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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

MEDICAL BOARD OF CALIFORNIA,

 Petitioner,

 v.

THE SUPERIOR COURT OF SACRAMENTO
COUNTY,

 Respondent;

MICHAEL J. MENASTER,

 Real Party in Interest.

C064592

(Super. Ct. No.
34200980000323)

In January 2008 real party in interest Dr. Michael Menaster underwent a psychiatric evaluation ordered by petitioner Medical Board of California (Board). The evaluation found Dr. Menaster suffered from a mental illness that impaired his ability to practice medicine, and recommended treatment and monitoring.

The Board filed an accusation alleging Dr. Menaster was subject to discipline under Business and Professions Code

section 822.¹ Following an administrative hearing, the Board adopted the administrative law judge's (ALJ) decision to place Dr. Menaster on probationary status for three years, require psychiatric evaluations, and have his practice monitored by another physician.

Dr. Menaster filed a petition for a writ of administrative mandate in respondent trial court, which the court granted. The court found Dr. Menaster's behavior was not sufficient to demonstrate that he could not practice safely in the absence of a disciplinary order.

The Board filed a petition for a writ of mandate in this court, arguing the trial court abused its discretion by interpreting section 822 to be solely concerned with public safety. Instead, the Board argues, section 822 also encompasses a physician who, by reason of mental illness, is unable to provide effective clinical treatment. We issued an alternative writ of mandate and shall deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

The Board is the agency within the Department of Consumer Affairs charged with administering the provisions of the Medical Practice Act, which governs licensing and discipline of physicians. (§ 2000 et seq.) Dr. Menaster is a licensed physician and surgeon in practice since 1991. Dr. Menaster currently has a private psychiatry practice in San Francisco.

¹ All undesignated statutory references are to the Business and Professions Code.

The Accusation

The Board filed an accusation against Dr. Menaster on May 29, 2008, alleging the physician was subject to discipline under section 822. The accusation noted Dr. Menaster's physician's certificate had previously been revoked in 2000 and reinstated when he completed five years' probation.

According to the accusation, Dr. Menaster's ability to practice medicine safely is impaired due to a mental disorder. The accusation recounts Dr. Menaster's lengthy history of emotional and behavioral problems for which he received therapy and medication.

Weapon Incident and Certificate Revocation

In 1999 Dr. Menaster was arrested by police following an anonymous tip that he had an AK-47 assault weapon in his vehicle. A search revealed Dr. Menaster, who was attending college classes, was carrying a loaded .40-caliber semiautomatic handgun in his pants pocket and two loaded handguns, a bayonet-type double-edged knife, a loaded AK-47, ammunition, a camouflage jacket, a helmet, and packages of psychotropic medications in his car.

Psychiatrist James Rosenberg evaluated Dr. Menaster after the incident. Dr. Rosenberg found the physician suffered from a mental illness, personality disorder not otherwise specified (NOS) with histrionic, immature, and paranoid features. Dr. Menaster admitted sleeping with two handguns and a knife under his pillow. He carried a concealed weapon during sessions with patients. Dr. Menaster also played a "'Halloween prank,'"

in which he entered two gun stores dressed in camouflage fatigues, brandishing a semiautomatic rifle and shouting, "'Die American scum.'" Dr. Rosenberg concluded Dr. Menaster "constitutes a substantial danger to the health and welfare of his patients and the public at large, and is not mentally fit to practice medicine."

The Board suspended Dr. Menaster's physician's certificate and placed him on five years' probation. As a condition of returning to his practice, Dr. Menaster submitted to a psychiatric analysis by Dr. Howard Dolinsky in March 2000. Dr. Dolinsky also diagnosed Dr. Menaster with personality disorder NOS. Dr. Dolinsky cited evidence of aberrant behaviors in addition to the physician's possession of numerous weapons, such as initiating 50 small claims debt collection actions against patients and unsolicited attempts to hug and kiss female coworkers. Dr. Dolinsky advised mandatory weekly psychotherapy sessions and supervision of Dr. Menaster's practice.

