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NO. 4-16-0938

FILED
January 9, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THOMAS LABROT, D.C., Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION; JAY STEWART, former Division of Professional Regulation Director; ILLINOIS MEDICAL DISCIPLINARY BOARD; MARIA LAPORTA, former Illinois Disciplinary Board Chairperson, Defendants-Appellees.	)	Appeal from Circuit Court of Sangamon County No. 15MR1081 Honorable John P. Schmidt, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices DeArmond and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The Director properly refused, as a discovery sanction, to dismiss disciplinary proceedings against the plaintiff; the nondisclosed evidence was neither exculpatory nor relevant.

(2) Plaintiff's argument the Director violated his due-process rights by refusing to order an additional hearing regarding allegedly exculpatory evidence is rendered moot by our decision reversing plaintiff's sanction, as plaintiff's only requested remedy on this ground was the opportunity to examine a witness regarding the exculpatory evidence should the case be remanded.

(3) The Department's sanction on plaintiff for failing to comply with Kentucky's peer-review registration rules, a sanction imposed to mirror the disciplinary action taken in Kentucky, is overly harsh given the mitigating circumstances, is unrelated to the purpose of the Medical Practice Act of 1987 (225 ILCS 60/1 to 60/64) (West 2012)), and is arbitrary due to the Department's failure to consider significant differences in the underlying circumstances of each case.

¶ 2 In August 2012, plaintiff, Dr. Thomas LaBrot, entered into an agreed order with the Kentucky Board of Chiropractor Examiners (Kentucky Board), admitting he violated statutory and administrative provisions related to his chiropractic license. The Kentucky Board reprimanded Dr. LaBrot's license for the violation and imposed a $1000 fine.

¶ 3 In December 2014, the Illinois Department of Financial and Professional Regulation (Department) filed an administrative complaint against Dr. LaBrot, asserting Dr. LaBrot's violation of Kentucky's registration rules related to the performance of peer reviews was a ground for revocation or suspension of Dr. LaBrot's registration certificate under the sister-state provision of the Medical Practice Act of 1987 (Act) (225 ILCS 60/22(A)(12) (West 2012)). According to this provision, Illinois disciplinary action may be taken when there is a "disciplinary action of another state or jurisdiction against a license or other authorization to practice as a *** doctor of chiropractic." 225 ILCS 60/22(A)(12) (West 2012).

¶ 4 After a May 2015 hearing before an administrative law judge (ALJ), the Director of the Department, in September 2015, decided "to mirror" the Kentucky sanction, reprimand Dr. LaBrot's license, and fine him $1000. Dr. LaBrot sought review of the Department's decision after the Sangamon County circuit court affirmed the Director's decision.

¶ 5 Dr. LaBrot appeals, arguing (1) the Director erred by denying his motion to dismiss as a discovery sanction as the Department failed to disclose exculpatory evidence; (2) the Director violated his rights to due process by failing to dismiss the case or order an additional hearing to allow Dr. LaBrot time to investigate the exculpatory evidence; (3) the discipline imposed was unduly harsh given the mitigating circumstances and not consistent with the

purpose of the Act; and (4) the Department's policy of mirroring the discipline imposed in sister-state disciplinary actions violates his right to due process.

¶ 6 We reverse.

¶ 7 I. BACKGROUND

¶ 8 In August 2012, Dr. LaBrot entered into an agreed order with the Kentucky Board, admitting violating statutory and administrative provisions related to his chiropractic license. Specifically, Dr. LaBrot admitted reviewing a patient's chiropractic file without (1) having registered with the Kentucky Board to perform peer reviews in violation of Kentucky statutory law (Ky. Rev. Stat. Ann. § 312.200(3) (2014)), and (2) meeting the Kentucky requirements for performance of peer reviews (201 Ky. Admin. Regs. 21:095, § 1 (2014)).The Kentucky Board reprimanded Dr. LaBrot's license for the violation and imposed a $1000 fine. According to the agreed order, Dr. LaBrot would, in part, act more diligently to ensure future compliance, cease performing peer reviews until regulatory requirements were satisfied, and complete a two-hour course on Kentucky jurisprudence. The agreed order would be published on the Kentucky Board's website.

