*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2016-352

MAY TERM, 2017

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| William J. McDonald, D.M.D. | } | APPEALED FROM: |
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| | } | Superior Court, Washington Unit, |
| v. | } | Civil Division |
| | } | |
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| Office of Professional Regulation | } | DOCKET NO. 649-10-15 Wncv |
| | | Trial Judge: Timothy B. Tomasi |

In the above-entitled cause, the Clerk will enter:

Dr. William J. McDonald, a licensed dentist, appeals the superior court's decision upholding a determination by the Board of Dental Examiners that his failure to obtain parental consent before extracting a minor's tooth constituted unprofessional conduct subjecting him to sanctions by the Board. We affirm.

The basic underlying facts concerning the incident in question are undisputed. On September 4, 2013, the subject patient, who was two days short of her seventeenth birthday, arrived with her mother at Dr. McDonald's office complaining of a toothache. Dr. McDonald had last seen the patient on April 3, 2012. Patient filled out an adult patient medical form that was given to her and then went into the examination room while her mother remained in the waiting room. Upon examining the patient, Dr. McDonald discovered an abscess of the gum at the third molar, which an April 2012 x-ray indicated was impacted. After obtaining the patient's verbal consent, Dr. McDonald extracted the molar without taking any x-rays.

The State filed charges against Dr. McDonald, alleging that he failed to practice competently in connection with his treatment of the patient, in violation of 3 V.S.A. § 129a(b)(1)-(2). Following a contested hearing in January 2015, the Board concluded that Dr. McDonald had acted unprofessionally in extracting the minor patient's tooth without first obtaining parental consent and taking a contemporaneous x-ray. The Board declined to find unprofessional conduct, however, in the manner of the extraction. As a sanction, the Board suspended Dr. McDonald's license for six months and required him to complete a risk management course. Dr. McDonald appealed the Board's decision to an appellate officer, who affirmed the decision in August 2015. Dr. McDonald then appealed to the superior court, which upheld the Board's determination with regard to Dr. McDonald's failure to obtain parental consent, but reversed the Board's determination with regard to his failure to obtain a contemporaneous x-ray. The court remanded the matter for the Board to reconsider the sanction in light of its reversal of the determination regarding Dr. McDonald's failure to obtain a contemporaneous x-ray.

On appeal to this Court, Dr. McDonald argues that the Board erred in failing to find that the incident in question constituted an emergency, that the emergency obviated the need to obtain

parental consent, that he was not given adequate notice of the charge relating to parental consent, and that the Board's decision was based on an unexpressed standard that was not supported by the evidence. In situations such as this, "[w]here there is an intermediate level of appeal from an administrative body, we review the case under the same standard as applied in the intermediate appeal." Devers-Scott v. Officer of Prof'l Regulation, 2007 VT 4, ¶ 4, 181 Vt. 248 (quotation omitted). Thus, we review the Board's "decision independent of the superior court's findings and conclusions." Id. Additional deference is owed, when, as here, "the action arose out of an administrative proceeding in which a professional's conduct was evaluated by a group of his peers." Braun v. Bd. of Dental Exam'rs, 167 Vt. 110, 114 (1997). "We will affirm the Board's findings as long as they are supported by substantial evidence, and its conclusions if rationally derived from the findings and based on a correct interpretation of the law." Id. "Evidence is substantial if, in looking at the whole record, it is relevant and a reasonable person could accept it as adequate to support the particular conclusion." Id. (citation omitted). "Thus, we are concerned with the reasonableness of the decision of the Board's decision, not how we would have decided the case." Id. We will not reweigh conflicting evidence, but rather will "defer to the finder of fact when there is conflicting evidence in the record." Devers-Scott, 2007 VT 4, ¶ 6.

Dr. McDonald first challenges the Board's finding that no emergency obviated his duty to obtain parental consent. We conclude that the Board's finding was supported by relevant evidence that a reasonable person could rely upon. As the Board found, although the patient was seen on an "emergency" basis rather than a regularly scheduled appointment, neither Dr. McDonald's own treatment notes nor his letter to the patient's mother after the extraction, which Dr. McDonald read into the record at the Board hearing, support his testimony before the Board that patient's allegedly dire condition required immediate action not allowing time even to obtain the consent of the patient's mother, who was sitting in the waiting room. Nor did Dr. McDonald's staff recall the visit in question or anything out of the ordinary about it. Indeed, Dr. McDonald's main defense before the Board was not that there was such a dire emergency that he had no time to obtain the consent of patient's mother, but rather that he was unaware, due to the fault of the patient, her mother, and his staff, that the patient was a minor and that her mother was in the waiting room.

Dr. McDonald also argues that that the Board's conclusion that his failure to obtain parental consent for the tooth extraction on a minor was based on an unexpressed standard unsupported by evidence. We find no merit to this argument. As both the appellate officer and the superior court noted, Dr. McDonald himself acknowledged that, under normal circumstances, accepted and prevailing dental practice requires obtaining parental consent before removing the tooth of a minor. Dr. McDonald essentially conceded this point in his own testimony. Moreover, "[a]s a body composed primarily of dental professionals, the Board has the power to apply its own expertise in evaluating the evidence." Braun, 167 Vt. at 115.

Dr. McDonald also complains that he received inadequate notice of the charge of lack of parental consent. Again, we find no merit to this argument, which Dr. McDonald does not appear to have raised in any of the proceedings below. The amended specification of charges stated, among other things, that Dr. McDonald extracted a tooth of the sixteen-year-old patient without presenting a consent form to the patient or her mother for signature. At the hearing before the Board, Dr. McDonald listened to the testimony of others, and provided his own testimony, regarding parental consent for minors and his failure to obtain it in this case. His failure to obtain parental consent was plainly at issue at the hearing, and Dr. McDonald had an adequate opportunity to prepare and respond to the charge that he did not obtain parental consent before extracting the minor's tooth. See Petition of Green Mountain Power Corp., 131 Vt. 284, 293 (1973) (stating that, with respect to due process, question on review "is not the adequacy of the original notice or

pleading" but rather "whether or not the parties were given an adequate opportunity to prepare and respond to the issues raised in the proceeding"). The Board did not, as Dr. McDonald asserts, base its decision on his failure to obtain the parent's written consent. The Board found that Dr. McDonald did not even obtain, at a minimum, verbal parental consent.

Finally, Dr. McDonald argues that the Board improperly based its decision on his prior disciplinary record and its perception of his self-righteous attitude. The record reveals that the Board considered Dr. McDonald's extensive prior disciplinary record, which was admitted in exhibits before the Board, and his attitude in this case only with regard to its sanction, which was proper, and not with regard to its conclusion that he engaged in unprofessional conduct. See Devers-Scott, 2007 VT 4, ¶ 56 (stating that it was proper for administrative law officer to consider plaintiff's attitude and demeanor during proceedings in determining appropriate sanction).

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice