SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4023-21

IN THE MATTER OF THE SUSPENSION OR REVOCATION OF THE LICENSE OF ARCHER IRBY, D.C. LICENSE NO. 38MC00651000 TO PRACTICE CHIROPRACTIC IN THE STATE OF NEW JERSEY.

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Argued February 28, 2024 – Decided June 4, 2024

Before Judges Accurso, Gummer, and Walcott-Henderson.

On appeal from the New Jersey State Board of Chiropractic Examiners, Division of Consumer Affairs, Department of Law and Public Safety.

Michael Garcia argued the cause for appellant Archer Irby, D.C. (Fernandez Garcia, LLC, attorneys; Michael Garcia, of counsel and on the briefs).

Michelle Frances Mikelberg, Deputy Attorney General, argued the cause for respondent New Jersey State Board of Chiropractic Examiners (Matthew J. Platkin, Attorney General, attorney; Janet Greenberg Cohen, Assistant Attorney General, of counsel; Michelle Frances Mikelberg, on the brief).

PER CURIAM

Archer Irby appeals from a July 27, 2022 final agency decision of the State Board of Chiropractic Examiners (Board) to revoke his chiropractic license, impose financial sanctions, civil penalties, and attorney's fees and costs for engaging in gross and repeated acts of negligence, N.J.S.A. 45:1-21(c) and (d), violating Board regulations related to sexual misconduct, N.J.A.C. 13:44E-2.3 and professional misconduct, N.J.S.A. 45:1-21(e) and (h). Irby argues the Board erred in deciding to adopt the finding and conclusions of the Administrative Law Judge (ALJ) because the ALJ improperly permitted the Attorney General's Office to introduce sealed records in the hearing. Because we conclude the Board's decision was amply supported by credible evidence in the record, and because Irby not only failed to object to the State's use of the sealed records but relied on them himself for his own strategic purposes, we affirm.

Irby was a chiropractor licensed in New Jersey. He was arrested and charged with various sexual offenses after complaints of inappropriate touching from four female patients. Following the filing of criminal charges, the Board filed a verified complaint and order to show cause alleging Irby had engaged in sexual contact with patients in violation of the Board's sexual-misconduct regulation, N.J.A.C. 13:44E-2.3. In the complaint the Board sought the

suspension or revocation of Irby's license and the imposition of penalties, costs, and attorney's fees. In response to the complaint and order to show cause, Irby agreed to a temporary suspension of his chiropractic license.

Irby was subsequently indicted and tried on charges of criminal sexual contact, N.J.S.A. 2C:14-3(b), and attempt to commit criminal sexual contact, N.J.S.A. 2C:5-1(a)(1) and N.J.S.A. 2C:14-3(b). At the conclusion of the trial, a jury acquitted Irby of all criminal charges. Irby thereafter moved to expunge his arrest records.

Around this same time, the Board transferred Irby's license-revocation proceeding to the Office of Administrative Law (OAL) for a hearing as a contested matter before an ALJ. During the pendency of the license revocation hearing, a Superior Court judge granted Irby's motion to expunge his records related to the criminal matter. The expungement order, which was entered on August 19, 2020, provides:

> all records of complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, 'rap sheets,' and judicial docket records concerning [Irby's] detection, apprehension, arrest, detention, trial or disposition for the offenses . . . shall be extracted and isolated by the Court, detention or correctional facilities, law enforcement or criminal justice agencies noticed in this proceeding pursuant to [L. 1979, c. 178, § 117, N.J.S.A. 2C:52-10].

The expungement order also expressly requires all records specified in the order to be removed from the files of "the agencies which have been noticed and which are, by the provisions of [N.J.S.A. 2C:52-10] entitled to notice . . . ." According to Irby, a copy of the expungement order was served on the Attorney General's Office prior to the commencement of his license-revocation hearing. The Board, however, disputes service and receipt of the expungement order on it or its counsel and avers that it became aware of the order only during the pendency of Irby's appeal.

The record on appeal includes a letter dated September 4, 2020, indicating that the lawyer who represented Irby with respect to the expungement and the license-revocation proceedings sent, by certified mail, the final expungement order to the Attorney General's Office, the Superintendent of the State Police, the Bergen County Prosecutor's Office, the Bergen County ID Unit, the Englewood Police Department Chief of Police, and the court administrator of Englewood Municipal Court. The record also includes correspondence from the Division of State Police, Identification and Information Technology Section, dated January 12, 2021, stating, "The State Bureau of Identification files have been corrected to comply with the Order of Expungement as written." There is

no similar acknowledgement of receipt of the final expungement order from the Attorney General's Office.