¶ 9 By letter dated February 2013, Dr. LaBrot notified the Department of the Kentucky discipline. In May 2014, he reported the Kentucky matter on his Illinois license-renewal application.

¶ 10 In December 2014, the Department filed an administrative complaint against Dr. LaBrot. According to the complaint, the Kentucky Board disciplined Dr. LaBrot because "he reviewed a chiropractic file on patient R.D. of Kentucky chiropractor D.P. and possibly others, without being registered with the [Kentucky Board] to perform peer reviews and without

meeting the requirements to perform peer reviews ***." The Department alleged this fact was a ground for revocation or suspension of Dr. LaBrot's certificate of registration pursuant to section 22(A)(12) of the Act, which authorizes disciplinary action when there is a "disciplinary action of another state or jurisdiction against a license or other authorization to practice as a *** doctor of chiropractic." 225 ILCS 60/22(A)(12) (West 2012). Dr. LaBrot refers to this provision as the "sister-state provision."

¶ 11 On May 4, 2015, Dr. LaBrot filed a motion to dismiss the administrative complaint, alleging the Department failed to disclose exculpatory evidence in violation of title 68, section 1110.130(d)(1), of the Illinois Administrative Code (Code) (68 Ill. Adm. Code 1110.130(d)(1) (West 2014)). Dr. LaBrot maintained he recently learned the Department withheld exculpatory evidence showing the Kentucky reprimand did not merit discipline, specifically, a letter written by Brian S. Zachariah, M.D., the Department's Chief Medical Coordinator and referenced in a *Chicago Tribune* article. The letter, according to Dr. LaBrot, provides possible reasons no disciplinary action was noted for 215 doctors who had their clinical privileges revoked or restricted by hospitals or managed-care organizations. The Department did not respond to his request for the letter's production. Dr. LaBrot maintained, pursuant to title 68, section 1110.130(a), the Code allows dismissal of a disciplinary action for the Department's failure to comply with discovery. 68 Ill. Adm. Code 1110.130(a) (West 2014).

¶ 12 The ALJ denied Dr. LaBrot's motion to dismiss. The ALJ found the letter irrelevant and concluded the Department did not violate discovery rules. The ALJ reasoned the letter was not exculpatory. The ALJ further observed, because Dr. Zachariah did not determine discipline, his beliefs as to appropriate disciplinary action is irrelevant. At this same hearing, the

parties stipulated the Department has the ability to publish sister-state disciplinary actions on its website.

¶ 13 On May 5, 2015, the ALJ held a hearing on the claims in the administrative complaint. At that hearing, Dr. LaBrot was the sole witness. According to Dr. LaBrot, he had been licensed as a chiropractor in Illinois since 1981. At no time was his license inactive. In addition to his Illinois license, Dr. LaBrot was licensed to practice chiropractic in five other states, including Kentucky. Dr. LaBrot was a member of the American Board of Quality Assurance and Utilization Review Physicians and the American College of Chiropractic Consultants. He volunteered for five years on the board of directors for Floating Doctors, a nonprofit organization that provides free medical care and other healthcare services to underserved coastal communities.

¶ 14 In his over three decades of practice, Dr. LaBrot had not been accused of misconduct involving patient treatment in any state. His privileges to practice had not been revoked, modified, or restricted. Dr. LaBrot had not been the subject of a professional negligence lawsuit. Dr. LaBrot's only disciplinary actions resulted from his failure to comply with the Kentucky rules and regulations regarding peer review.

