SIXTH DIVISION
December 20, 2013

No. 1-12-2694

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DR. JOSEPH GIACCHINO, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, JAY STEWART, JOHN LAGATTUTA, THE MEDICAL DISCIPLINARY BOARD, DONALD SEASOCK, and SADZI OLIVA, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 11 CH 24443 Honorable Richard J. Billik, Jr., Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred with the judgment.

ORDER

¶ 1 *Held*: Plaintiff's medical licenses were revoked by the director of the Division of Professional Regulation of the Illinois Department of Financial and Professional Regulation after he was found to have violated the Medical Practice Act of 1987 and the Illinois Controlled Substances Act. Plaintiff filed a complaint for administrative review and other relief. In pertinent part, count I of the complaint alleged the evidence failed to show plaintiff violated the Acts such that his medical licenses should be revoked. Count II was brought under U.S.C. § 1983 and alleged his due process rights were violated when he was denied a fair administrative hearing. The circuit court affirmed on count I and dismissed count II. We affirmed the circuit court.

¶ 2 The director of the Division of Professional Regulation (Director) of the Illinois Department of Financial and Professional Regulation (Department) entered a final administrative decision, finding that plaintiff, Dr. Joseph Giacchino, violated provisions of the Medical Practice Act of 1987 (225 ILCS 60/1 *et seq*. (West 2010)), and the Illinois Controlled Substances Act (720 ILCS 570/100 *et seq*. (West 2010)) (collectively referred to as the Acts), and revoking his physician and surgeon's license and controlled substance license (collectively referred to as his medical licenses). Plaintiff filed a four-count complaint for administrative review and other relief. Count I alleged in pertinent part that the evidence failed to show that plaintiff violated the Acts such that his medical licenses should be revoked. Count II was brought under 42 U.S.C. § 1983 and alleged that his due process rights were violated when he was denied a fair administrative hearing due to agency bias and that he was deprived of the right to cross-examine the witnesses who testified against him. Counts III and IV alleged that section 312(h) of the Illinois Controlled Substances Act (720 ILCS 570/312(h) (West 2010)), and section 22(A)(17) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(17) (West 2010)), which plaintiff was found to have violated, were unconstitutionally vague. The circuit court affirmed the Director on count I and dismissed counts II through IV. Plaintiff appeals, contending: (1) the circuit court erred in affirming the Director on count I of his complaint; and (2) the circuit court erred in dismissing count II of his complaint for failing to state a cause of action under 42 U.S.C. § 1983. Plaintiff makes no argument on appeal regarding the dismissal of counts III and IV. We affirm.

¶ 3 Plaintiff, a primary care pain management practitioner with an office in Melrose Park, was first licensed in 1974. In June 1987, the Department summarily suspended his medical licenses for

dispensing controlled substances for non-therapeutic purposes. In September 1989, the Director restored plaintiff's physician's license, subject to a five-year probationary period, and indefinitely suspended his controlled substance license.

¶ 4 When plaintiff violated one of the terms of probation for his physician's license by failing to complete a medical competency exam, the Director extended the probationary period until September 1995, and required him to pass the exam. In June 1998, the Director restored plaintiff's controlled substance license subject to a two-year probationary period. As of April 22, 2010, plaintiff's medical licenses were active.

¶ 5 On April 22, 2010, the Department petitioned the Acting Director to issue an order for a temporary suspension of plaintiff's medical licences, alleging: (1) he issued and/or prescribed large quantities of controlled substances (including Xanax, Vicodin, and Norco) to numerous patients for non-therapeutic purposes and without conducting proper patient examinations; (2) he engaged in sexual activities with a patient during office visits and offered that patient medication in exchange for oral sex; (3) he post-dated a prescription for controlled substances; (4) several of his patients obtained controlled substances from him with the intent to sell them to others; and (5) numerous local pharmacies complained about his prescribing habits to the Department and/or the U.S. Drug Enforcement Administration (DEA). After a hearing that day, the acting Director found that plaintiff's actions constituted an immediate danger to the public. The acting Director temporarily suspended plaintiff's medical licences, pending further administrative proceedings.

¶ 6 Also on April 22, 2010, the Department filed an 18-count administrative complaint against plaintiff alleging he violated the Medical Practice Act of 1987 and the Illinois Controlled Substances

Act in his treatment of six patients, G.K., M.M., C.C., H.M., E.V., and C.S. The Department alleged plaintiff had issued and/or prescribed controlled substances to G.K. (primarily Xanax and Vicodin) without: (1) properly evaluating and/or monitoring her for signs and symptoms of addiction; (2) properly evaluating and/or examining her medical conditions; and (3) making an adequate clinical evaluation, justification and/or rationalization for issuing said medications. The Department also alleged that between 2004 and 2006, plaintiff engaged in sexual intercourse with, and received oral sex from, G.K. In addition, plaintiff allegedly informed G.K. in January 2008 that she could receive free medication in exchange for performing oral sex on him. Also, in February 2008, plaintiff allegedly used sexually explicit language in a conversation with G.K. during an office visit and also sexually propositioned her during that visit.

¶ 7 The Department alleged that by these acts against G.K., plaintiff violated: (1) section 22(A)(17) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(17) (West 2010)), which prohibits the prescribing, selling, administering, distributing and/or giving any drug classified as a controlled substance or narcotic for other than medically accepted therapeutic purposes; (2) section 22(A)(33) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(33) (West 2010)), which prohibits the violation of state or federal laws or regulations relating to controlled substances; (3) section 312(h) of the Illinois Controlled Substances Act (720 ILCS 570/312(h) (West 2010)), which provides that "[a]n order purporting to be a prescription issued to any individual, which is not in the regular course of professional treatment *** and which is intended to provide that individual with controlled substances sufficient to maintain [his] or any other individual's physical or psychological addiction, habitual or customary use, dependence, or diversion of that controlled substance is not a

prescription within the meaning and intent" of the Act and that the prescriber "shall be subject to the penalties provided for violations of the law relating to controlled substances"; (4) section 304(a)(5) of the Illinois Controlled Substances Act (720 ILCS 570/304(a)(5) (West 2010)), which provides that the Department may suspend or revoke a license to dispense a controlled substance when the licensee has "violated any provision" of the Act or any "rules promulgated" thereunder; (5) section 22(A)(5) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(5) (West 2010)), which prohibits a physician from engaging in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud, or harm the public; and (6) section 22(A)(20) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(20) (West 2010)), which prohibits a physician from engaging in "[i]mmoral conduct in the commission of any act including, but not limited to, commission of an act of sexual misconduct related to the licensee's practice."

¶ 8 With respect to M.M., C.C., H.M. and E.V., the Department alleged that plaintiff prescribed controlled substances to them without: (1) properly evaluating and/or monitoring them for signs and symptoms of addiction; and (2) properly evaluating and/or examining their medical conditions. The Department alleged plaintiff thereby violated sections 22(A)(5), (A)(17), and (A)(33) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(5), (A)(17), (A)(33) (West 2010)), and sections 304(a)(5) and 312(h) of the Illinois Controlled Substances Act. 720 ILCS 570/304(a)(5) (West 2010); 720 ILCS 570/312(h) (West 2010).

