

BEFORE THE BOARD OF ALTERNATIVE HEALTH CARE
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-09-0096-AHC REGARDING:

THE PROPOSED DISCIPLINARY)	Case No. 1072-2009
TREATMENT OF THE NATUROPATHIC)	
PHYSICIAN LICENSE OF SANTO D. PRATO,)	
License No. 103.)	
)	

**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

I. INTRODUCTION

In this matter, the Business Standards Division (BSD) has filed a complaint against licensee Santo Prato alleging that his answer to a single question on his license application in 2006 was fraudulent, deceitful, or a misrepresentation of fact that violated Mont. Code Ann. § 37-1-316(3) and, by virtue of that violation, constitutes unprofessional conduct in violation of Mont. Code Ann. § 37-1-316(18).

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on May 18, 2009. Darcee Moe, agency legal counsel, represented BSD. Patrick Melby, attorney at law, represented Prato. BSD called no witnesses. Only Prato testified. The parties stipulated to the admission of BSD’s Exhibits 1 through 3 and Prato’s Exhibit A. The parties also stipulated to the Department’s stipulated facts 1 through 3 and the licensee’s stipulated facts 1 through 6.

The parties requested and were accorded the opportunity to present post- hearing briefing. That briefing has been completed and the matter submitted for determination. Based on the evidence and arguments adduced at hearing and in the parties’ post-hearing briefing, the hearing examiner makes the following findings of fact, conclusions of law and recommended decision.

II. FINDINGS OF FACT

1. Prato is licensed by the State of Montana as a Naturopathic Physician holding license number 103.

2. On April 7, 2006, as a part of an application to be licensed as a naturopathic physician in the State of Arizona, the State of Arizona informed Prato that the Arizona Naturopathic Physicians Board of Medical Examiners had opened an investigation “regarding

possible inappropriate and unlawful use by you of the following credentials, *but not limited to*, “N.M.D.”, “Dr.”, “Naturopathic Physician” and “Naturopathic Specialist.” Exhibit 2, Licensure Application Update from the State of Arizona dated April 7, 2006. The letter further advised Prato that use of the terms “Dr.”, “NMD,” and “Naturopathic Physician” might have violated Arizona Revised Statutes §§ 32-1555 and 32-1557.

3. Prato applied for his Montana license on September 11, 2006. On the basis of the information in the application, Montana issued Prato a license in November 2006.

4. Prato’s Montana application contained a number of questions regarding Prato’s background and his profession. Question #16 asked him “Has a complaint ever been filed against you alleging unethical behavior or unprofessional conduct?” Prato did not answer this question, instead leaving it blank.

5. Question #17 of the application asked him “Has any legal or disciplinary action been filed against you which relates to the propriety or your fitness to practice this profession?” Prato answered this question “no.”

6. Prato answered Question #17 in the negative because at the time he answered Question #17 he honestly did not understand the question to be asking him about the licensure application process in Arizona. He understood the licensure process in Arizona to be a license application and not a legal or disciplinary action related to his fitness to practice.

7. On March 11, 2008, approximately one and one half years after Montana issued Prato his license, he entered into a consent agreement with the Arizona Naturopathic Physicians Board by which he was required to withdraw his application to practice naturopathic medicine in Arizona. Exhibit 3. The consent agreement specifically notes that the Arizona Board’s investigation involved allegations of unprofessional conduct against the licensee. Exhibit 3, page 2.

III. CONCLUSIONS OF LAW¹

A. The Department Has Failed to Demonstrate a Violation

1. Jurisdiction of this matter is vested in the Montana Board of Alternative Health Care. Mont. Code Ann. § 37-26-201.

2. The Department bears the burden of proof to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Board of Funeral Service*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126. The Department must also show that any sanction which it seeks is appropriate under the circumstances of the case.

3. Mont. Code Ann. § 37-1-318(3) prohibits a licensee from engaging in fraud, misrepresentation, deception or concealment of a material fact in applying for a license. Mont. Code Ann. § 37-1-318(18) prohibits a licensee from engaging in unprofessional conduct. A disciplinary action can be taken against either a licensee or a license applicant. Mont. Code Ann. § 37-1-308.

4. In his hearing testimony and in his closing briefs, Prato asserted that the unauthorized use of the terms “Dr.,” “NMD,” and “Naturopathic Physician” did not reflect on his fitness to practice. The hearing examiner does not agree. The Arizona investigation under Montana law was an investigation into the statutorily prescribed misuse of titles that are reserved to persons who are properly licensed to practice naturopathic medicine. Such conduct is explicitly proscribed under Montana law regulating professionals. *See, e.g.*, Mont. Code Ann. § 37-1-316(5) (which prohibits a licensee or license applicant from utilizing a misleading advertisement or other representation, such as holding oneself out as a naturopathic physician when one is not licensed as such). Such prohibitions are designed to prevent licensees from misleading the public about their credentials and to prevent unauthorized practice. Conduct which violates that prohibition reflects on the honesty or integrity of the applicant which in turn can reflect on that person’s fitness to practice. *Cf.*, *Packer v. Board of Medical Examiners*, 37 Cal. App. 3d 63, 112 Cal. Rptr. 76 (1974). It is difficult to see how Prato’s conduct of utilizing the moniker “Dr.,” “NMD,” and “Naturopathic Physician” which by statute is specifically denoted as unprofessional conduct in Montana does not reflect on his fitness to practice the profession.