Subsequent Therapy

From June 2000 through June 2006 Dr. Marvin Firestone monitored Dr. Menaster's practice and provided therapy. In June 2006 Dr. William Tatomer began treating Dr. Menaster.

Incidents at Department of Social Services

In October 2005 Dr. Menaster began working for the Department of Social Services (DSS) as a medical consultant, analyzing written claims for disability. His position was purely administrative and did not involve any patient contact.

According to the accusation, at the DSS "Dr. Menaster engaged in inappropriate and disruptive workplace behavior. He constantly and inappropriately socialized, gossiped, shouted, and used profanity in the office; he broached personal topics with and made suggestive comments to female employees. He was not amenable to supervision and numerous attempts by management to correct Dr. Menaster's behavior were unsuccessful. On one occasion Dr. Menaster called his supervisor and began to rant, yell, and use profanity over the phone. At one point during the call Dr. Menaster 'let out a very loud and disturbingly frightful scream' and, as his supervisor was trying to calm him, Dr. Menaster hung up on her. Dr. Menaster's explanation for the phone call was that he was upset about an 'illegal' bake sale that was taking place near his work station and interfering . . . with his productivity. The ongoing, inappropriate, bizarre and disturbing conduct made Dr. Menaster's coworkers and supervisors increasingly uncomfortable and even fearful for their safety. DSS ultimately instituted a personnel action against Dr. Menaster, who resigned [in March 2006] in order to avoid being fired."

A Board investigator interviewed Dr. Menaster in February 2007. Dr. Menaster admitted suffering from a mental disorder that he described as characterized by extreme anxiety and depression. According to Dr. Menaster, the DSS failed to accommodate his disability by not providing a quiet workplace. Instead, he was subjected to disruptive bake sales, Girl Scout cookie sales, and other noisy activities. The DSS also demanded

excessive productivity. Dr. Menaster believed the conduct the DSS described as "inappropriate" was misinterpreted or taken out of context. He was currently working with a psychiatrist to treat his condition.

Dr. Seaman's Evaluation

In January 2008 Dr. Charles Seaman, a psychiatrist, evaluated Dr. Menaster for the Board. Dr. Menaster recounted his problems at the DSS and his difficulties with the working environment. He also acknowledged that many of the behaviors reported by the DSS did in fact occur, including inappropriate personal comments and inappropriate advances to female workers.

As for the incident over the bake sale, Dr. Menaster stated he had been under pressure to perform and was distracted by people talking loudly near his cubicle. He believed having a bake sale within a state building was illegal. Upset about the bake sale and anxious about his productivity, he called his union steward to complain. Dr. Menaster admitted using profanity and screaming into the telephone but explained "it was just to vent.'" He did not threaten to hurt himself or anyone else.

Following the bake sale incident, Dr. Menaster resigned. He told Dr. Seaman that he saw the DSS's subsequent notification to the Board as retaliation for complaining to various agencies. Subsequently, Dr. Menaster filed a complaint with the Public Employee Relations Board. He also filed numerous complaints against a number of government agencies, including the DSS.

Dr. Menaster also discussed disciplinary action taken by the Board in 1999 because of three incidents. The first involved his treatment of a 71-year-old man. He mistakenly wrote a prescription for a very high dose of medication. He disregarded the pharmacy's warning about the prescription. After the patient became confused, Dr. Menaster did not associate the problems with the high dosage. In retrospect, Dr. Menaster stated: "'I should have not treated him or hospitalized him.' . . . 'I shouldn't have dismissed the pharmacy.'"

In the second case, Dr. Menaster treated a 10 year old who was experiencing hallucinations telling him to stab his parents. He recommended medication and psychiatric hospitalization. After the parents refused hospitalization, Dr. Menaster increased the boy's medication. The boy experienced negative side effects, and Dr. Menaster was told he prescribed the wrong medications and that the child should have been hospitalized.