¶ 9 With respect to C.S., the Department alleged that plaintiff postdated a prescription for Xanax and Norco, thereby violating section 22(A)(31) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(31) (West 2010)), which prohibits a "false, fraudulent or deceptive statement in any

document connected with practice under this Act." The Department also alleged that plaintiff's post-dating of C.S.'s prescription for Xanax and Norco violated sections 22(A)(5) and (A)(33) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(5) and (A)(33) (West 2010)), and section 304(a)(5) of the Illinois Controlled Substances Act. 720 ILCS 570/304(a)(5) (West 2010).

¶ 10 I. The Administrative Hearing

¶ 11 A. Evidence As To The Charges Regarding Patient G.K.

¶ 12 At the hearing on the administrative complaint, G.K. testified she was first treated by plaintiff in 2004 and that she was last treated by him in 2009. G.K. initially sought treatment from plaintiff because she was addicted to Xanax, she wanted him to prescribe her Xanax and Vicodin, and a friend had told her that plaintiff would prescribe any controlled substance she wanted.

¶ 13 During the 32-month period between May 2004 and December 2006, G.K. visited plaintiff's office at least monthly, for a total of 38 office visits. G.K. testified that at her first visit, she falsely told plaintiff that her back was "act[ing] up" and that she had anxiety, and she asked him to prescribe her Xanax and Vicodin in specific dosage amounts. Plaintiff never asked G.K., during any of her visits, about her past medical history, nor did he perform a physical exam on her, ask her to describe the level of pain she was experiencing, require her to give a urine sample, or diagnose her conditions. A few months after G.K.'s first office visit, plaintiff asked her to get an MRI, which she did, but plaintiff never discussed the results of the MRI or his diagnosis with her, nor did he change her medication levels.

¶ 14 At each of those 38 office visits, plaintiff wrote G.K. prescriptions for both Vicodin and Xanax in the following amounts: 120 tablets of Vicodin ES (May 2004 through December 2006);

60 tablets of Xanax, 1 mg (May 2004 through June 2004); 90 tablets of Xanax, 1 mg (June 2004 through July 2004); and 90 tablets of Xanax, 2 mg (August 2004 through December 2006). When he wrote the prescriptions, plaintiff did not discuss with G.K. the nature of those medications and potential side effects or drug interactions, and he did not ask about her family history or whether she previously had used those drugs.

¶ 15 G.K. testified that in 2005, plaintiff asked G.K. about her sex life with her fiancé. Plaintiff then, on his own, wrote her fiancé a prescription for Cialis.

¶ 16 G.K. testified that beginning in 2005, on five occasions, she had either oral or vaginal sex with plaintiff during her appointments at his office while she was alone in the exam room with him and at his request. G.K. did not remember the specific dates or times of day each of the five incidents occurred.

¶ 17 G.K. testified that during the first sexual encounter in 2005, she was alone in the exam room with plaintiff and asked him for refills of her prescriptions. Plaintiff locked the door, unzipped his pants, and told her to give him oral sex or else she would not get her prescriptions. G.K. took it as a serious request, and so gave him oral sex because she was afraid he would cut her off from the medication, which could result in her having a seizure and dying. Afterwards, plaintiff gave G.K. the prescriptions and she left the room. G.K. testified that during the third sexual encounter, plaintiff again asked for oral sex She complied, after which he gave her the Xanax and Vicodin prescription refills, and she left. G.K. explained that the oral sex was in exchange for the prescription refills.

¶ 18 G.K. testified that the second, fourth, and fifth sexual encounters with plaintiff involved vaginal intercourse. During the second encounter, G.K. thought plaintiff was going to ask her for

oral sex, but instead he told her he wanted her "on his examining table" and so "he bent [her] over the [exam] table. It was fast." Plaintiff was not wearing a condom and he ejaculated inside her. After he finished he wrote her the prescriptions. The fourth and fifth sexual encounters also both involved vaginal intercourse when she was bent over the exam table and he immediately undid his pants, entered her and ejaculated, after which he gave her the prescriptions.

¶ 19 G.K. testified she sometimes would try to avoid plaintiff's sexual advances by telling him she had cramps or stomach problems, or by having a fellow patient, E.V., accompany her to office visits and come into the exam room with her. G.K. never reported the sex to the police or to the Department because she was ashamed. G.K. continued visiting plaintiff because she was "strongly addicted" to the drugs and she was afraid that if she did not have sex with him he would not give her the prescriptions.

¶ 20 G.K. testified she stopped seeing plaintiff in late 2006 or early 2007, after suffering multiple seizures while trying to wean herself from the Xanax by decreasing the dosage and buying it "off the streets." When G.K. was hospitalized after a February 2007 seizure, she contacted the DEA about plaintiff's prescribing practices. G.K. told the DEA that she almost died and that her brother, a patient of plaintiff, died in 2004 from an overdose of Xanax and Vicodin.

¶ 21 G.K. next had contact with the DEA in the summer of 2007, after she completed a drug rehabilitation program in July, when she met with DEA investigator Cori Rizman and special agent Mark Warpness several times. G.K. informed them she was addicted to Vicodin and Xanax and she told them the amounts of those drugs that plaintiff had prescribed her. G.K. testified that Investigator Rizman and Agent Warpness were the first people she told about the 2005 sexual

encounters with plaintiff. Investigator Rizman and Agent Warpness confirmed that G.K. told them she had sexual relations with plaintiff in 2005 and 2006 on several occasions because she was addicted to the medications he prescribed her, and that she was pressured into having sex with him in order to get the prescriptions. They confirmed that she also told them she sometimes had E.V. accompany her to office visits to try and avoid sexual contact with plaintiff.

¶ 22 Investigator Rizman and Agent Warpness familiarized themselves with the volume of controlled substances, specifically hydrocodone (with brand names including Vicodin and Norco) that plaintiff distributed under his DEA registration. From 2006 through 2008, plaintiff dispensed or ordered over one million hydrocodone pills. The DEA investigated plaintiff due to a concern that he was illegally prescribing controlled substances. Two pharmacists testified they stopped filling some of plaintiff's prescriptions for controlled substances when they became alarmed at his prescribing habits.

¶ 23 In late 2007, G.K. agreed to cooperate with the DEA as a confidential source and she agreed to wear a wire to two office visits with plaintiff on January 2, 2008, and February 4, 2008, after more than a one-year lapse in visiting his office. G.K. testified she did this to get "some type of justice for [her] brother dying" and because she "almost died and maybe other people were dying," too.

¶ 24 The audio recordings and written transcripts, prepared by Investigator Rizman, from G.K.'s two office visits with plaintiff on January 2, 2008, and February 4, 2008, were admitted into evidence and the audio recordings were played during the administrative hearing. Investigator Rizman and Agent Warpness explained that the January 2, 2008, recording captured a conversation between plaintiff and G.K. during which he referred to their prior sexual activity. At the beginning

of the January 2, 2008, visit, the following exchange occurred between plaintiff and G.K.:

"[Plaintiff]: There you are sweetie.

[G.K.]: Hey Joe, I wanted to apologize. I was out of town to get my head together and I owed you money forever and I'm sorry. What were you on vacation? You're nice and tan.

[Plaintiff]: A little bit. *** It's been over a year.

[G.K.]: Yeah, I went with my sister [and] opened a restaurant and I was helping her but with my brother dying I was really messed up with that. So, anyway, I'm back. I know you missed me. Right?