¶ 15 Dr. LaBrot was employed by American Specialty Health (ASH), a health services company. His position at ASH was senior vice president of clinical services for the state of Kentucky. ASH's clients included private health-insurance companies that contracted with state Medicaid agencies to administer Medicaid services. Part of ASH's services for its clients was to verify the medical necessity of proposed specialty care. The medical-necessity verification process involved peer review. According to Dr. LaBrot, in the peer-review process, a physician

presented clinical findings to ASH, which then had physicians in the same medical field review the information to determine whether the healthcare services met the benefit definition of medically necessary to be covered services.

¶ 16 In Kentucky, the insurance regulations required a medical director oversee peer-review activities. Dr. LaBrot acted as the medical director. He oversaw peer-review activities and ensured clinicians had the proper training, credentials, and resources to meet contractual requirements. As the medical director, Dr. LaBrot was not required to be registered as a peer reviewer. Kentucky law, however, required those who performed peer reviews meet certain registration requirements. No other state in which Dr. LaBrot was licensed, including Illinois, required licensed chiropractors to register separately as a peer reviewer. Dr. LaBrot denied ever conducting a peer review.

¶ 17 According to Dr. LaBrot, when ASH completed "our due diligence," ASH reviewed Kentucky's laws and regulations. ASH noticed a peer reviewer needed a Kentucky license, but failed to see the additional step of registering with the Chiropractic Board of Examiners to perform peer review. ASH began performing peer reviews in Kentucky at the end of 2011. Upon learning of its error, ASH stopped performing peer review in Kentucky, even before Dr. LaBrot entered the agreed order. ASH resumed peer-review activity in Kentucky upon satisfying the mandates of the agreed order and complying with Kentucky's registration requirements.

¶ 18 Dr. LaBrot acknowledged the agreed order indicated "respondent reviewed a chiropractic file on patient RD of Kentucky chiropractor DP and possibly others, without being registered with the Kentucky Board *** to perform peer reviews." Dr. LaBrot denied peer

reviewing a patient's file.

¶ 19 On May 29, 2015, the ALJ issued her findings and recommendations. Among these findings was the ALJ's conclusion regarding aggravating factors. The ALJ concluded "the primary statutory aggravated factor" to be Dr. LaBrot's lack of contrition for the offense. The ALJ reasoned Dr. LaBrot, during his testimony, "denied any wrongdoing and consistently attempted to minimize the violation of Kentucky law." According to the ALJ, Dr. LaBrot, as medical director, was responsible for overseeing the peer-review process and the credentialing of his staff. The peer reviews at ASH looked at the patient's specific information, such as age, history, and clinical findings to determine the appropriate care based on those demographics and clinical findings. Not only did Dr. LaBrot fail to comply with Kentucky law but so did his entire staff. The ALJ rejected Dr. LaBrot's assertions he merely violated registration requirements. Kentucky required peer-review training and maintained its own set of standards and protocols for the reviews and record keeping.

¶ 20 The ALJ found additional aggravating factors, including Dr. LaBrot's testimony he was unaware of the Kentucky statute for registration and, concerning to the ALJ, the protocols for the peer-review process. Dr. LaBrot, upon entering the agreed order, admitted reviewing a chiropractic file: "Respondent reviewed a chiropractic file on Patient R.D. of Kentucky chiropractor D.P. and possible others." But, during testimony, he repeatedly denied performing any peer reviews. The ALJ further concluded the fact the discipline was "recent" to be another aggravating factor.

¶ 21 As to the factors in mitigation, the ALJ noted Dr. LaBrot's history regarding his license and the fact he had not previously been disciplined. The ALJ further noted Dr. LaBrot's

volunteer service for Floating Doctors. Dr. LaBrot took remedial action and testified his staff was compliant. The ALJ concluded mitigating factors do not outweigh the aggravating factors "and the multiple terms of the discipline imposed by Kentucky[,] warrants a reprimand in the State of Illinois." The ALJ recommended Dr. LaBrot's license be reprimanded and he be fined $1000 "to mirror the Kentucky discipline."