The third incident involved Dr. Menaster's arrest for possession of firearms. Dr. Menaster stated he started carrying a gun because he had received anonymous, threatening voice mail messages. He also began collecting numerous guns as an investment, as well as a form of self-protection. He kept a bayonet in his car because he had heard about people getting trapped by their seat belts and he thought he might need the bayonet to cut himself free. After his arrest, Dr. Menaster got rid of all his guns and through therapy was able to realize he was overreacting and had some "'paranoid'" features.

Dr. Menaster agreed with the diagnosis of personality disorder NOS. He observed that "I tend to personalize comments by others as attack or criticism."

At the conclusion of his report, Dr. Seaman offered his opinion as to Dr. Menaster's ability to practice medicine: "Dr. Menaster is currently able to practice medicine with safety to the public. The available evidence is not sufficient to conclude that he is not able to practice medicine with safety to the public. That is because, although records indicate a history of interpersonal problems and inappropriate behaviors at DSS, there was no patient involvement since he was not directly responsible for providing patient care. Additionally, he has been removed from the stressors he had at DSS. [¶] In the past, Dr. Menaster was deemed unsafe to practice medicine because his impaired judgment was associated with the possession and use of weapons and the treatment of specialized patient populations without adequate training. However, Dr. Menaster indicated he is no longer in possession of any weapons and he limits his medical practice to the treatment of individuals between age 16 and 64. Although Dr. Menaster's Personality Disorder NOS has seemingly led to interpersonal problems with coworkers and supervisors, there is a lack of evidence to indicate the presence of similar interpersonal problems involving patients or the public at large at this time."

Dr. Seaman also stated that ongoing mental health treatment and monitoring were necessary to ensure public safety. He found the necessity for such treatment might be indefinite.

Dr. Dolgoff's Evaluation

In January 2009 Dr. Robert Dolgoff, a psychiatrist, interviewed Dr. Menaster, reviewed the facts surrounding the accusation, and submitted a psychiatric evaluation. Dr. Dolgoff also found Dr. Menaster suffered from personality disorder NOS. However, "There is no evidence that this disorder has ever affected patient care or endangered patients. I see no reason to discipline him. He has been accepting treatment voluntarily for the last 8 years."

Dr. Dolgoff also noted that physicians who are on probation have difficulty getting referrals from managed care panels. He found no evidence of any clinical shortcomings in Dr. Menaster's work with patients, and noted Dr. Menaster understands, accepts, and has learned how to handle his problems.

Dr. Dolgoff concluded: "There is no reason to think that his patients will be in danger. When physicians have drug or alcohol problems ongoing probation may be recommended because of the possibility of relapse with subsequent harm to patients but a personality disorder does not pose such a risk."

Administrative Hearing

A full administrative hearing followed.

Dr. Seaman

Dr. Seaman testified that Dr. Menaster suffers from a lifelong mental disorder. This disorder causes him to misperceive benign events and to feel threatened, resulting in an overreaction. The disorder affects interpersonal functioning, leading a person to misinterpret the motives and

intent of other people. This leads to difficulties in resolving conflicts.

According to Dr. Seaman, Dr. Menaster was not very responsive to treatment. Dr. Seaman also expressed concerns about Dr. Menaster's practicing without supervision, since his judgment was impaired by his mental disorder and he has shown a pattern of poor judgment.

On cross-examination, Dr. Seaman admitted Dr. Menaster had been treating patients for 20 years without incident. Dr. Seaman reaffirmed that he believed, with reasonable medical certainty, that Dr. Menaster "is currently able to practice medicine with safety to the public."

On redirect, Dr. Seaman was asked: "And do you have an opinion whether Dr. Menaster is impaired in his ability to practice safely? [¶] A. I think there is impairment. . . . But I was not able to find enough evidence to say that he was unsafe just because there's been a lack of patient contact." The only evidence of conflict with patients in the last 20 years was Dr. Menaster's suing two patients for nonpayment of medical bills in 1999.

Dr. Tatomer

Dr. Tatomer testified he evaluated Dr. Menaster in 2002 and became his treating psychiatrist in 2006. He currently meets with Dr. Menaster twice a month. Dr. Tatomer believed that Dr. Menaster could practice medicine safely without supervision despite his diagnosis. Dr. Tatomer testified: "I think

Dr. Menaster clearly can practice medicine with no danger to the public."