[Plaintiff]: Of course.

[G.K.]: Of course.

[Plaintiff]: Last time you were here you were up on the table, weren't you?

[G.K.]: Yeah, I remember that. Well, not today Joe. Not today. Yeah, that's right.

* * *

[Plaintiff]: How's your sex life?

[G.K.]: My sex life? Obviously not too good. Right? I should say, how's your sex life Joe? So where did you go on vacation?

[Plaintiff]: Miami.

[G.K.]: Oh that's nice. Was I blushing?

[Plaintiff]: Oh yeah.

[G.K.]: Ah huh you got me blushing. Ok Joe, wait till next time.

[Plaintiff]: But that's what you always say.

[G.K.]: No.

[Plaintiff]: Yeah, you always have to be pushed into it.

[G.K.]: Oh whatever. Ok, so next time I'll say, you forgive me now? Don't get me blushing Joe. At least you know I'm a lady, right? Hey do you ah, now because last time I was here you gave me the pills and then so do you still do that now?

[Plaintiff]: Yeah, but that would cost you more. I don't know how much you have. *** You've got 70 [dollars]?

[G.K.]: Give you 70 [dollars] now? Sure.

[Plaintiff]: Seventy or [oral sex], either one.

[G.K.]: Ok, so if I give you [oral sex] it's free, right?

[Plaintiff]: Oh yeah, absolutely."

¶ 25 On February 4, 2008, G.K. again wore a wire to her office visit with plaintiff, during which the following exchange occurred:

"[Plaintiff]: So what else is going on in your life? Any new boyfriends?

[G.K.]: Yeah, I've been dating this one guy.

[Plaintiff]: Oh yeah.

[G.K.]: Yeah, he seems pretty cool.

[Plaintiff]: He seems pretty...how long have you been dating him?

[G.K.]: Just a couple weeks.

[Plaintiff]: Oh so you haven't given a hump yet to him or what?

[G.K.]: No.

[Plaintiff]: Why not [G.K.]? You need it!

[G.K.]: Why, no don't be embarrassing me here. *** Sorry if I've been kind of [a] little stand offish.*** I think that it's maybe my stomach.

[Plaintiff]: That's why you got to get f***ed and get back into the routine again, you see.

[G.K.]: Oh and I'll be better?

[Plaintiff]: Yeah.

[G.K.]: So come in here on a weekly basis and I'll get well?

[Plaintiff]: Or you could take your pants off and get on the table.

[G.K.]: Well, I'm going to pass on this time, though next month though for sure.

[Plaintiff]: You always pass, see."

¶ 26 After the February 4 visit, Investigator Rizman spoke with G.K., who indicated that plaintiff's comments about her getting up on the table referred to their prior sexual encounters.

¶ 27 B. Evidence As To The Charges Regarding Patient M.M.

¶ 28 M.M. was treated by plaintiff between April 2005 and September 2009. M.M. testified she sought treatment from plaintiff in order to get Vicodin.

¶ 29 During the 36-month period between April 2005 and March 2008, M.M. visited plaintiff's

office at least monthly, for a total of 41 visits, and paid anywhere from $230 to $300 for each office visit. M.M. testified that when she came in less than 30 days from her prior visit, plaintiff would still give her a prescription for Vicodin. She falsely told plaintiff on her first visit with him that she had been in a car accident and had a lower back problem as a reason for needing the pain medication. Plaintiff never physically examined her, nor did he take her history of drug and alcohol abuse, have her show him the location of her pain, request her records from other physicians, or require her to have blood work, urine tests or drug screening.

¶ 30 At each of those 41 visits, plaintiff wrote M.M. prescriptions for Vicodin in the following dosages and amounts: 120 tablets of Vicodin ES (April 2005 through October 2006, December 2006 through January 2007); 150 tablets of Vicodin ES (November 2006, February 2007 through August 2007); and 180 tablets of Vicodin ES (September 2007 through March 2008). M.M. testified plaintiff never explained to her about Vicodin's addictive nature, its side effects, or discussed alternative medications or treatments.

¶ 31 Beginning in March 2008, M.M. suffered three seizures and was hospitalized. The next month, M.M.'s boyfriend called plaintiff and told him that M.M. was addicted to Vicodin and that plaintiff should no longer see her as a patient. M.M. stopped seeing plaintiff for a period of time after her March 2008 seizures, but returned to him for treatment from December 2008 through March 2009, when he prescribed her 180 tablets of Vicodin ES at each monthly visit. M.M. testified that when she returned to his office in December 2008, plaintiff did not ask her about her seizures or her addiction to Vicodin.

¶ 32 M.M. testified she stopped visiting plaintiff in April 2009, when she entered a drug

rehabilitation program. M.M. returned to plaintiff on August 10, 2009, and on September 2, 2009, and at each visit he prescribed her 180 tablets of Lortab. Plaintiff did not ask her about her multi-month absence. A few days after her September visit, M.M. wrote plaintiff a letter explaining her addiction to Vicodin and her recent drug rehabilitation, and requesting that he terminate his treatment of her.

¶ 33 C. Evidence As To The Charges Regarding Patient C.C.

¶ 34 Plaintiff's medical and prescription records for C.C. show that he treated her between June and August 2009. At her first office visit, plaintiff ordered a drug screen revealing that C.C. used an illegal drug. Nonetheless, plaintiff prescribed her Norco and Xanax in the following dosages and amounts: 150 tablets of Norco (June 2009); 210 tablets of Norco (July-August 2009); and 120 tablets of Xanax 1 mg (June 2009-August 2009). C.C.'s aunt, a Chicago Police Department sergeant, testified that in September 2009, C.C. suffered a drug overdose resulting in her hospitalization.

¶ 35 D. Evidence As To The Charges Regarding Patient H.M.

¶ 36 Plaintiff's medical records show he treated H.M. between December 2004 and August 2009. H.M. made four office visits to plaintiff between December 2004 and April 2005, during which plaintiff prescribed her 120 tablets of Vicodin ES at each visit. During the 40-month period between March 2006 and August 2009, H.M. made 46 office visits during which plaintiff prescribed the following: 120 tablets of Vicodin ES (March 2006 through October 2006, August 2008 through September 2008); 150 tablets of Vicodin ES (January 2007 through October 2007, January 2008 through July 2008, October 2008 through August 2009); 60 tablets of Vicodin ES (November 2007); 90 tablets of Vicodin ES (December 2007, September 2008); 60 tablets of Valium 10 mg (March

2006 through September 2006, November 2007); 90 tablets of Valium 10 mg (October 2006 through October 2007, December 2007 through August 2009); 30 tablets of Phentermine 37.5 mg (June 2007 through January 2009, March 2009 through August 2009); and 60 tablets of Darvocet N 100 (December 2007 through January 2008).

¶ 37 On August 22, 2006, H.M. visited plaintiff at his office and informed him that her pain medication had been stolen. Plaintiff prescribed her more Vicodin E.S. and Valium.

¶ 38 E. Evidence As To The Charges Regarding Patient E.V.

