptable and prevailing practice." MCL 333.16247; MSA 14.15(16247).

Thus, in accordance with section 85 of the APA Respondent must also articulate on the record its reasons for imposing this particular fine. Because the Board requires Petitioner to pay the fine before application is made for license restoration, Respondent must further articulate why this condition does not unreasonably hinder Dr. Alexander's right to apply after three years of revocation or to reapply at "reasonable intervals." This will require the Board to make findings of fact with respect to Dr. Alexander's ability to pay the amount of the fine imposed.

It is well settled that constructions of a statute made by the agency charged with administering it are entitled to respectful consideration and will not be overruled without cogent reasons. Courts give great weight to agency views, especially when there are gaps in the statutory scheme. Such administrative interpretations will be overruled only when the statute's language compels a contrary construction. See Nagreta v Ambassador Steel Co (On Rehearing), 380 Mich 513; 158 NW2d 473 (1968), and its numerous progeny. See also Detroit Edison Co v Michigan Air Pollution Control Comm, 167 Mich App 651, 660; 423 NW2d 306 (1988). However, the Court can find nothing in the Code that authorizes the Board to require full payment of a fine before it will consider an application for license restoration.

To summarize, this Court cannot presently discern whether Respondent's choice of sanction is the result of a well-reasoned exercise of discretion. Although Respondent is entitled to the presumption that it has not abused its discretion, that is not irrebuttable. Here the mode of discipline imposed on Petitioner is not justified by reasons since none save for Petitioner's Code violations is expressly given. Thus, the Board fails to satisfy the requirements for a valid administrative order. See Butcher v Dep't of Natural Resources, 158 Mich App 704, 706-707; 405 NW2d 149 (1987). Cf Teasel v Dep't of Mental Health, 419 Mich 390, 409-412; 355 NW2d 75 (1984).

Such conclusion is dictated by several considerations. Where the Board fashions a sanction comporting with section 85 of the APA, a reviewing court is less likely to respond inappropri-

ately by substituting its own judgment for that of the agency. Such practice is also more likely to reveal latent abuses by the agency. Thus, where the Board's choice of sanction satisfies section 85, courts can exercise more effective judicial review when a sanction is appealed. Such reviewing courts can then base any necessary intervention on "clear and articulable grounds" since the agency's findings and rationale for such choice are part of the record. Bessinger, supra. Such review also ensures that the due process right to an appropriate sanction is adequately protected as envisioned by the APA. Finally, sanctions comporting with section 85 of the APA promote the efficient administration of justice without usurping the Board's broad discretion in fashioning a sanction.

The Court is unable to discern the path of the Board's reasoning and decision making on remand. For that reason the Court finds that Respondent's choice of sanction with only a partial supporting rationale violated section 85 of the APA, MCL 24.285; MSA 3.560(185). The Court determines further that the APA violation constitutes "unlawful procedure" which has resulted in "material prejudice" to Petitioner. MCL 24.306(1)(c); MSA 3.560 (206)(1)(c). That any discipline based on unlawful procedure would materially prejudice Dr. Alexander is not seriously debated. The Board's superseding final order must therefore be vacated and the matter remanded for a final decision and order wherein the reasons for the Board's choice of sanction are sufficiently articulated to comport with section 85 of the APA.

An order consistent with this opinion may enter upo its proper presentation.

REVERSED.

JAMES R. GIDDINGS
Circuit Judge

DATED: September 20, 1993