IN THE SUPREME COURT OF FLORIDA

R. FREDERICK BOEDY,

Petitioner,

vs.

Case Number: 64,811

DEPARTMENT OF PROFESSIONAL REGULATION,

Respondent.

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF FLORIDA

R. FREDERICK BOEDY,

Petitioner,

vs. Case Number: 64,870

DEPARTMENT OF PROFESSIONAL REGULATION,

Respondent.

_____/

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I. PRELIMINARY STATEMENT

References herein to the Petitioner's Initial Brief and to the Respondent's Brief will be designated "PB" and "RB", respectively, followed by the appropriate page numbers in parentheses.

All emphasis is supplied unless the contrary is indicated.

II. STATEMENT OF THE CASE AND FACTS

The Petitioner takes specific exception to the Respondent's factual assertion that

> The purpose of the examinations was to allow the Department's examining physician to examine the Petitioner and evaluate his mental and physical condition to ascertain whether he was competent to practice medicine with reasonable skill and safety.

(RB 2). The Order Compelling Mental And/Or Physical Examination expressly stated its purpose as

> obtaining examinations, reports and expert opinion and testimony concerning your ability to practice medicine with reasonable skill and safety pursuant to Section 458.331(1)(s), Florida Statutes and for introduction into evidence at any administrative hearing to be conducted on any administrative complaint against you. . . .

(App. to Pet. 13).

III. ARGUMENT

Initially, several aspects of Respondent's position are misleading: First, Respondent continues to argue that the statute is not intended as punishment (RB 5), but that misses the point. The correct focus of this inquiry is the effect of the statute on the professional, and revocation of a professional's license has been squarely held to be "punitive" for purposes of analyzing the self-incrimination issue. Spevack v. Klein, 385 U.S. 511, 17 L.Ed.2d 574, 87 S.Ct. 625 (1967); Vining v. Florida Real Estate Commission, 281 So.2d 487 (Fla. 1973); (PB 8-11, 13-15, 18-20). Government action need not be vindictive to be "penal". (R 21). Also, note that the Respondent itself classifies the very sanctions sought here as "penal" by reference to those same sanctions sought in Vining (RB 4), and the quoted portion of a case relied on by the Respondent focuses on "whether the statutory scheme was so punitive either in purpose or effect" (RB 22). Thus, the Respondent's attempt to distinguish the present case on the basis that it was not prompted by misconduct (RB 6-9) is also erroneous, since the sanctions are the same whether or not fault is involved.[1]

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[1] Likewise, the Respondent misconstrues the proper test by translating "the nature of the statement and the exposure that it invites" to mean "statutory language and the legislative intent" (RB 21).

Second, the Respondent makes a ludicrous assertion in its summation:

> Petitioner is not being punished for being incapacitated, the Respondent merely seeks to determine if the Petitioner is in fact incapacitated.

(RB 33). This quite inaccurately suggests that no further action would be taken if the Petitioner were found unfit. In this respect, Respondent attempts to minimize the seriousness of the charges, but proving one mentally unfit in our culture can easily be more devastating than proving one guilty of white-collar type criminal acts, e.g., receiving kickbacks.

Third, the Respondent argues that the Petitioner "refus[ed] to allow an examination into his fitness to practice medicine" (RB 4), but that is clearly not the case. While the Petitioner did refuse to be a witness against himself, he did not and could not prohibit the Respondent's inquiry into his fitness by all other means available. The Respondent could call witnesses to the Petitioner's behavior which gave rise to the Respondent's concern (RB 10), to any actual failure to practice competently, and to criminal proceedings against the Petitioner. Additionally, the Respondent could have sought testimony and records from the mental health treatment voluntarily obtained by the Petitioner (RB 10). Thus, the Respondent had access to evidence on the issue of the Petitioner's fitness to practice medicine, and the compelled testimony sought was not the "least intrusive means available" (RB 12).

Fourth, the Respondent advances the convoluted argument that the conclusion of the psychiatrist rather than the statements elicited from the examinee are determinative (RB 9-10), but that is obviously putting the cart before the horse, since the examinee's statements are determinative of the psychiatrist's conclusion.

Fifth, the Petitioner argues that "medical examinations are a reasonable means to determine fitness" (RB-10), but at issue here is a mental examination, and that is what gives rise to the testimonial issue. Again, a blood alcohol test (RB 11-12) is not testimonial (PB 7, n. 4), as the very case cited by the Respondent indicates. State v. Bender, 382 So.2d 697, 698 (Fla. 1980), citing Schmerber v. California, 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966).