¶ 39 G.K. testified that because her addiction to Vicodin and Xanax was worsening, she asked E.V. to visit plaintiff as a patient in order to obtain prescriptions for Vicodin and Xanax and then give her the medication. E.V. confirmed this during his testimony. Between December 2004 and July 2009, E.V. visited plaintiff's office 22 times and at each office visit, plaintiff prescribed him 120 tablets of Vicodin ES and 90, 1 mg. tablets of Xanax. Plaintiff never advised E.V. of the side effects of the medication nor advised him not to drink or take other medications at the same time. E.V. and G.K. testified that E.V. would get his prescriptions filled at the pharmacy and then he would give G.K. the medication.

¶ 40 Both E.V. and G.K. testified that G.K. was present in the exam room during each of E.V.'s office visits and that plaintiff never physically examined E.V., except at the first visit, when plaintiff may have checked E.V.'s back "a little" after E.V. falsely told plaintiff he was having back pain. Plaintiff did not ask E.V. to rate his pain. After several appointments, plaintiff asked E.V. to get an MRI, which he did in the fall of 2005, but plaintiff never discussed those results with E.V. or explained what was wrong with his back, yet continued to prescribe E.V. the medications.

¶ 41 F. Evidence As To The Charges Regarding Patient C.S.

¶ 42 Detective Mike Umbenhower of the Naperville Police Department Special Operations Group testified that on February 17, 2010, C.S. was arrested after committing traffic offenses and after he was discovered to have a bag of cannabis in his pocket. At the police station, Detective Umbenhower inventoried the contents of C.S.'s wallet and discovered a prescription written to C.S. by plaintiff for Xanax and Norco. The prescription was post-dated February 24, 2010. The post-dating of a prescription violates federal law, specifically 21 C.F.R. § 1306.05(a), which states: "All prescriptions for controlled substances shall be dated as of, and signed on, the day when issued."

¶ 43 G. Dr. Buvanendran's Expert Testimony

¶ 44 Dr. Asokumar Buvanendran is a licensed physician and board certified in anesthesiology and pain management. He is a full professor at Rush University Medical Center, where he teaches anesthesiology residents as well as residents sub-specializing in pain management, and is the director of anesthesiology for orthopedic surgery. He is the president of the Illinois Society of Anesthesiologists and a member of several local, state, and national medical societies. As part of his clinical practice in chronic pain management, he prescribes various controlled substances on a daily basis. During the hearing, when the Department requested that Dr. Buvanendran be qualified as an expert witness, counsel for plaintiff noted he had no objection and did not *voir dire* him as to his qualifications and background. The ALJ then noted that Dr. Buvanendran's testimony would be regarded as expert testimony. Dr. Buvanendran then testified as to the relevant standards of practice and how plaintiff breached those standards as to patients G.K., M.M., C.C., H.M. and E.V.

¶ 45 Dr. Buvanendran testified that prior to prescribing controlled substances for a patient, the

standard of practice requires a physician to: obtain a detailed history and review any prior medical records relative to the patient's complaint; conduct a complete nine-system physical exam and a neurological exam; determine the cause of the pain and whether there is a specific pathology; formulate a diagnosis; and then begin with conservative treatment, such as physical therapy and non-controlled substances including non-steroid, anti-inflammatory drugs before prescribing potent controlled substances. When a patient returns after an extended lapse in treatment, the physician should take a complete new history, perform a physical examination, review medical records from other physicians during the intervening period, and conduct tests to determine the pathology of the then-current complaints of pain before prescribing controlled substances.

¶ 46 Dr. Buvanendran testified that when a physician continually issues controlled substance refills to a patient, the standard of practice requires that he order blood tests to monitor the patient's liver function because controlled substances, including Vicodin, contain acetaminophen which can cause liver toxicity. When a physician learns that a patient is using illicit drugs, he should look for other warning signs of addiction and of failure to take the controlled substances as prescribed, and the physician should discuss this with the patient and proceed cautiously in prescribing controlled substances.

¶ 47 Dr. Buvanendran testified that the ethical standards of the profession require no sexual contact between a physician and a patient, and no verbal interactions of a sexual nature with a patient during an office visit.

¶ 48 Dr. Buvanendran concluded that plaintiff deviated from the standard of practice with regard to patients G.K., M.M., C.C., H.M., and E.V. In forming his opinions, Dr. Buvanendran reviewed

plaintiff's medical records for each patient, and the transcripts of the hearing testimony of those patients.

¶ 49 Dr. Buvanendran detailed the reasons why plaintiff's treatment of each of the five patients deviated from the standard of practice. As to G.K., Dr. Buvanendran testified that plaintiff breached the standard of practice by: (1) failing to obtain an appropriate history, physical exam, and radiological tests to determine her pain's etiology prior to starting her on Vicodin and Xanax, which he prescribed to her in the first instance instead of beginning with non-steroidal, anti-inflammatory drugs; (2) failing to test for liver toxicity or order radiological evaluations throughout her treatment; (3) ordering continuous medication refills without appropriate investigations into the cause of pain; (4) failing to take a complete new history, conduct a physical exam and order tests to determine pain etiology after a lapse in treatment; (5) failing to document the reason he changed her medications from Xanax and Vicodin to Valium and Norco; and (6) engaging in unethical misconduct when he had verbal communications with her of a sexual nature in 2008.

¶ 50 As to M.M., Dr. Buvanendran testified plaintiff breached the standard of practice by: (1) failing to investigate the cause of her back pain, obtain or review any records regarding the purported automobile accident she claimed to be involved in, and obtain diagnostic radiologic tests before or while persistently prescribing the controlled substances on a monthly basis; (2) failing to decrease the amount of controlled substances and conduct urine toxicology and drug screens though she exhibited warning signs of addiction; (3) failing to document the reason for increasing the quantities of controlled substances prescribed; (4) failing to investigate and document M.M.'s reported seizures; (5) failing to take a complete new history, conduct a physical exam and order tests to determine pain

etiology after a lapse in treatment; and (6) failing to conduct an effective pain assessment and discuss alternative treatment options.

¶ 51 As to C.C., Dr. Buvanendran testified plaintiff breached the standard of practice by: (1) failing to investigate and determine the cause of pain via radiological evaluations; (2) failing to use caution in prescribing controlled substances though C.C. had a positive history of illegal marijuana use; (3) failing to consider the warning signs of addiction, such as requests for early refills and positive drug screens, and failing to act appropriately in response; (4) prescribing excessive quantities of controlled substances for particular time frames; and (5) failing to document the reason for increasing the quantity of medications prescribed.

¶ 52 As to H.M., Dr. Buvanendran testified plaintiff breached the standard of practice by: (1) failing to complete an appropriate diagnostic work up or appropriately document his physical exam findings; (2) issuing early refills despite positive drug screens and claims of stolen medication; (3) failing to obtain medical records relating to prior treatment or history; (4) failing to take a complete new history, conduct a physical examination and order tests to determine pain etiology following a lapse in treatment; (5) failing to document the reason for increasing the quantities of controlled substances prescribed; and (6) failing to obtain lab tests for liver toxicity.

¶ 53 As to E.V., Dr. Buvanendran testified plaintiff breached the standard of practice by: (1) prescribing controlled substances without a diagnostic work up and complete physical exam; (2) failing to take a complete new history, conduct a physical exam and order tests to determine pain etiology after a lapse in treatment; and (4) failing to order liver toxicity tests.

