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Summary of Gilman v. Nevada State Bd. Med. Exam'rs, 120 Nev. Adv. Op. 31

Angela Morrison
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***Gilman v. Nevada State Bd. Med. Exam'rs*, 120 Nev. Adv. Op. 31
(May 9, 2004).¹**

ADMINISTRATIVE LAW – DISCIPLINARY PROCEEDINGS

Summary

Bradley Gilman appealed an order denying judicial review of a disciplinary action taken against him by the Nevada State Board of Veterinary Medical Examiners.

Outcome/Disposition

Affirmed in part and reversed in part. The court affirmed the order of the Eighth Judicial District Court in part, but reversed the district court's denial of review of the Nevada State Board of Medical Examiner's assessment of costs and fees against Gilman.

Factual & Procedural History

Appellant Bradley Gilman was a veterinarian at Green Valley Hospital. On October 22, 1998, a couple took their pet beagle to the hospital for an examination and vaccinations. Because the beagle had been experiencing intestinal problems for four days, Gilman obtained permission from the couple to x-ray the beagle for an intestinal blockage. Gilman asked Greg Krasch, an unlicensed veterinary technician, to perform the autopsy. The dog was agitated and Gilman told Krasch to seek permission from the owners to sedate the dog before performing the x-rays. Nonetheless, Krasch took the x-rays without sedating the beagle.

When the owners returned to pick up the dog, the animal collapsed. Gilman checked the dog for signs of shock but did not tell the owners why the beagle was in shock. He instructed the owners to transport the beagle to the Emergency Animal Center to be monitored overnight. Unfortunately, after being treated for shock at the Center, the beagle died that night. The owners filed a complaint against Dr. Gilman with the Nevada State Board of Veterinary Medical Examiners ("the Board"). Gary Ailes, DVM, investigated the incident and the Board filed an Accusation against Gilman on August 31, 1999.

At an evidentiary hearing on December 13, 1999, "[t]he Board voted to convict Dr. Gilman of incompetence and gross negligence under NRS 638.140(5), an ethics violation under NAC 638.046 and incompetence under NRS 638.140(5) for the use of an unlicensed veterinary technician."² The Board suspended Gilman's license for sixty days and placed Gilman on probation for three years. Additionally, the Board assessed \$18,093 against Gilman for costs and attorney's fees.

Subsequent to the Board's ruling, Gilman filed a petition for judicial review but the district court denied review. He appealed to the Nevada Supreme Court and the court remanded the case to district court to remand "to the Board for a determination of

¹ Summarized by Angela Morrison.

² *Gilman v. Nevada State Bd. Med. Exam'rs*, 120 Nev. Adv. Op. 31, 3 (May 19, 2004).

whether Dr. Gilman's misconduct was shown by clear and convincing evidence."³ At a public hearing, the Board announced that clear and convincing evidence demonstrated Gilman had engaged in misconduct. The district court affirmed the Board's decision and assessment of costs. Gilman moved to file supplemental records and motions in the Nevada Supreme Court that would show the disciplinary action violated his due process rights. The Nevada Supreme Court granted the motion.

Discussion

Gilman made several arguments to support his challenge to the Board's action. First, he argued that the members of the Board could not serve as impartial decision makers. Second, Gilman maintained that the Board abused its discretion by assessing "Board Costs" against him and that the Board improperly levied \$7,145 in expert witness fees against him. Third, Gilman argued that the Board should not have ordered him to pay the investigation and hearing attendance fees of Dr. Mike Chumrau. Fourth, Gilman contended the Board failed to show that he was grossly negligent or incompetent by satisfactory proof and the Board's finding that he had acted incompetently by hiring an unlicensed technician violated the prohibition against ex post facto laws. Finally, Gilman alleged the Board violated his due process rights because it did not allow his attorney to make objections to the record or to highlight exculpatory evidence in the record at the public meeting conducted by the Board on remand.

1. Impartial Decision Makers

Gilman cited three reasons why the Board's actions constituted an appearance of bias: (1) no independent hearing officer; (2) the imposition of \$18,093 against Gilman; and (3) the money went into the Board's operating fund instead of into the state general fund. Although the Board members did have some fiscal responsibility for the Board's finances, the Nevada Supreme Court held that the Board members' pecuniary interest was too remote to impart the appearance of bias.

It reasoned that the percentage of the costs assessed against Gilman was too small of a percentage of the Board's total budget. Furthermore, the court found that in light of the Board's budgetary surplus and the ample evidence to support the Board's allegations against Gilman no temptation existed for the Board to find against Gilman solely for pecuniary gain. The court also determined that depositing the costs in the Board's operating fund did not show bias. Only fines must be given to the state general fund but costs are a way for the Board to recuperate the expenses it incurred during the investigation. Nonetheless, the court held that the Board erred when it imposed attorney's fees against Gilman because there is no statutory basis to do so.