¶ 22 At some point after the hearing before the ALJ, Dr. LaBrot filed a Freedom of Information Act (FOIA) (105 ILCS 5/34-6.1 (West 2014)) request and, as a result, obtained from the Department a copy of Dr. Zachariah's letter. The letter, dated January 17, 2012, was written to the director of Health Research Group in Washington D.C.:

> "As you state in your letter, not all clinical[-]privilege actions necessarily result in state[-]licensure actions. There are many reasons why this is true. For example, the clinical[-]privilege action may have resulted from non-patient care related issues such as failure to complete medical records or other administrative matters. The Medical Disciplinary Board may have evaluated a hospital's clinical[-]privilege action and determined that the allegation, even if true, did not rise to the level of a violation of our state's [Act]. Alternatively a potential violation may have been investigated, perhaps even gone to a formal hearing, yet in the final analysis no violation could be proven in the 'clear and convincing' manner which is the burden of proof mandated by state law. Also, the necessary investigation and resultant disciplinary process itself

> takes months and sometimes years. It is possible that some of the physicians to which you refer will eventually have a disciplinary action taken against them even if it has not yet occurred or been recorded. In addition, not all medical board actions are discipline. For example we may issue a non-public, letter of concern or enroll a physician in a Care, Counseling and Treatment program. The record of such an action, if taken, would not be available in your search and I would be prohibited by state law from sharing this information with you."

¶ 23 Upon receiving the letter from the Department, Dr. LaBrot asked the Director to reopen the hearing to examine Dr. Zachariah about the content of the letter. The Director denied Dr. LaBrot's request.

¶ 24 In June 2015, the Medical Disciplinary Board (Board) of the Department adopted the ALJ's conclusions of law and recommendation of a reprimand to Dr. LaBrot's license and a $1000 fine. In September 2015, the Director adopted the findings and conclusions of the Board. The Director ordered Dr. LaBrot's license be reprimanded and Dr. LaBrot be fined $1000.

¶ 25 In November 2015, Dr. LaBrot filed an administrative complaint seeking review of the Department's decision. In November 2016, the circuit court entered a docket order, stating: "Court has reviewed the pleadings[, and] the record on file and considered the arguments of counsel[.] The final administrative decision of the Director is affirmed[.]"

¶ 26 This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 Our review of the Department's final decision is governed by the Administrative Review Law. 735 ILCS 5/3-101 (West 2012); 225 ILCS 60/41 (West 2012). Our role is to review the decision of the administrative agency, not the decision of the circuit court. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531, 870 N.E.2d 273, 292 (2006).

¶ 29 A. The Department's Failure To Produce Dr. Zachariah's Letter

¶ 30 Dr. LaBrot first argues the Director erred by not granting his motion to dismiss the proceeding based on the Department's failure to produce Dr. Zachariah's letter. Dr. LaBrot contends the letter was exculpatory within the meaning of title 68, section 1110.130(d)(1) of the Illinois Administrative Code. Dr. LaBrot maintains he was accused of violating a purely administrative rule, having nothing to do with patient care, and the letter appears to align with his position he should not be further disciplined. Dr. LaBrot contends relevancy is further established because the Director regularly relies on the Chief Medical Coordinator's opinion in determining discipline.

¶ 31 Defendants contend the Director's ruling was proper as the letter was not exculpatory or relevant. Defendants also maintain, even if improper, the Code did not mandate the Director dismiss the action.

¶ 32 Title 68, section 1110.130(d)(1) mandates the Department provide "exculpatory evidence" to the charged party. 68 Ill. Adm. Code 1110.130(d)(1) (2012). "Exculpatory evidence" is defined as "any evidence which tends to support the registrant's position or to call in question the credibility of a Department witness." *Id.* Subsection (a) permits a party to seek dismissal of the case against it when the Department has failed to comply with section 1110.130. 68 Ill. Adm. Code 1110.130(a) (2014). We give deference to ALJ's decision on the admissibility

of evidence, reversing only when there is an abuse of discretion. See *Wilson v. Department of Professional Regulation*, 344 Ill. App. 3d 897, 909, 801 N.E.2d 36, 45 (2003).