¶ 54 H. Plaintiff's Testimony

¶ 55 The Department questioned plaintiff as an adverse witness and he was the sole witness to testify in his own case, specifically declining to call an expert. Plaintiff testified he had about 3,300 patients who came from Illinois and out-of-state for chronic pain management and for whom he prescribed controlled substances. Plaintiff maintained only an office-based practice, not admitting patients to the hospital. He attributed his large practice to his "personality."

¶ 56 Plaintiff testified that in conducting evaluations and pain assessments of patients, he does not ask his patients to rate their pain level on a numerical scale from 1 to 10. Rather, he determines those numbers after visually evaluating them by watching how they move up to the exam table, noting if they are smiling, laughing, joking or crying, and talking to them "about anything." Plaintiff admitted "we may not talk about pain at all."

¶ 57 Plaintiff testified the "most important tool in assessing a new chronic pain patient's condition and veracity is 80, 90% direct verbal communication." The remaining 10% or 20% of the pain assessment results from a physical assessment and diagnostic procedure. Plaintiff explained that his physical assessment is his visual evaluation of the patients, and that chronic pain patients who remain stable need not have a physical exam. Plaintiff does not ask patients about their physical functions, sleep patterns, and percentages of their pain that had been relieved since the prior visits or during the past week, rather he subjectively determines those percentages based on "a culmination of [his] 30-some years" in medicine. Plaintiff testified he does not believe MRIs are necessary to diagnose chronic back pain, and he does not order radiological testing, drug screens or liver function tests for his patients who cannot afford them.

¶ 58 Plaintiff testified that although chart documentation is an essential part of a good medical

practice, he finds it "quite voluminous to document everything [he] talk[s] about with a patient." Plaintiff testified he engaged in the following assessments/treatments of his patients even though it was not documented: as to G.K., finding out when she had received her medication during her lapse in treatment from him; as to M.M., performing a pain assessment, verifying her reported history of an automobile accident, ascertaining her reasons for early refills, and discussing the call from her boyfriend; as to C.C., counseling her about the use of illegal substances and performing a pain assessment at her first office visit; as to H.M., conducting pain assessments, performing physical examinations, and counseling for abuse of illicit drugs; and as to E.V., refusing to prescribe medication unless he received an MRI.

¶ 59 Plaintiff testified that possible signs of a patient's drug abuse and addiction to controlled substances include doctor shopping, claiming to lose medication and asking for larger quantities, and requesting early refills. In the case of the five patients other than C.S., who exhibited drug seeking behavior, plaintiff testified they did not demonstrate drug addiction or abuse, but only drug tolerance, *i.e.*, periods where they needed more, rather than less, medication. However, plaintiff also testified he dismissed patients C.C. and M.M. from his practice once he learned of their drug abuse, but sent no formal letter or documented in their charts that he would refuse to treat them further.

¶ 60 Plaintiff denied any sexual relationship with G.K., including oral or vaginal sex. Plaintiff admitted he sometimes uses "risque" language depending on his relationship with his patient, but he claimed it would "never be used for solicitation of [oral or vaginal sex]." Plaintiff explained that a patient's sexual history is a big component of chronic pain, and so treatment may involve a sexual conversation.

¶ 61 Plaintiff admitted to "very rarely" post-dating prescriptions. He testified that post-dating prescriptions is a "very common medical practice" and he was not aware that he violated any rules by post-dating a prescription.

¶ 62 II. The ALJ Recommended Decision

¶ 63 The ALJ issued a recommended decision on March 10, 2011. The ALJ recounted the procedural history and the allegations and evidence presented, made findings of fact, and discussed the relevant law. The ALJ determined that the Department proved by clear and convincing evidence that plaintiff violated the Medical Practice Act of 1987 and the Illinois Controlled Substances Act as alleged in each count of the complaint and recommended revocation of his medical licenses.

¶ 64 The ALJ determined that plaintiff prescribed or issued controlled substances to G.K., M.M., C.C., H.M., and E.V. for other than medically accepted therapeutic purposes in violation of section 22(A)(17) of the Medical Practice Act of 1987. 225 ILCS 60/22(A)(17) (West 2010). The ALJ noted that Dr. Buvanendran found that plaintiff prescribed controlled substances to these five patients in large quantities on a monthly basis without: obtaining a detailed medical history to determine the cause of their pain; conducting a thorough and complete physical examination, radiological testing and laboratory blood work; first attempting conservative non-narcotic treatment; and recognizing their exhibited drug addiction behavior. The ALJ concluded that "[b]ecause [plaintiff] did not conduct a complete medical examination and history or order diagnostic tests or, if he did order them, did not appear to review those tests, a true diagnosis was never formulated. *** In this case, by not having an etiological cause for the patients' complaints, [plaintiff's] prescribing of such large amounts of controlled substances at each visit was not for a medically accepted

therapeutic purpose."

¶ 65 Next, the ALJ determined that plaintiff engaged in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public in violation of section 22(A)(5) of the Medical Practice Act of 1987. 225 ILCS 60/22(A)(5) (West 2010). The ALJ noted that a consideration in making this determination is whether the questionable activities constitute a breach of the physician's responsibility to a patient according to accepted medical standards. See 68 Ill. Admin. Code § 1285.240(a)(1)(B), (a)(2)(E). The ALJ found that Dr. Buvanendran provided credible testimony that plaintiff breached his physician's responsibilities to G.K., M.M., C.C., H.M., and E.V. by: failing to obtain detailed histories from them, including prior medical records or accident reports; failing to determine the cause of their pain; failing to perform radiological testing; and failing to commence with conservative treatment such as physical therapy and non-controlled substances.

¶ 66 Next, the ALJ determined that plaintiff engaged in sexual misconduct related to his practice while providing medical treatment to G.K., in violation of section (A)(20) of the Medical Practice Act of 1987. 225 ILCS 60/22(A)(20) (West 2010). The ALJ found that plaintiff's verbal communications with G.K. during the two office visits in 2008, which were recorded, "lend credibility" to G.K. and "establishes that [plaintiff] engaged in sexual misconduct with Patient G.K. while providing medical treatment in his office." The ALJ also noted:

> "Agent Warpness and Investigator Rizman testified that there were things about the recorded conversations that indicated Patient G.K. was being truthful. *** Patient G.K. had previously stated to DEA Agent Warpness and Investigator Rizman that she resisted these

> encounters. During the recorded conversations [plaintiff] said, 'You always have to be pushed into it.' Patient G.K. also told DEA Agent Warpness and Investigator Rizman that [plaintiff] would get her on the table. During the recorded conversations, [plaintiff] referred to her last visit and says, 'Last time you were you were up on the table, weren't you?' At another point during the recorded conversations, [plaintiff] said, 'Or you could take your pants off and get on the table.' During the recorded conversations, [plaintiff] said, 'That's why you need to get f ***ed and get back into the routine again, you see.' To DEA Special Agent Warpness, this referred to the routine of coming in and having sex."

¶ 67 The ALJ further stated she was making "the same findings of credibility for Patient G.K. The sexual comments and references made during the recorded conversations including [plaintiff] asking for [oral sex] not only enhanced the credibility of Patient G.K. but proved that [plaintiff] engaged in immoral conduct of a sexual nature with Patient G.K. while providing medical treatment to her."

¶ 68 The ALJ next found plaintiff used a false, fraudulent or deceptive statement in a document connected with his practice, in violation of section (A)(31) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(31) (West 2010)), when he post-dated C.S.'s prescription for Xanax and Norco.