Thereafter, Irby appeared before the ALJ for the license-revocation hearing. In addition to Irby, the ALJ also heard the testimony of the four former patients who had accused Irby of sexual contact in the criminal trial: S.I., P.H., E.W. and M.S.[1] The Board called Dean Curtis, D.C., a licensed chiropractor board certified in chiropractic rehabilitation as its expert witness and Irby called Casey Skorski, D.C., also a licensed chiropractor as his expert witness.

We summarize the testimony of the witnesses to provide the proper context for our review of the Board's decision. During the license-revocation hearing, S.I., P.H., E.W., and M.S. testified that Irby had engaged in various forms of inappropriate touching during their chiropractic sessions: S.I. testified Irby had touched her breasts and placed his mouth on her nipple during treatment for a neck condition; P.H. testified Irby had touched and cupped her breasts with his hands; E.W. testified Irby had made a series of sexual innuendos, placed his hands on her breasts, and exposed his penis to her during treatment; and M.S.

[1] We use initials to protect the privacy interests of the victims. See R. 1:38-3(c)(12).

testified Irby had touched her breasts and exposed his penis to her during treatment.

Dr. Curtis testified there was "no clinical rationale" for a chiropractor to touch a patient's breast or for a chiropractor's face "to be anywhere near the anterior part of her body" to perform clinical techniques for the diagnoses documented in S.I.'s treatment records. With respect to M.S., who had alleged Irby unlatched her bra and grabbed both of her breasts during treatment, Dr. Curtis testified there was no information in her treatment record to indicate a pectoral massage or grabbing of M.S.'s soft breast tissue was a necessary or beneficial therapeutic treatment. He also testified he was unaware of a scenario where it would be "clinically appropriate for a chiropractor to cup the breast or place a hand over the patient's nipple area[.]" With respect to E.W., Dr. Curtis concluded neither of her diagnoses required contact with her pectoral muscles and, further, the techniques Irby had documented in E.W.'s treatment log as having been performed did not require any such contact. Dr. Curtis also reviewed Irby's billing records and noted that with respect to each of the women, Irby had failed to appropriately document the treatments he claimed to have rendered and did not use corresponding billing codes for treatment of the

pectoralis muscles, which was the subject of much of his testimony as he sought to explain why he had touched his victims' breasts.

In his testimony during the revocation-hearing, Irby denied all of the charges lodged against him by the four former patients. Specifically, he denied touching their breasts—or explained that any such touching occurred during the course of legitimate chiropractic care as he manipulated the pectoralis muscles. Irby also denied exposing his penis. According to Irby, each of the women had fabricated the allegations against him to "perpetuate the story." And, at least one of the women had fabricated the allegations because she was upset after being discharged from his practice after her medical loan funds had been exhausted, although he admitted to providing her with complimentary sessions after she was no longer his patient. Irby stated he had a "jokin[g] office" and that he "joked around with everyone," he conceded he had told police that he had made "little stupid comments" to one of the women but denied the remarks were sexual or otherwise inappropriate and claimed that "everything in [his] office was always professional with her." Irby further claimed the patient had been sexually suggestive during one of their sessions. The State cross-examined Irby about his interactions with his patients using his prior statements to police from his arrest and interrogation to establish inconsistencies in his testimony.

Irby offered in evidence the expert report of Dr. Carrie Skorski, D.C., who testified that patients understand the risk of incidental contact during adjustments. However, in response to a question posed by the Board's counsel, Dr. Skorski acknowledged there is no recognized chiropractic modality that involves the physician touching a patient's breasts.

The ALJ admitted in evidence Dr. Curtis' two expert reports and curriculum vitae, Dr. Skorski's report, patient treatment and billing records, photographs of S.I., photos of the exterior and interior of Irby's office, as well as a transcript and videotape of Irby's interview with law enforcement from his 2016 arrest.[2] The ALJ found all four victims' and Dr. Curtis' testimony more credible than Dr. Skorski's. However, the ALJ found Irby not credible, specifically noting Irby's testimony was "almost entirely not believable" and that "[h]e was evasive, combative, non-responsive, argumentative and arrogant." The ALJ recommended revocation of Irby's chiropractic license. Irby filed exceptions to the ALJ's recommendation as permitted by N.J.A.C. 1:1-18.4

[2] According to the Board, "[t]he only materials [its counsel] offered in evidence, which had been obtained from law enforcement were Irby's July 30, 2016 statement, photographs of S.I. and her telephone, and photographs of the exterior and interior of Irby's chiropractic office."

stating that the ALJ did not like him and had failed to discredit the witnesses against him.