Dr. Dolgoff

Dr. Dolgoff agreed with the diagnosis that Dr. Menaster suffers from personality disorder NOS. However, this diagnosis did not make Dr. Menaster an impaired physician. Dr. Dolgoff explained: "Because it is not affecting patient care. Because there is no evidence that any patient has been harmed. And because he has improved a great deal and has become much more knowledgeable about his interworkings [*sic*] and how he affects other people. And so he's a lot better than he was before" According to Dr. Dolgoff, he saw no reason for Dr. Menaster to be subject to discipline by the Board and believed he could practice safely.

Dr. Menaster

Dr. Menaster testified he has changed his practice to avoid patient care problems that led to the earlier disciplinary order. He no longer treats children under 16, and sees only a limited number of patients per week. Dr. Menaster acknowledged the DSS was a difficult work environment for him.

The ALJ Decision

The ALJ reviewed the allegations and the testimony at the administrative hearing. The ALJ concluded the Board had established by clear and convincing evidence that cause existed to discipline Dr. Menaster under sections 822 and 2227.

The ALJ found it was undisputed Dr. Menaster suffered from a long history of emotional and behavioral problems stemming

from his personality disorder NOS. The ALJ stated: "Although respondent was able to practice successfully, with weekly treatment, medication and monitoring, for five years after imposition of discipline by the Board . . . his recent conduct in connection with his employment at DSS demonstrates his disorder continues to affect his functioning. Drs. Dolgoff and Tatomer suggest that respondent's recent problems at DSS should be ignored and respondent permitted to engage in unsupervised practice because he is aware of his PD-NOS diagnosis, is motivated to manage his disorder and has made progress in doing so. However, as pointed out by Dr. Seaman, respondent still has significant difficulty controlling his anxiety and emotions under stress despite ongoing treatment, as evidenced by his screaming during the call to his union representative, his screaming and crying during the 2006 the [sic] unemployment hearing, and the fact he called Dr. Firestone numerous times during the day for guidance when under stress at DSS."

The ALJ also noted that Dr. Menaster's inappropriate behavior occurred even though he had been receiving weekly psychotherapy and medication for anxiety and depression for years. The ALJ expressed concern that Dr. Menaster had limited patient contact in the past few years, providing limited opportunity to evaluate recent interactions with patients. Although the ALJ found Dr. Menaster had made progress managing his disorder, he failed to establish this progress was sufficient to justify permitting him to practice unsupervised.

The ALJ revoked Menaster's certificate, but stayed the revocation and placed him on three years' probation with continuing evaluations, therapy, and monitoring. The Board adopted the ALJ's decision.

Trial Court

Dr. Menaster filed a petition for writ of administrative mandamus in the trial court. Following a hearing, the trial court granted the petition.

The trial court painstakingly summarized the evidence. The court concluded, under the independent judgment standard of review, the weight of the evidence did not support a disciplinary action against Dr. Menaster under section 822 and did not establish by clear and convincing evidence that Dr. Menaster's mental condition impairs his ability to practice psychiatry with safety to the public.

The court noted all of the experts and Dr. Menaster agree he suffers from a "PD-NOS" mental disorder; however, this alone did not justify discipline. Instead, "Discipline . . . must be based on some manifestation of the disorder in the form of behavior that demonstrates that the practitioner is unable to practice without risk to public safety."

As the court acknowledged, the behavior that led to the prior disciplinary order raised serious concerns about whether Dr. Menaster could practice safely. However, Dr. Menaster successfully completed probation, and the weapons problems and errors in patient care had not recurred. The court concluded: "Thus, while the behavior that led to the prior disciplinary

order certainly justifies a heightened level of concern regarding the manner in which his condition may manifest itself in the context of his practice, in order for that concern to ripen into facts supporting discipline, there must be some combination of more recent behavior and expert opinion to establish the link to safety in practice."