¶ 33 We find the ALJ did not abuse its discretion in finding the letter is not relevant to the case against Dr. LaBrot or exculpatory. The Zachariah letter concerns possible reasons why clinical-privilege actions do not result in state-licensure actions. Dr. Zachariah explained there were "many possible reasons" for this, including they "may have resulted from non-patient care related issues such as failure to complete medical records or other administrative matters."

¶ 34 Dr. Zachariah's letter is not exculpatory. Exculpatory evidence is "[e]vidence tending to establish a criminal defendant's innocence." Black's Law Dictionary (10th ed. 2014). The letter has no bearing on whether Dr. LaBrot violated the sister-state provision.

¶ 35 Dr. Zachariah's letter is not relevant. To be relevant, evidence must have a " 'tendency to make the existence of a fact that is of consequence to the determination of the action either more or less probable than it would be without the evidence.' " *Fakes v. Eloy*, 2014 IL App (4th) 121100, ¶ 139, 8 N.E.3d 93 (quoting *Downey v. Dunnington*, 384 Ill. App. 3d 350, 387, 895 N.E.2d 271, 301(2008)). Dr. Zachariah's letter has no tendency to make the existence of a fact of consequence more or less probable. The Department's case is not, unlike the matters addressed in the letter, a clinical-privilege action. Even assuming this action is "administrative," a matter defendants dispute, this letter does not in any way dictate the kind of discipline that should be applied.

¶ 36 Because Dr. Zachariah's letter is neither exculpatory nor relevant, the Department was under no obligation under section 1110.130(d)(1) to produce the letter. The section 1110.130(a) motion to dismiss was properly denied.

¶ 37 B. The Director's Decision Not To Compel Production or Reopen the Hearing

¶ 38 Dr. LaBrot next argues the Department's refusal to compel the Department to produce the letter or to reopen the case to allow for Dr. Zachariah's examination was an improper violation of his right to due process. Dr. LaBrot contends his due-process rights were violated in that Dr. Zachariah's letter and testimony "might be helpful" to him.

¶ 39 We note Dr. LaBrot does not seek a reversal on this ground. Dr. LaBrot asks only "if the Court does not instruct the Director to dismiss the action or to impose a lesser sanction," we should reverse and remand "with instruction to reopen the hearing to allow for Dr. Zachariah's examination." Because we are remanding with instructions for the Director to enter an order consistent with our judgment, resolution of this question will have no result on the appeal. We need not decide it. See *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2016 IL 118129, ¶ 10, 51 N.E.3d 788 (" 'As a general rule, courts of review in Illinois do not *** consider issues where the result will not be affected regardless of how those issues are decided.' " (quoting *In re Barbara H.*, 183 Ill. 2d 482, 491, 702 N.E.2d 555, 565 (1998)).

¶ 40 C. The Director's Decision To Mirror Kentucky Board's Discipline

¶ 41 Under section 22(A)-(A)(12) of the Act (225 ILCS 60/22(A)-(A)(12) (West 2012)), the Department is authorized to "revoke, suspend, place on probation, reprimand, refuse to issue or renew, or take any other disciplinary or non-disciplinary action as the Department may deem proper with regard to the license or permit of any person issued under this Act *** for *** disciplinary action of another state or jurisdiction against a license or other authorization to practice as a *** doctor of chiropractic[.]" In each case, the Department determines the proper sanction. *Siddiqui v. Department of Professional Regulation*, 307 Ill. App. 3d 753, 764, 718

N.E.2d 217, 228 (1999).