¶ 69 Finally, the ALJ found that plaintiff violated section 22(A)(33) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(33) (West 2010)), which prohibits the violation of state or federal laws or regulations relating to controlled substances, where he issued prescriptions to G.K., M.M., C.C., H.M., and E.V which were not in the regular course of professional treatment as required by section 312(h) of the Illinois Controlled Substances Act. 720 ILCS 570/312(h) (West 2010). Rather, the prescriptions were intended to provide them with controlled substances sufficient to maintain their

addiction and dependence. In support, the ALJ noted that three of the patients were hospitalized, two underwent drug rehabilitation, and the medical records do not document that plaintiff discussed the addiction hazards of controlled substances even after they exhibited signs of drug-seeking behavior. Further, the ALJ also noted in support the testimony of two pharmacists, who stopped filling some of plaintiff's controlled substance prescriptions when they became alarmed by his prescribing habits, and the testimony of DEA Agent Warpness and Investigator Rizman who stated that over a two-year period plaintiff dispensed over one million controlled substances.

¶ 70 III. The Medical Disciplinary Board Decision

¶ 71 On April 6, 2011, the Medical Disciplinary Board, after reviewing the record, adopted the findings of fact and conclusions of law contained in the ALJ's recommended decision, accepted the ALJ's recommended decision, and recommended that plaintiff's medical licenses be revoked.

¶ 72 IV. The Director's Decision

¶ 73 On April 27, 2011, plaintiff filed a motion for a rehearing before the Director. In his motion, plaintiff argued: (1) the proofs should be re-opened to allow him to provide an expert physician who will testify that plaintiff's "practice and procedures are and were proper"; (2) the ALJ's findings of fact were against the manifest weight of the evidence; and (3) G.K.'s testimony regarding plaintiff's alleged sexual misconduct was not credible.

¶ 74 On June 15, 2011, the Director issued the final administrative decision, finding that plaintiff failed to allege any facts, errors of law, or new evidence warranting action contrary to the ALJ's and Medical Disciplinary Board's recommendation, and revoked his medical licenses.

¶ 75 V. The Circuit Court Proceedings

¶ 76 On July 12, 2011, plaintiff filed a four-count complaint for administrative review and other relief in the circuit court. Plaintiff alleged that during 2005, "and until the matter before the Department against [p]laintiff began," he operated as a "ringside doctor." Plaintiff would "oversee boxing matches in order to ensure that no medical problems would occur at any boxing match, and that there would be a physician immediately present in case one was necessary." Plaintiff alleged that during that time, "the Department's new Director of Boxing, Ron Puccillo, would frequently attend boxing matches and would also sit ringside. He would frequently bring his friend, John Lagattuta." Mr. Lagattuta was the official in charge of overseeing the investigation and prosecution of medical professionals. Mr. Puccillo and Mr. Lagattuta began to request free medical services from plaintiff.

¶ 77 Plaintiff alleged that during this time, when Mr. Puccillo and Mr. Lagattuta were requesting free medical services from him, a Chicago Tribune columnist "used his position in the Tribune to regularly drum up extraordinary media attention on [plaintiff], calling for an immediate removal of his medical license principally because of [plaintiff's] much younger and 'stunning Cuban' wife, expensive residence and the word of a convicted drug addict and untruthful witness,'G.K.' "

¶ 78 Plaintiff alleged that in October or November 2007, when Mr. Lagattuta still was supervising medical prosecutions, plaintiff attended a Justinian Society dinner with Mr. Lagattuta and Mr. Puccillo. During the dinner, Mr. Lagattuta told plaintiff he was currently under investigation and that "there were confidential DEA informants in his practice." Mr. Lagattuta told plaintiff to "keep his mouth shut" because Mr. Lagattuta was running for judge "and did not want to be damaged by any bad press from [plaintiff] defending his license."

¶ 79 Plaintiff alleged that in 2009, he became aware that an investigation had, indeed, been launched by the DEA into "some of [p]laintiff's practices." During that investigation, Mr. Puccillo told plaintiff "he ought to purchase a firearm to defend himself from, among other things, drive-by shootings because of the sentiment of people in the Department." In 2009, Mr. Lagattuta "abruptly" stopped requesting free medical services from plaintiff.

¶ 80 Plaintiff alleged the Department's "prosecution" of him "began in earnest" on April 22, 2010, with the granting of a petition to summarily suspend his medical licenses pending a complete hearing and decision before the Department. At that time, Mr. Lagattuta was the Chief of the Administrative Law Judges and he worked closely with the other ALJs, of which there were only three. Plaintiff alleged that after the prosecution began, he "informed the Department through counsel of the conversation between him and Lagattuta" at the Justinian Society dinner in 2007. Plaintiff alleged he so informed the Department because he was concerned that "he would not receive a fair trial given Lagattuta's involvement in the adjudication of matters before the Department, Lagattuta's warning to [p]laintiff not to defend himself against the charges that would be brought against him, and Puccillo's warning to purchase a firearm to protect himself from drive-by shootings." Plaintiff alleged that "[d]espite the fact that Lagattuta had a clear conflict of interest with [plaintiff], in that he had asked [plaintiff] to forfeit his own defense of his medical license for the sake of Lagattuta's desire to become a [j]udge, *** Lagattuta nonetheless took no efforts to remove his influence from the proceedings against [plaintiff]."

¶ 81 In count I of his complaint, plaintiff alleged that the evidence failed to show he violated the Acts such that his medical licenses should be revoked. Count II was brought under 42 U.S.C. § 1983

and alleged his due process rights were violated and he was denied a fair hearing because Mr. Lagattuta and the ALJ were biased against him. Plaintiff also alleged he was deprived of the right to cross-examine the witnesses against him. Counts III and IV alleged that section 312(h) of the Illinois Controlled Substances Act (720 ILCS 570/312(h) (West 2010)), and section 22(A)(17) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(17) (West 2010)), were unconstitutionally vague. The circuit court affirmed the Director on count I and dismissed counts II through IV pursuant to section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2010). Plaintiff appeals the order affirming the Director on count I and dismissing count II. Plaintiff makes no arguments on appeal regarding the order dismissing counts III and IV, and accordingly has waived review of any issued regarding the dismissal of those counts. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 82 VI. Analysis of Plaintiff's Appeal

¶ 83 A. Whether The Circuit Court Erred In Dismissing Count II

¶ 84 First, plaintiff argues the circuit court erred in dismissing count II of his complaint pursuant to section 2-615 of the Code of Civil Procedure. "We note that the question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. [Citation.] Illinois is a fact-pleading jurisdiction that requires a plaintiff to file both a legally and factually sufficient complaint. [Citation.] When ruling on a section 2-615 motion to dismiss, the circuit court must admit all well-pleaded facts as true and disregard any legal and factual conclusions that are unsupported by allegations of fact." [Citation.] The standard of review on a section 2-615

dismissal is *de novo*." *Illinois Ins. Guaranty Fund v. Liberty Mutual Ins. Co.*, 2013 IL App (1st) 123345, ¶ 14.

¶ 85 Plaintiff argues on appeal that count II of his complaint stated a due process claim under 42 U.S.C. § 1983, specifically, that his procedural and substantive due process rights were violated because Mr. Lagattuta and the ALJ who provided over his administrative hearing were biased against him, thereby preventing them from offering him a fair hearing.