The court described Dr. Menaster's behavior at DSS as "odd, aberrant, and even troubling" but not sufficient alone to establish the required link. Although Dr. Menaster acted inappropriately and displayed poor judgment, "there does not appear to be any evidence of overtly threatening or menacing behavior on petitioner's part while at DSS." As to Dr. Menaster's anger over the disruptive bake sale, the court noted he made no threats of violence to himself or others.

The court acknowledged Dr. Menaster saw only a limited number of patients during this period but concluded his behavior at the DSS, by itself, was not sufficient to establish that he could not practice safely in the absence of a disciplinary order. That behavior, the court determined, must be linked to safety concerns through expert testimony establishing his disorder is likely to manifest itself in behavior in his practice in ways that actually risk causing harm to patients.

The only expert to attempt to establish such a link was Dr. Seaman. However, the court found Dr. Seaman's testimony "falls short of establishing the necessary link to public safety."

Dr. Seaman's testimony established that Dr. Menaster's disorder continued to exist and that the stress he encountered in the past was not unique and could recur in the context of his medical practice. According to the court, Dr. Seaman did not persuasively demonstrate that Dr. Menaster's personality disorder, when acted upon by stress, poses a risk to public safety. Instead, "Dr. Seaman's concerns focused on the manner in which petitioner's personality disorder might lead to anxiety and emotional response, with a corresponding effect on his judgment and his ability to manage conflict in interpersonal relations. While these are legitimate concerns . . . they relate more to the issue of petitioner's clinical effectiveness as a psychiatrist than to public safety."

Dr. Seaman's testimony failed to establish that Dr. Menaster's mental disorder necessarily translates to the potential for harm to patients: "Specifically, Dr. Seaman does not link petitioner's personality disorder and its behavioral manifestations to a heightened likelihood of the types of practice errors that occurred in the past, or to other potential practice errors that legitimately would put patients at risk of harm, or to a potential for violence against patients, any of which would demonstrate a clear risk to public safety."

While the court acknowledged it might be true that Dr. Menaster would perform more effectively with supervision, section 822 is concerned with public safety, not with a psychiatrist's clinical effectiveness, unless that

ineffectiveness poses a risk to public safety. The evidence failed to establish such a level of ineffectiveness.

Even Dr. Seaman, the court noted, acknowledged there is no evidence Dr. Menaster has rendered any unsafe treatment to any patient under his care since the prior disciplinary order expired, or behaved in such a manner to put the safety of any patient at risk. Therefore, under section 822, the court could uphold the Board's discipline only if the evidence revealed an actual risk to public safety. Lacking such evidence, the trial court overturned the Board's disciplinary order.

Following entry of judgment, the Board filed a petition for a writ of mandate with this court. We issued an alternative writ of mandate.²

² At the hearing on Dr. Menaster's petition, the court noted: "I don't think anybody's going to walk out of here saying Doctor Menaster is just fine. [¶] I don't think anybody -- certainly the court has no confidence that the incidence [*sic*] at DSS are not going to be repeated at some point. [¶] . . . [¶] And his reaction to his environment was in the court's opinion unreasonable and extreme. [¶] . . . [¶] I think anybody who hears Doctor Menaster's situation is going to say to themselves, well, what this guy could use is some psychiatric evaluation, some continuing psychotherapy, and perhaps a practice monitor. [¶] Now, the need for those conditions of probation and the desirability of those conditions . . . frankly, I think, are established. [¶] What's not established is a basis pursuant to [section] 822 to impose those restrictions. . . . [P]erhaps at some point we will get some direction from an appellate court that [section] 822 can encompass clinical effectiveness at a level evidenced by Doctor Menaster. [¶] . . . [¶] Certainly at some level clinical effectiveness . . . can rise to the level of giving a potential for a safety problem, but [section] 822 particularly mentions safety. [¶] And although there was much evidence, it's the court's opinion that it did not sufficiently