In its final decision, the Board modified the ALJ's initial decision to specifically exclude N.J.S.A. 45:1-21(f) as a basis for discipline.[3] The Board, however, accepted the ALJ's findings of fact and conclusions of law in all other respects and found Irby's conduct, "egregious, depraved and predatory." The Board further opined on Irby's "lack of remorse, his refusal to admit wrongdoing, and his attempt to conceal his conduct under the veil of the sacral occipital technique (SOT)" to suggest that his victims had misinterpreted his use of SOT as inappropriate touching.[4] The Board concluded that nothing short of

[3] N.J.S.A. 45:1-21 provides that the Board "may refuse to issue or may suspend or revoke any certificate, registration or license issued by the [b]oard upon proof that the applicant or holder of such certificate, registration or license based on certain enumerated grounds." In relevant part, Subsection (f) relates to past convictions or conduct constituting "any crime or offense that has a direct or substantial relationship to the activity regulated by the board or is of a nature such that certification, registration or licensure of the person would be inconsistent with the public's health, safety, or welfare."

[4] Irby described SOT as a technique used "to evaluate the sacrum to the occipital and – and look at the respiratory flow of balance within the body itself and we do it by clinical muscle testing, posture analysis on every visit and . . . it's a complimentary measure to just regular diversified adjusting, but it is a very specific analysis . . . that looks . . . not just with the structural analysis of the spine, but the organic tissue of . . . the body."

a permanent revocation of Irby's license was warranted and imposed penalties and sanctions as recommended by the ALJ. This appeal followed.

Irby primarily argues that despite the expungement order effectively sealing all records related to his prior arrest on charges of criminal sexual contact, the Board improperly used the records against him, and the ALJ improperly admitted and considered the records in the license-revocation hearing. In particular, Irby claims the State violated the expungement order by: providing copies of certain sealed records to its expert witness, Dr. Curtis; making "over [fifty] references to his arrest [and] legal matters throughout cross-examination"; and improperly using his statement to law enforcement officers on the date of his arrest to impeach him. Irby contends the "[Deputy Attorney General's] global approach to using expunged records during [the Board's] case-in-chief and referring to [him] as a 'professional predator' so affected the ALJ that he inappropriately abused his judicial discretion." Irby also argues ineffective assistance of trial counsel under Strickland v. Washington, 466 U.S. 668 (1984).

The Board asserts Irby's arguments are essentially a "meritless challenge" to a legally and factually supported initial decision made by the ALJ and that his decision resulted from "a full and fair hearing and is not arbitrary, capricious

or unreasonable, as [his] findings are supported by substantial credible evidence in the record." It maintains it did not become aware of the expungement order granted to Irby until he filed his merits brief and appendix in this appeal. Moreover, the Board argues "an expungement order does not extend to an administrative action before a State licensing agency"; "[Irby's] trial counsel never objected to the admission of the criminal materials"; and "the expungement order was entered in error" because "[t]his action regarding Irby's professional license was pending before the OAL when the expungement order was entered[]"; and that given the OAL proceeding is a civil matter, Irby has no viable claim for ineffective assistance under Strickland.

We review final agency decisions—not administrative law judges' initial decisions. See DiBlasi v. Bd. of Trs., 315 N.J. Super. 298, 301 (App. Div. 1998); In re Dennis, 385 N.J. Super. 269, 375 (App. Div. 2006). When an agency's final determination is based on the ALJ's findings of fact and credibility, we defer to those determinations. See Burlington Bd. of Soc. v. G.W., 425 N.J. Super. 42, 47 (App. Div. 2012). A reviewing board is not bound by an ALJ's legal conclusions, see A.M.S. ex rel A.D.S. v. Margate City Bd. of Ed., 409 N.J. Super. 149, 150-60 (App. Div. 2009).

Our role in reviewing administrative actions is generally limited to three inquiries:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether . . . the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Allstars Auto Grp., Inc. v. New Jersey Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018)) (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).]

"An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Ibid. (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the party challenging the administrative action." A.M. v. Monmouth Cnty. Bd. of Soc. Servs., 466 N.J. Super. 557, 565 (App. Div. 2021) (alterations omitted) (quoting E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 349 (App. Div. 2010)).

As a preliminary matter, we note there is no dispute Irby obtained a final order of expungement following his acquittal in the criminal matter. That was

the determination made by the judge who heard Irby's expungement petition and the order is not subject to collateral attack here. In addressing the expungement issues raised by Irby, however, we remain unpersuaded that the Board erred in adopting the ALJ's decision for the following three reasons: Irby failed to object to the State's use of the sealed records, Irby relied on those records before the ALJ, and Irby's counsel, who represented him in the criminal, expungement and licensing proceedings, knew about the expungement order. As such, Irby's actions constitute invited error.