¶ 42 When evaluating an administrative disciplinary decision, this court " 'defers to the administrative agency's expertise and experience in determining what sanction is appropriate to protect the public interest.' " *Gruwell v. Illinois Department of Financial & Professional Regulation*, 406 Ill. App. 3d 283, 295, 943 N.E.2d 658, 669 (2010) (quoting *Abrahamson v. Department of Professional Regulation*, 153 Ill. 2d 76, 99, 606 N.E.2d 1111,1132 (1992)). Our deference, however, does not mean "that all administrative decisions are sacred and not within reach of the courts." *Id.* at 295, 943 N.E.2d at 669-70 (quoting *Dorfman v. Gerber*, 29 Ill. 2d 191, 196, 193 N.E.2d 770, 773 (1963)). "We will reverse a sanction that amounts to an abuse of discretion or is arbitrary or capricious." *Id.* at 295, 943 N.E.2d at 670.

¶ 43 This court has reviewed administrative sanctions for an abuse of discretion. See *e.g.*, *id.* We have found an abuse of discretion occurs in the imposition of a sanction when the sanction is "(1) overly harsh in view of the mitigating circumstances or (2) unrelated to the purpose of the statute." *Siddiqui*, 307 Ill. App. 3d at 763, 718 N.E.2d at 228 .

¶ 44 Despite our holdings, defendants cite the First District decision of *Bultas v. Board of Fire & Police Commissioners*, 171 Ill. App. 3d 189, 197, 524 N.E.2d 1172, 1177 (1988), and urge this court to "tread carefully" when considering the severity of the discipline. Defendants maintain when the court reweighs the aggravating and mitigating evidence to rule an agency's choice of discipline is overly harsh, the court erases the deferential standard.

¶ 45 *Bultas* is not controlling. In *Bultas*, the First District held it was "aware of no authority which properly permits courts reviewing administrative decisions to reweigh evidence, including mitigating factors, for the purpose of determining that the sanction of discharge is

exceedingly harsh."*Id*. *Bultas* directly conflicts with this court's later analysis in *Gruwell* and *Siddiqui* and is not binding. Moreover, since *Bultas*, the First District reversed course. For example, in *Kafin v. Division of Professional Regulation*, 2012 IL App (1st) 111875, ¶ 43, 972 N.E.2d 1191, the First District considered "whether the punishment was overly harsh, arbitrary, or unreasonable in view of mitigating circumstances." We adhere to *Gruwell* and *Siddiqui*.

¶ 46 Before we review Dr. LaBrot's sanction, we note not only is the sanction a reprimand to Dr. LaBrot's license and a $1000 fine, but also the sanction was crafted "to mirror" the sanction imposed in the Kentucky action against Dr. LaBrot. This, according to Dr. LaBrot, reflects a policy of the Department, in sister-state actions, to *mirror* discipline imposed in the other state. In his final main argument on appeal, regarding the constitutionality of the Department's reliance on this unwritten policy, Dr. LaBrot cites the *Department of Financial & Professional Regulation v. Garibaldi*, Nos. 2014-7568, 2014-10701, Findings and Order (Nov. 4, 2015). In *Garibaldi*, the Board explained its disciplinary recommendation was designed "to remain consistent with its practice of mirroring the discipline imposed in the other state." While the Department argues that argument is forfeited and we should not take judicial notice, we will take judicial notice of this public record insofar as it shows the existence of this policy. See generally *Muller v. Zollar*, 267 Ill. App. 3d 339, 341, 642 N.E.2d 860, 862 (1994).

¶ 47 On appeal, Dr. LaBrot maintains the sanction is overly harsh given the mitigating circumstances. Dr. LaBrot emphasizes in his 36-year career as a licensed Illinois chiropractor he had not been accused of misconduct involving patient treatment, had his privileges to practice restricted or modified, or been the subject of a professional negligence lawsuit. Apart from the Kentucky reprimand, Dr. LaBrot had not been investigated for any wrongdoing. Dr. LaBrot

points to his community service, the fact the Kentucky violation was inadvertent, and no harm to a patient was alleged. Dr. LaBrot further points to the fact he and ASH acted quickly and responsibly to cure the registration requirements and comply with the agreed order. Dr. LaBrot, maintains the "aggravating factors" do not support the imposed discipline in light of the mitigating factors.