2. Board Costs & Expert Witness Fees

The Board assessed \$1,737 for travel, hotel and meals for nine people for two days and per diem and travel expenses for Dr. Bernard Cannon. Because the Board members are practicing members who must leave their practice for the day to conduct the

³ *Id.*

hearings, pursuant to Nevada Revised Statutes (“NRS”) 639.040 and 281.160, they are entitled to salary, per diem, and travel expenses. Thus, the court held that the Board did not abuse its discretion to the extent it charged Gilman for those costs of its members and employees. However, the court reasoned that the Board improperly assessed those costs for the prosecuting attorney because the prosecuting attorney was employed by the state’s Attorney General’s office. The court, therefore, reversed the district court’s affirmance of Board Cost’s for anyone who was not a Board member or employee.

Gilman argued that the award of \$7,145 in expert witness fees was improper because NRS 18.005(5) only allows the recovery of \$1,500. NRS 18.005 sets forth what types of costs may be recovered by a prevailing party in a civil case in district court. Because no mention of the amount of costs recoverable by the Board in disciplinary actions exists in NRS 638.147(10) (repealed 2003), the court used NRS 18.005 to assist it in determining whether the Board abused its discretion. Besides setting a limit of \$1,500, NRS 18.005 allows the district court to determine “that the circumstances warrant a larger fee.”⁴ Hence, the court determined that the Board did not abuse its discretion because most of the evidence against Gilman came from expert’s testimony.

3. Dr. Chumrau’s Fees

Because Dr. Ailes was the investigator on his case and Dr. Mike Chumrau did not submit a detailed explanation of his services, Gilman argued that the assessment of Dr. Chumrau’s investigation and hearing attendance fees against him were improper. The court agreed. It held that an administrative board “must also demonstrate ‘how such fees were necessary to and incurred in the present action.’”⁵ As a result, the court ruled the district court erred by denying judicial review on the basis of Dr. Chumrau’s costs.

4. Satisfactory Proof & Prohibition Against Ex Post Facto Laws

Gilman contended that the district court erred in its application of the “substantial evidence” standard under Nevada Revised Statute 233B.135. Instead, Gilman argued, the court should have applied the “satisfactory proof” standard which the Nevada Supreme Court has defined as clear and convincing evidence.⁶ The court issued an order of limited remand on that basis and the Board determined that Gilman’s misconduct was shown by clear and convincing evidence. Because the record revealed that the evidence sufficiently supported the Board’s findings, the court affirmed the district court’s denial of review regarding the standard of proof.

Additionally, Gilman argued the Board violated the prohibition against ex post facto laws because at the time of his hearing, the statute did not bar the use of unlicensed veterinary technicians. Although the court agreed that NRS 638.013 did not affirmatively state veterinary technicians must be licensed, the court reasoned that, in context with other statutes which specify licensing for veterinary technicians or criminalize practicing

⁴ *Id.* at 11.

⁵ *Id.* at 12 (quoting *Bobby Berolini, Ltd. v. PETA*, 114 Nev. 1348, 1352-53, 971 P.2d 383, 386 (1998)).

⁶ *See generally In re Drakulich*, 908 P.2d 709 (1995).

as a veterinary technician without a license,⁷ the statutory scheme requires that veterinary technicians be licensed. In addition, the court also pointed out that pursuant to NRS 638.1406(2), a veterinarian may be disciplined for employing an unlicensed technician. Therefore, the court concluded the Board did not abuse its discretion in finding that Gilman was incompetent for hiring an unlicensed technician.

5. The Board's Refusal to Allow Counsel to Make Objections or Exculpatory Remarks

Gilman's last challenge to the Board's decision was that the Board's refusal to allow his attorney to object or speak on his behalf at the evidentiary hearing on remand violated his due process rights. The court held the Board did not violate Gilman's due process rights. It reasoned that the proceeding was quasi-judicial in nature and so long as the Board gave Gilman proper notice of the hearing, Gilman did not even have to be present. Further, the court stated that the Board merely summarized the record and neither side was allowed to point to inculpatory or exculpatory evidence. Finally, the court found that all the members of the Board had read the record and could disregard any inaccuracies.

Conclusion

This case should provide a guide to administrative agencies and those facing disciplinary action from an administrative agency. It sets forth an explanation regarding what costs a prevailing agency may collect in a disciplinary action. The court also highlighted the importance of detailing the costs and providing reasons for the costs.

⁷ *Gilman*, 120 Nev. Adv. Op. at 16 (citing NEV. REV. STAT. 638.005, 638.103, 638.122, 638.123 and 638.170(3)).