5. The Department’s complaint, however, did not assert that Prato’s conduct in utilizing professional monikers of “Dr.,” “NMD,” and “Naturopathic Physician” when he was not licensed as a naturopathic physician was a basis for sanctioning his Montana license. Instead, the Department staked its case on the very narrow assertion that Prato’s checking “no” on Question #17 was a fraudulent, deceitful, or material misrepresentation that violated Mont.

¹ Statements of fact in the conclusions of law are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Code Ann. § 37-1-316(3) or that his answer constituted unprofessional conduct under Mont. Code Ann. § 37-1-316(18).

The Department has failed to convince the hearing examiner that any alleged violation occurred here. Prato's un rebutted testimony convinces the hearing examiner that at the time he filled out the Montana license application, Prato honestly did not apprehend that the Arizona action was or might be a legal or disciplinary action that reflected on his fitness to practice. The April 2006 letter from the State of Arizona referred to the matter as an investigation, not as a disciplinary or legal action. Prato reasonably understood it to be part of the license application process initiated by him, not a legal or disciplinary action brought against him. Prato clearly did not appreciate that the Arizona licensing investigation proceeding might be a legal or disciplinary proceeding related to his fitness to practice that might necessitate the need to respond to Question #17 of the Montana application with a "yes" instead of a "no."

The Department has presented no evidence nor provided any compelling argument to demonstrate that Prato in fact did understand or reasonably should have understood that the Arizona action was or might have been a legal or disciplinary action that should have caused him to mark "yes" on Question #17. It has not argued that a violation of either Mont. Code Ann. § 37-1-316(3) or (18) can be found in the absence of evidence to show that Prato actually knew or reasonably should have known that the Arizona action was a legal or disciplinary action that should have caused him to mark "yes" on Question #17. In the absence of such evidence, the hearing examiner cannot say that the Department has preponderantly proven that Prato utilized fraud, deception, or misrepresentation to procure his Montana license or that answering Question #17 with a "no" constituted unprofessional conduct.²

In response to Prato's convincing evidence that he honestly did not understand that the Arizona licensure application was either a disciplinary or legal action, the Department argues that "the Board's screening panel found reasonable cause to believe that Dr. Prato had committed unprofessional conduct by failing to fully disclose the ongoing Arizona disciplinary case filed against him when he answered "no" to the question regarding legal or disciplinary action initiated against him" and that it is the prerogative of the Board to determine the standards governing a licensee's conduct. While this is true, this argument misses the point. The complaint that the Department filed defines the parameters of the case before this tribunal. As a matter of due process, neither this tribunal nor the Board is at liberty to impose liability for a violation of a statute which has not been alleged as a basis for the complaint.

²The licensee has painted this case as an issue of the Department's failure to properly frame its application questions in order to seek information that it was after. Licensee's opening brief, page 3. It is unnecessary for the hearing examiner to pass on whether the question was so "technical" that it could not under any circumstance have been construed to elicit the information which the Department argues Prato should have disclosed. It is sufficient for purposes of this case to note that Prato did not in fact understand the question to be asking him about the Arizona investigation and the Department has not even attempted to demonstrate through argument or evidence that Prato should have understood the Montana license application to be seeking information about the Arizona investigation.

The sole basis for the complaint in this case is the assertion that Prato engaged in fraud, misrepresentation, or concealment of a material fact by marking “no” in answer to Question #17. As the trier of fact is convinced that Prato did not know and could not reasonably have been expected to know that Arizona had launched a legal or disciplinary action against him at the time, the Department needed to present some evidence or argument to show that in fact he knew or reasonably should have known that the nature of the Arizona proceeding was disciplinary. The Department, however, presented no evidence whatsoever to rebut Prato’s testimony. In the absence of such evidence, there simply is nothing upon which the hearing examiner can predicate a finding that Prato has violated Mont. Code Ann. § 37-1-316(3) or Mont. Code Ann. § 37-1-316(18).

B. The Failure to Demonstrate a Violation Requires Dismissal

6. If a licensee is found not to have violated any of the provisions of Mont. Code Ann. Title 37, Chapter 1, Part 3, then the Department prepares and serves the Board’s findings of fact together with an order of dismissal of the charges. Mont. Code Ann. § 37-1-311.

7. Because BSD has failed to demonstrate that the licensee engaged in conduct that violated Title 37, Chapter 1, Part 3, Montana Code Annotated, dismissal of the charges is appropriate.

IV. RECOMMENDED ORDER

Based on the foregoing, the hearing examiner recommends that the Board of Alternative Health Care enter its order dismissing the allegations contained in the complaint filed against the licensee as BSD has failed to prove its case by a preponderance of the evidence.

DATED this 2nd day of October, 2009.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Examiner