"Mistakes at trial are subject to the invited-error doctrine." State v. A.R., 213 N.J. 542, 561 (2013). "Under that settled principle of law, trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal . . . .'" Ibid. (quoting State v. Corsaro, 107 N.J. 339, 345 (1987)); see also State v. Santamaria, 236 N.J. 390, 409 (2019) ("a party cannot strategically withhold its objection to risky or unsavory evidence at trial only to raise the issue on appeal when the tactic does not pan out"). "The doctrine prevents litigants from 'playing fast and loose' with, or otherwise manipulating, the judicial process." State v. Bailey, 231 N.J. 474, 490 (2018) (quoting State v. Jenkins, 178 N.J. 347, 359 (2004)). "Where the invited error did not demonstrably impair a defendant's ability to maintain a

defense on the merits or where the after-criticized judicial action was reasonably thought to secure a trial or tactical advantage for the defendant, it has not been considered so egregious as to mandate a reversal on appeal." Corsaro, 107 N.J. at 345 (quoting State v. Harper, 128 N.J. Super. 270, 277 (App. Div. 1974)). "In other words, if a party has 'invited' the error, he is barred from raising an objection for the first time on appeal." A.R., 213 N.J. at 561.

Irby asserts the State had "improperly provid[ed] copies of sealed materials to the State's expert, Dr. Dean Curtis"; and offered into evidence: "the video of [his] interview by detectives with the City of Englewood Police department"; "a transcript of that interview"; photographs of one of the witnesses, S.I.; and photographs of the exterior and interior of Irby's chiropractic office. Irby also contends that the Board's adoption of the ALJ's decision, which was based on consideration of those sealed records, constitutes reversible error.

Irby's argument is undermined by the undisputed fact that Irby used and referenced the sealed records throughout the hearing to aid in his defense. Specifically, Irby made several references to the transcript of his statement to police, and it was Irby who offered the videotaped statement in evidence. He also used photographs of his office during cross-examination of S.I. to question her recollection of the area where she claimed to have been assaulted.

Critically, the same counsel represented Irby in his criminal, expungement and licensing proceedings, and counsel would have been in the best position to advise the ALJ of the expungement order, if he so chose. He did not. With this undisputed record, we cannot countenance Irby's contention the Board erred in its determination to accept the factual and credibility findings of the ALJ based as they were on the sealed records.

Critically, the Board also properly considered Irby's acquittal at trial and properly modified the ALJ's initial decision to exclude consideration of whether Irby's conduct constituted a violation of N.J.S.A. 45:1-21(f)—which permits the Board to take action "if a licensee has been convicted of, or engaged in acts constituting, any crime or offense that has a direct or substantial relationship to the activity regulated by the board[.]" Having removed subsection (f) from consideration, the Board accepted the ALJ's findings and conclusions of law and found Irby's conduct was "egregious, depraved, and predatory." In fact, the Board specifically relied on the ALJ's findings that the "matter is entirely based on the credibility of witnesses," and proof by a preponderance of the evidence that the State had demonstrated that Irby's actions violated N.J.S.A. 45:1-21(c), (d), (e), and (h).

The Board further concluded that "coupled with his lack of remorse, his refusal to admit wrongdoing, and his attempt to conceal his conduct under the veil of SOT"—a legitimate medical treatment Irby argued he had employed on his patients—constituted misconduct and agreed with the ALJ that nothing less than permanent revocation and sanctions were appropriate.

Irby further argues the sanctions imposed are "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," citing In re Polk, 90 N.J. 550, 580 (1982). The Board may impose sanctions and modify the ALJ's decision pursuant to N.J.S.A. 45:1-21, and here the Board adopted the ALJ's findings that Irby had engaged in repeated acts of negligence, malpractice or incompetence which damaged or endangered the life, health, welfare, safety or property of any person in violation of N.J.S.A. 45:1-21(c) and (d), as the basis for imposing sanctions. Our review of a sanction is limited and given we "afford substantial deference to the actions of administrative agencies such as the Board," In re License Issued to Zahl, 186 N.J. 341, 353 (2006) (quoting Matturri v. Bd. of Trs. of the Judicial Ret. Sys., 173 N.J. 368, 381 (2002)), we conclude there is no reason to disturb the Board's imposition of sanctions.

Irby finally argues trial counsel provided ineffective assistance in his licensing-revocation hearing, citing Strickland, 466 U.S. 668. However, ineffective assistance under Strickland is generally limited to criminal proceedings. State v. Gideon, 244 N.J. 538, 549 (2021) ("Those accused in criminal proceedings are guaranteed the right to counsel to assist in their defense. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10."); see also Strickland, 466 U.S. at 685-86. Irby's remedy for any ineffectiveness of his trial counsel, assuming there was any, is a legal-malpractice action. See Cortez v. Gindhart, 435 N.J. Super. 589, 598 (App. Div. 2014).

Affirmed.