¶ 86 Plaintiff waived review of this issue by failing to raise it at the administrative hearing. "A party must promptly assert a claim of bias or partiality by an administrative agency upon knowledge [thereof]." *Kimball Dawson, LLC v. City of Chicago Dept. of Zoning*, 369 Ill. App. 3d 780, 792 (2006). "The basis for this can readily be seen. To allow a party to first seek a ruling in a matter and, upon obtaining an unfavorable one, permit him to assert a claim of bias would be improper." *North Ave. Properties, L.L.C. v. Zoning Bd. of Appeals of City of Chicago*, 312 Ill. App. 3d 182, 188 (2000) (quoting *E & E Hauling, Inc. v. Pollution Control Board*, 107 Ill. 2d 33, 38-39 (1985)).

¶ 87 Plaintiff here failed to raise the issue of the alleged bias of Mr. Lagattuta (and of the ALJ who presided over the administrative hearing) either at the administrative hearing or in the motion for a rehearing before the Director. Accordingly, the issue is waived.

¶ 88 We do note that in his complaint for administrative review, plaintiff alleged that when the Department's prosecution of him "began in earnest," he "informed the Department through counsel of the conversation between him and Lagattuta" which allegedly took place at the Justinian Society dinner. However, plaintiff did not allege to whom he spoke in the Department, when the conversation took place, and whether he specifically indicated his belief that Mr. Lagattuta (and/or

the ALJ who presided over his administrative hearing) was biased against him. As recounted above, the record on appeal contains no indication that plaintiff ever informed the ALJ who presided over the administrative hearing, the Medical Disciplinary Board, or the Director who considered plaintiff's motion for rehearing, about his claim of bias. The issue is waived.

¶ 89 B. Whether The Circuit Court Erred In Affirming The Director On Count I

¶ 90 With respect to count I of his complaint for administrative review, plaintiff contends on appeal that the circuit court erred in affirming the Director's final administrative decision revoking his medical licenses.

¶ 91 The Department has the burden of proving its case by clear and convincing evidence. 68 Ill. Adm. Code § 1110.190(a) (1996). On administrative review, we review the final decision of the agency (*Parikh v. Division of Professional Regulation of the Dept. of Financial and Professional Regulation*, 2012 IL App (1st) 121226, ¶ 31), which, in this case, is the decision entered by the Director affirming the recommendation of the Medical Disciplinary Board that plaintiff's medical licenses be revoked. The Director's factual findings are held as *prima facie* true and correct and will not be disturbed unless the findings are against the manifest weight of the evidence. *Parikh*, 2012 IL App (1st) 121226, ¶ 31. The Director's decision on the legal effect of a given set of facts–such as whether plaintiff's conduct constituted a violation of the Acts–presents a mixed question of law and fact reviewed under the clearly erroneous standard. *Heabler v. Illinois Dept. of Financial and Professional Regulation*, 2013 IL App (1st) 111968, ¶ 17.

¶ 92 1. Whether The Factual Findings Were Against The Manifest Weight Of The Evidence

¶ 93 In the present case, the ALJ made factual findings that were adopted in whole by the Medical

Disciplinary Board and the Director. Specifically, the ALJ found from Dr. Buvanendran's testimony that plaintiff prescribed controlled substances to G.K., M.M., C.C., H.M., and E.V. without: obtaining a detailed medical history to determine the cause of their pain; conducting a thorough and complete physical examination, radiological testing and laboratory blood work; first attempting conservative non-narcotic treatment; and recognizing their drug addiction behavior. The ALJ found from Detective Umbenhower's testimony that plaintiff post-dated C.S.'s prescription for Xanax and Norco. The ALJ also found from the recorded conversations between plaintiff and G.K., as well as from the testimony of G.K., DEA Agent Warpness and Investigator Rizman, that plaintiff provided controlled substances to G.K. in exchange for vaginal and oral sex. We have extensively set forth the testimony and evidence relied on by the ALJ in making these findings of fact and will not repeat them again here. All of the ALJ's findings of fact, which, as discussed, were adopted by the Medical Disciplinary Board and by the Director when rendering his final administrative decision, were amply supported by the evidence presented at the administrative hearing and were not against the manifest weight of the evidence.

¶ 94 Plaintiff argues that his testimony was more credible than that of Dr. Buvanendran and G.K. The ALJ found Dr. Buvanendran and G.K. to be credible witnesses, and the ALJ's findings were adopted by the Medical Disciplinary Board and by the Director when rendering his final administrative decision. In appeals from administrative review, we do not reevaluate witness credibility. *Parikh*, 2012 IL App (1st) 121226, ¶ 31.

¶ 95 Plaintiff cursorily argues that Dr. Buvanendran should not have been qualified as an expert and his testimony should not be given much weight. Plaintiff waived review by failing to raise any

objections to Dr. Buvanendran's qualifications at the administrative hearing. *Pesoli v. Department of Employment Sec.*, 2012 IL App (1st) 111835, ¶ 23.

¶ 96 2. Whether The Decision On The Legal Effect Of The Facts Was Clearly Erroneous

¶ 97 The ALJ made a determination of the legal effect of these facts, which was adopted in whole by the Medical Disciplinary Board and the Director. Specifically, the ALJ determined that: plaintiff prescribed or issued controlled substances to G.K., M.M., C.C., H.M., and E.V. for other than medically accepted therapeutic purposes in violation of section 22(A)(17) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(17) (West 2010)); plaintiff engaged in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public in violation of section 22(A)(5) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(5) (West 2010)); plaintiff engaged in sexual misconduct related to his practice while providing medical treatment to G.K. in violation of section (A)(20) of the Medical Practice of 1987 (225 ILCS 60/22(A)(20) (West 2010)); plaintiff used a false, fraudulent or deceptive statement in a document connected with his practice, in violation of section (A)(31) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(31) (West 2010)), when he post-dated C.S.'s prescription for Xanax and Norco; and plaintiff violated section 22(A)(33) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(33) (West 2010)), which prohibits the violation of state or federal laws or regulations relating to controlled substances, when he issued prescriptions to G.K., M.M., C.C., H.M., and E.V. which were not in the regular course of professional treatment as required by section 312(h) of the Illinois Controlled Substances Act. 720 ILCS 570/312(h) (West 2010).

¶ 98 As discussed, the Medical Disciplinary Board and the Director adopted the ALJ's

determination regarding the legal effect of the facts, *i.e.*, that plaintiff's conduct in prescribing the controlled substances to G.K., M.M., C.C., H.M., and E.V., post-dating C.S.'s prescription for Xanax and Norco, and engaging in inappropriate sexual conduct with G.K. constituted a violation of the relevant sections of the Illinois Medical Practice Act of 1987 and the Illinois Controlled Substances Act. Said determination was well-supported by the testimony and evidence presented at the administrative hearing (and extensively set forth earlier in this order) regarding: (1) plaintiff's repeated issuance of prescriptions for large amounts of controlled substances to G.K., M.M., C.C., H.M., and E.V., without taking appropriate safeguards to determine the medical necessity thereof; (2) plaintiff's post-dating of C.S.'s prescription for Xanax and Norco in violation of federal law; and (3) plaintiff's inappropriate sexual overtures to G.K. during her January 2, 2008, and February 4, 2008, office visits, which corroborated G.K.'s testimony that plaintiff had earlier traded her controlled substances for sex. Accordingly, the determination regarding the legal effect of the facts (that plaintiff violated the Illinois Medical Practice Act of 1987 and the Illinois Controlled Substances Act as charged by the Department) was not clearly erroneous.