DISCUSSION

Standard of Review

In ruling on a petition for a writ of mandate following an order of suspension or revocation of a professional license, the trial court must determine, based on its independent judgment, whether the administrative decision is supported by the weight of the evidence. (*Hildebrand v. Department of Motor Vehicles* (2007) 152 Cal.App.4th 1562, 1567-1568.) The court considers whether the administrative law judge committed an abuse of discretion on the ground that the findings are not supported by substantial evidence in the light of the whole record. (Code Civ. Proc., § 1094.5, subd. (c); *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

On appeal, we review the record to determine whether the trial court's judgment is supported by substantial evidence. (*Achene v. Pierce Joint Unified School Dist.* (2009) 176 Cal.App.4th 757, 765-766.) In an administrative mandate proceeding in which the trial court has exercised its independent judgment, we consider the court's factual determinations conclusive if they are supported by substantial evidence. On questions of law, we review the trial court's findings de novo. (*Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 386-387.) We resolve all evidentiary

establish the basis for that discipline. [¶] . . . [¶] I think the board's decision was beneficial to the public in general. . . . [B]ut I . . . also . . . find that it does not meet the requirements of the statute."

conflicts in favor of the prevailing party, and give the prevailing party the benefit of all reasonable inferences in support of the judgment. (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 52.)

Controlling Statute

Section 822 provides: "If a licensing agency determines that its licentiate's ability to practice his or her profession safely is impaired because the licentiate is mentally ill, or physically ill affecting competency, the licensing agency may take action by any one of the following methods: [¶]

(a) Revoking the licentiate's certificate or license. [¶]

(b) Suspending the licentiate's right to practice. [¶]

(c) Placing the licentiate on probation. [¶] (d) Taking such other action in relation to the licentiate as the licensing agency in its discretion deems proper. [¶] The licensing agency shall not reinstate a revoked or suspended certificate or license until it has received competent evidence of the absence or control of the condition which caused its action and until it is satisfied that with due regard for the public health and safety the person's right to practice his or her profession may be safely reinstated."

Analysis

The Board contends the trial court erroneously granted Dr. Menaster's writ of administrative mandate, since the Board is authorized to protect the public against potential harm under section 822. Specifically, the Board argues the trial court erred in requiring that there be some evidence of adverse impact

in Dr. Menaster's day-to-day practice stemming from his mental illness.

According to the Board, the trial court "correctly concluded that real party suffers from a mental illness and also correctly concluded that a mental illness in and of itself does not establish grounds for disciplinary action. The lower court erred, however, in considering the absence of recent, documented patient harm as evidence that real party was able to practice safely." In support, the Board relies on *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757 (*Griffiths*).

In *Griffiths*, the appellate court considered section 2239, subdivision (a), which states: "The use or prescribing for or administering to himself or herself, of any controlled substance; or the use of any dangerous drugs specified in Section 4022, or of alcoholic beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to any other person or to the public, or to the extent that such use impairs the ability of the licensee to practice medicine safely or more than one misdemeanor or any felony involving the use, consumption, or self-administration of any of the substances referred to in this section, or any combination thereof, constitutes unprofessional conduct. The record of the conviction is conclusive evidence of such unprofessional conduct."

The physician disciplined in *Griffiths* argued that imposing discipline on his medical license solely based on convictions involving alcohol use, where no facts showed alcohol consumption

affected his medical practice, violated the due process requirement that a nexus must exist between the conduct giving rise to the discipline and the physician's fitness or competence to practice medicine. (*Griffiths, supra*, 96 Cal.App.4th at p. 767.) The court found the statute passed constitutional muster. (*Id.* at p. 779.)

The appellate court found that by defining more than one misdemeanor conviction involving alcohol consumption as unprofessional conduct in section 2239, subdivision (a), the Legislature has determined that a nexus exists between those convictions and a physician's competence to practice medicine. (*Griffiths, supra*, 96 Cal.App.4th at p. 770.) The court noted driving under the influence of alcohol also shows an inability or unwillingness to obey the law and constitutes a serious breach of a duty owed to society. (*Ibid.*)

The physician also argued the discipline was invalid because no evidence showed his alcohol use impaired his medical practice. The court responded that, in relation to multiple convictions involving drunk driving, it rejected the argument that a physician can seal off or compartmentalize personal conduct so it does not affect the physician's professional practice. (*Griffiths, supra*, 96 Cal.App.4th at p. 771.) The court cited legal authority for the proposition that conduct occurring outside the practice of medicine may form the basis for imposing discipline because such conduct reflects on a

licensee's fitness and qualifications to practice medicine.