Sixth, as the Petitioner has pointed out (PB 16-17), the test advanced by the Respondent (RB 24) is not applicable here, but even if it were the Respondent erroneously measures not the sanction but the impact of a compelled examination (RB 25).

The most telling aspect of Respondent's Brief is the failure to even mention - much less distinguish - Spevack v. Klein, supra. As the Petitioner has already pointed out (PB 8-9, 13, 14-15), the United States Supreme Court clearly held there that a professional's license cannot be revoked solely because of invocation of the privilege against self-incrimination. Respondent has relied on cases not directly applicable to the situation at bar (RB 15-18, 29), arguing that the statute at

issue here is not punitive since immunity is available.[2] However, again, that is directly contrary to Spevack v. Klein, supra; Vining v. Florida Real Estate Commission, supra; and Lester v. Department of Professional and Occupational Regulations, State Board of Medical Examiners, 384 So.2d 923 (Fla. 1st DCA 1977), where immunity was irrelevant to the courts' rulings. Also, as Respondent points out (RB 32-33), not even the court below thought the immunity issue determinative.

Respondent's "more difficult" (RB 18) distinction of Slochower v. Board of Education, 350 U.S. 552, 100 L.Ed. 692, 96 S.Ct. 637 (1956), is unpersuasive. Slochower did not involve the immunity issue and did not turn on the existence of "a reasonable fear of prosecution" as Respondent has implied. (RB 18-19). There, Slochower's invocation of his privilege against self-incrimination in an administrative proceeding was considered the equivalent of resignation from his tenured professorial position, but the United States Supreme Court ruled that "the mere claim of privilege under the Fifth Amendment does not provide a reasonable basis for the state to terminate his employment." Id., at 555. That is exactly what happened to the Petitioner. Since the Respondent has total control of the issuance of licenses to practice medicine, it is an even more serious predicament than the "government employment" situation of Slochower, since a

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[2] The Respondent argues that immunity renders the statute non-punitive, but the Petitioner suggests that many physicians would choose a criminal conviction over license forfeiture.

professor can always seek employment elsewhere.[3] Thus, the Court in Slochower relied not at all on the presence of a "reasonable fear of prosecution" but on the individual dignity underlying our Constitution, referring to the privilege against self-incrimination as "one of the most valuable prerogatives of the citizen. Id., at 557.

Finally, one case cited by the Respondent deserves comment. The strict holding of Hubbard v. Washington State Medical Disciplinary Board, 348 P.2d 981 (Wash. 1960) - that an adjudication of mental incompetency, regardless of the basis, is sufficient proof to suspend a surgeon's license - is not directly applicable here, where there has been no such adjudication. However, the Court's analysis of that situation was pertinent, even though there was no self-incrimination issue involved. Albeit in another context, the Court characterized the serious nature of revocation of a physician's license as "much like the death penalty." Id., at 984, quoting In re Flynn, 328 P.2d 150, 154 (Wash. 1958). The Court clarified the two levels of competency in this situation: (1) basic competency to avoid civil mental commitment; and (2) the higher competency necessary to practice medicine. Just as the state was able to revoke Hubbard's license without his testimony, the Respondent has alternative means of proving the Petitioner's unfitness. Also,

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[3] Respondent admits that "loss of government employment may constitute a penalty or forfeiture." (RB 32), citing City of Hollywood v. Washington, 384 So.2d 1315 (Fla. 4th DCA 1980).

in seeking restoration of his license, Hubbard properly carried the burden of proving his fitness, much like an initial applicant for a professional license.

In sum, in a license forfeiture proceeding, the Respondent may use all evidence available to prove unfitness, and the licensee may then choose to testify in self-defense. However, it is wholly unconstitutional to forfeit a license solely because the licensee refuses to be a witness against himself and to thereby waive the state's burden of proof.

IV. CONCLUSION

For the reasons and authorities contained in the Petitioner's Initial Brief and herein, the certified question should be answered in the affirmative, and the decision of the district court should be reversed.

Respectfully submitted,

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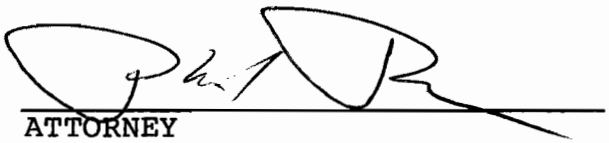
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this 29th day of May, 1984, to Charles Tunnicliff, Esquire, Department of Professional Regulation, 130 North Monroe Street, Tallahassee, Florida 32301.



ATTORNEY