¶ 48 Defendants contend the Director properly relied on the aggravating factors in setting Dr. LaBrot's discipline. Defendants argue the record supports the finding of a lack of contrition in that Dr. LaBrot testified he did not engage in peer review while the agreed order stated he had. Defendants maintain the Director properly cited Dr. LaBrot's unawareness of the Kentucky peer-review protocols as an aggravating factor as well as the recency of the Kentucky disciplinary action.

¶ 49 We agree with Dr. LaBrot and find, in view of the mitigating circumstances, the sanction imposed is overly harsh and thus an abuse of discretion. Dr. LaBrot had been licensed for 36 years without a blemish to his record until the Kentucky action. The Kentucky action involved a violation for which no patient had asserted an injury. The Kentucky Board disciplined Dr. LaBrot for violating its peer-review registration requirements, and Dr. LaBrot promptly addressed and corrected the violations. Dr. LaBrot complied with Illinois law and reported the discipline.

¶ 50 Contrary to the Department's position, in light of the mitigating circumstances, the aggravating factors do not justify sanctioning Dr. LaBrot in the same manner as the Kentucky Board. Before imposing discipline, the Director relied on one *statutory* factor in aggravation: lack of contrition. The Director concluded Dr. LaBrot lacked contrition because he repeatedly

denied personally peer reviewing patient files while the agreed order indicated he had done so.

¶ 51 Typically, on review, we give great deference to credibility determinations made by the trier of fact because it sits in the best position to observe the witnesses and assess their credibility. See *Best v. Best*, 223 Ill. 2d 342, 350, 860 N.E.2d 240, 245 (2006). The ALJ, however, did not find anything in Dr. LaBrot's demeanor made him seem less contrite. The determination of a lack of contrition followed a comparison of Dr. LaBrot's testimony he did not personally conduct a peer review to his admission in the agreed order he did complete a peer review. It also arose from Dr. LaBrot's continued reference to the Kentucky action as an administrative one, despite the fact patient care, in the review of patient information, was involved.

¶ 52 We question the amount of weight the ALJ and the Director placed on this factor. The discrepancy between Dr. LaBrot's statements and his decision to admit to peer review as part of a negotiated order does not establish a lack of credibility or indicate a lack of contrition. Dr. LaBrot was a senior vice president acting in a supervisory role, supporting his contention he did not personally peer review a patient's chart. Other facts show a contrite Dr. LaBrot, in that he and ASH promptly ceased peer-review operations in Kentucky before he was disciplined and corrected the errors after the agreed order was entered.

¶ 53 We further question the Director's consideration of Dr. LaBrot's "unawareness of the Kentucky statute and peer-review protocols" as an aggravating factor in these circumstances. We agree with Dr. LaBrot this acts as a double punishment for the act of not properly registering with the Kentucky Board, as the unawareness merely restates the underlying violation. Defendants' case law to show this to be a proper aggravating factor is unpersuasive. Neither case

cited by defendants concerns Illinois law. See *Lawyer Disciplinary Board v. Aleshire*, 736 S.E.2d 70 (W. Va. 2012); *In re Millstein*, 667 A.2d 1355 (D.C. Cir. 1995). Neither involves similar circumstances. In *Aleshire*, the licensee was not charged with failing to meet registration requirements, but with criminal conduct that reflected on his honesty and engaging in conduct prejudicial to the administration of justice resulting in harm to two clients. *Aleshire*, 736 S.E.2d at 75-77. Millstein was charged with commingling his client's funds. *Millstein*, 667 A.2d at 1356.