¶ 99 3. Whether The Sanction Imposed Was An Abuse of Discretion

¶ 100 Plaintiff contends the sanction imposed, the revocation of his medical licenses, was unfairly excessive. The standard of review is whether the Director abused his discretion in the imposition of the sanction. *Reddy v. Illinois Dept. of Professional Regulations*, 336 Ill. App. 3d 350, 354 (2002).

¶ 101 The Director committed no abuse of discretion. Plaintiff was a repeat offender, having had his medical licenses summarily suspended by the Department in 1987 for dispensing controlled

substances for non-therapeutic purposes. The Director restored plaintiff's physician's license in September 1989, subject to a five-year probationary period. Plaintiff subsequently violated one of the terms of probation, and the Director extended the probationary period until September 1995. After plaintiff successfully completed probation and his licenses were restored, plaintiff violated the Illinois Medical Practice Act of 1987 and the Illinois Controlled Substances Act by repeatedly issuing prescriptions for large amounts of controlled substances to G.K., M.M., C.C., H.M., and E.V without taking appropriate safeguards to determine the medical necessity thereof, post-dating a prescription to C.S. for Xanax and Norco in violation of federal law, and making inappropriate sexual overtures to G.K. during two office visits in 2008 and trading her controlled substances for sex. In addition, the evidence showed that from 2006 through 2008, plaintiff dispensed or ordered over one million hydrocodone pills. Two pharmacists testified they stopped filling some of plaintiff's prescriptions for controlled substances because they were alarmed at his prescribing habits. On all these facts, the Director committed no abuse of discretion in sanctioning plaintiff by revoking his medical licenses.

¶ 102 C. Whether The Department Violated Plaintiff's Sixth Amendment Rights By Failing to Disclose Certain Exculpatory Evidence

¶ 103 Plaintiff argues the Department failed to disclose evidence regarding G.K.'s prior arrests and convictions, thereby depriving him of his sixth amendment right to conduct a meaningful cross-examination. Plaintiff waived review by failing to raise the issue at the administrative hearing. *Walls v. Department of Employment Sec., Bd. of Review*, 2013 IL App (5th) 130069, ¶ 18.

¶ 104 D. Whether Sections 22(A)(5) And (A)(17) Of The Medical Practice Act Of 1987 Are Unconstitutional

¶ 105 Plaintiff argues sections 22(A)(5) and 22(A)(17) of the Medical Practice Act of 1987 (225 ILCS 60/22(A)(5), (A)(17) (West 2010)), are unconstitutionally vague. Plaintiff waived review by failing to raise this issue at the administrative hearing. *Heabler*, 2013 IL App (1st) 111968, ¶ 22.

¶ 106 E. Whether The Director's Final Administrative Decision Should Be Reversed Due To Agency Bias At The Administrative Hearing

¶ 107 Plaintiff argues for reversal of the Director's final administrative decision revoking his medical licenses due to Mr. Lagattuta's and the ALJ's bias against him. This is essentially a rehash of plaintiff's argument for reversal of the dismissal of count II of his complaint for administrative review. As we discussed earlier in this order when affirming the dismissal order, plaintiff has waived review of the bias issue by failing to timely raise it in the administrative proceedings either before the ALJ, the Medical Disciplinary Board, or the Director.

¶ 108 Even choosing to address the issue on the merits, we find no cause for reversal. "Review of a claim of bias on [the] part of an administrative agency or official begins with the presumption that administrative officials are objective and capable of fairly judging an issue. [Citation.] Bias by an administrative agency may be shown only if a disinterested observer would conclude that the agency, or its members, had adjudged the facts and law of the case before the matter was heard." *Kimball Dawson, LLC*, 369 Ill. App. 3d at 791-92.

¶ 109 Plaintiff points to certain testimony by DEA Agent Warpness, Department Investigator Dan Murphy, and DEA Investigator Rizman as evidence of Mr. Lagattuta's and the ALJ's bias. Plaintiff specifically points to the following testimony of Agent Warpness:

> "Q. At any point in time did the DEA consider-if you know, to just stop [plaintiff's] ability to prescribe?

* * *

A. We put in the order to show cause to our chief counsel. They are so backlogged, it takes years.

Q. It takes years?

A. Right.

Q. Except in May of 2010 or–

A. Yeah.

Q. –then it took–it was quick.

A. Once the State reacted and they pushed it on through, somehow it got moved to the top. I don't know how that works."

¶ 110 Agent Warpness's testimony makes absolutely no mention of any bias on the part of Mr. Lagattuta or the ALJ who presided over plaintiff's administrative hearing.

¶ 111 Plaintiff also points to the testimony of Department Investigator Murphy that plaintiff had an "association" with the Department in that he was a ringside doctor who knew "an employee" at the Department. Investigator Murphy did not further elaborate on the nature of plaintiff's "association" with the unnamed Department employee, nor did he testify that said association in any way biased Mr. Lagattuta or the ALJ against plaintiff.

¶ 112 Plaintiff similarly points to the testimony of DEA Investigator Rizman that plaintiff was a ringside doctor, and that an employee of the Department, "Ron Puchinello, or something similar to that" was close friends with plaintiff such that the DEA decided not to initially involve the Department in the investigation of plaintiff. DEA Investigator Rizman testified "Ron would bring

large stacks of cash to [plaintiff's] office and had what was considered VIP treatment in [plaintiff's] office."

¶ 113 Although DEA Investigator Rizman testified to plaintiff's friendship with Department employee "Ron Puchinello[1]", she never testified to the relationship, if any, that plaintiff or "Ron Puchinello" had with Mr. Lagattuta or with the ALJ who presided over the administrative hearing. Nor did she testify that plaintiff's friendship with "Mr. Puchinello" caused Mr. Lagattuta or the ALJ to prejudge the facts and law of plaintiff's case before the matter was heard. On this record, plaintiff has failed to overcome the presumption that Mr. Lagattuta and the ALJ were objective and capable of fairly judging plaintiff's case. In so holding, we again note that all the ALJ's findings of fact and law were amply supported by the evidence presented at the administrative hearing.

¶ 114 F. Whether Plaintiff Was Denied Due Process Because No Member Of The Medial Disciplinary Board Was Present For Much Of The Administrative Hearing

¶ 115 Plaintiff argues for reversal of the Director's final administrative decision revoking his medical licenses because his due process rights were violated when no member of the Medical Disciplinary Board was present during much of his administrative hearing. Plaintiff's argument is without merit. We have held that Medical Disciplinary Board members need not be present when the evidence is taken so long as they review the record of proceedings before rendering their recommendation. *Kafin v. Division of Professional Regulation of the Dept. of Financial and Professional Regulation*, 2012 IL App (1st) 111875, ¶ 33. Here, the record shows that the members of the Medical Disciplinary Board reviewed the record of the proceedings before making their

[1]Investigator Rizman most likely was referring to Ron Puccillo.

recommendation to the Director; accordingly, no due process violation occurred.

¶ 116 For the foregoing reasons, we affirm the circuit court.

¶ 117 Affirmed.