¶ 54 As to the Director's reliance on the recency of the Kentucky discipline as an aggravating factor, we find this reliance improper. Defendants cite two out-of-state cases in which courts have relied on the recency of prior violations as aggravating evidence in favor of discipline: *Iowa Supreme Court Attorney Disciplinary Board v. Weiland*, 862 N.W.2d 627, 642 (Iowa 2015); and *In re Nelson*, 982 P.2d 983, 984 (Kan. 1999). These cases do not support the proposition the "recency" of an action in a sister-state *disciplinary proceeding* in relation to Illinois's disciplinary proceeding on the *same act* should be an aggravating factor. Both defendants' cases involve "recency" between *multiple violations* that resulted in disciplinary action. *Weiland*, 862 N.W.2d at 642 (noting the "track record" as an aggravating factor); *Nelson*, 982 P.2d at 984 (involving three prior acts). While multiple violations may show a pattern or track record of negligent behavior—proper aggravating factors—the time period between sister-state proceedings involving one act does not.

¶ 55 Given the mitigating factors, including Dr. LaBrot's previously lengthy and unblemished record, Dr. LaBrot's prompt action in correcting the problem, and the lack of any alleged harm to a patient, the sanction is overly harsh.

¶ 56 The sanction is also unrelated to the purpose of the Act. The Act's purpose is to protect the public health and welfare from individuals not qualified to practice medicine. *Reddy v. Department of Professional Regulation*, 336 Ill. App. 3d 350, 354, 785 N.E.2d 876, 879 (2002). An Illinois sanction against Dr. LaBrot is unnecessary to inform the Illinois public of Dr. LaBrot's failure to comply with Kentucky registration requirements, as the law already requires the public be so informed. Section 10(4) of the Patients' Right to Know Act (225 ILCS 61/10(4) (West 2014)) mandates the Department make available on the internet a public profile of each physician and a description of final disciplinary actions by licensing boards in other states. Further sanction also would not serve to protect Illinoisans from licensed chiropractors conducting peer review without being registered to do so as Illinois law has not deemed such requirements necessary. No allegations in the record establish Dr. LaBrot's failure to comply with the registration requirements resulted in the use of inadequate peer-review protocols or caused harm to any patients. Any additional sanction against Dr. LaBrot would not serve the purpose of protecting the health and welfare of Illinoisans.

¶ 57 The imposed discipline is arbitrary. An agency's action is arbitrary and capricious if the agency contravenes legislative intent, fails to consider a crucial part of the problem, or provides an explanation so implausible it runs contrary to agency expertise. *Gruwell*, 406 Ill. App. 3d at 295, 943 N.E.2d at 670. Here, because the Department failed to consider crucial parts of the problem, the decision is arbitrary. The Department "mirrored" the discipline in Kentucky though the circumstances underlying both disciplinary actions are vastly different. To protect its citizenry, Kentucky created registration requirements for chiropractors who engage in the peer-review process. The Kentucky Board's imposition of a reprimand and $1000 fine followed Dr.

LaBrot's failure to comply with those rules and practice peer review without proper licensing. Dr. LaBrot's failure to comply was not self-reported, and, at the time of the disciplinary action, Kentucky citizens had not been informed of Dr. LaBrot's lapse. In contrast, unlike Kentucky, Illinois has not deemed it necessary to protect its citizens by requiring licensed chiropractors involved in peer review to complete similar peer-review registration requirements. By the time disciplinary action began in Illinois, Dr. LaBrot had fully complied with the Kentucky regulations and ASH began peer review in Kentucky. Dr. LaBrot self-reported the Kentucky disciplinary action to the Department, and Illinois citizens would be informed of Dr. LaBrot's lapse in Kentucky without any Illinois disciplinary action. Given these distinctions, the decision to mirror the Illinois punishment to the Kentucky punishment is arbitrary.

¶ 58 We are not holding the Department may not impose sanctions for violation of sister-state rules and regulations or sanctions that mirror those imposed by the sister state. We simply hold, in the circumstances of this case, the disciplinary action taken is an abuse of discretion and is arbitrary. Because no further sanction serves the purpose of the Act, we reverse the order of the circuit court and set aside the Director's reprimand to Dr. LaBrot's Illinois license and the $1000 fine.

¶ 59 III. CONCLUSION

¶ 60 We reverse the circuit court's judgment and set aside the Department's September 2015 order.

¶ 61 Reversed and Department order set aside.