(*Ibid.*)³

Here, the Board seizes on the *Griffiths* court's response to the argument that a physician cannot be disciplined because no evidence showed his drinking and driving convictions resulted in any harm to patients. The *Griffiths* court reasoned: "If accepted, this argument would have a serious implication for license discipline proceedings. In essence, it would prohibit the imposition of discipline on a licensee until harm to patients had already occurred. We reject this argument because it overlooks the preventative functions of license discipline, whose main purpose is protection of the public [citation], but whose purposes also include prevention of future harm [citation, fn. omitted] and the improvement and rehabilitation of the physician [citation]." (*Griffiths, supra*, 96 Cal.App.4th at p. 772.)

The Board faults the trial court for not discussing *Griffiths* and instead finding "[d]iscipline thus must be based on some manifestation of the disorder in the form of behavior that demonstrates that the practitioner is unable to practice without risk to public safety." The Board argues that, under

³ The court cited cases involving physicians committing income tax fraud, perjury, and filing fraudulent insurance claims as instances in which, although the physician had not practiced medicine incompetently, the physician had shown poor character or a lack of integrity. This translates into an unfitness meriting license discipline. (*Griffiths, supra*, 96 Cal.App.4th at pp. 771-772.)

Griffiths, ineffectiveness that could lead to future harm justifies imposition of discipline under section 822. We are not persuaded. The Board fails to appreciate that the language of section 2239 and the conduct covered by the statute differ markedly from that of section 822.

In *Griffiths*, the court considered section 2239, which also discusses conduct that "impairs the ability of the licensee to practice medicine safely," but in a very different context. Section 2239 deals with physicians impaired by substance abuse, conduct which is defined as "unprofessional" and therefore cause for discipline. The *Griffiths* court considered drunk driving convictions and carefully articulated why such conduct need not be directly linked to a physician's practice: it evinces a lack of integrity and an inability to follow the law. (*Griffiths*, *supra*, 96 Cal.App.4th at pp. 771-772.)

In *Watson v. Superior Court* (2009) 176 Cal.App.4th 1407 (*Watson*), we considered both section 2239 and *Griffiths*. In *Watson*, a physician challenged the Board's discipline, arguing the use of alcoholic beverages to the extent it poses a danger to the physician or to others may be the basis for discipline only if it is also proven there is a nexus between such use and the physician's ability to practice medicine safely. (*Watson*, at p. 1411.)

In rejecting the physician's argument, we noted "the existence of a nexus does not require a finding of an actual adverse impact on the past day-to-day practice of medicine, but may be satisfied by a potential for such adverse impact in the

future." (*Watson, supra*, 176 Cal.App.4th at p. 1415.) In *Watson*, the physician had been arrested four times for driving under the influence. (*Id.* at pp. 1411-1412.) Citing *Griffiths*, we concluded that the physician's arrests for driving under the influence of alcohol, even though no convictions resulted, provided a nexus between the punished conduct and the physician's ability to practice medicine safely. (*Watson*, at pp. 1423-1424.)

Conduct meriting discipline under section 822 does not lend itself to such an interpretation. Section 822 covers mental and physical illness that renders a physician unable to practice his or her profession safely. The *Griffiths* court found, under section 2239, that substance abuse resulting in criminal convictions formed the necessary nexus between the punished conduct and the physician's ability to practice safely. No such criminal conduct is referenced in section 822, and in the present case, no such criminal conduct occurred. We disagree with the Board that these are "irrelevant factual distinctions" between Dr. Menaster's situation and the situation in *Griffiths*.

In order to satisfy due process, the state's power to regulate a profession cannot be used arbitrarily to penalize conduct that has no demonstrable bearing upon fitness for its practice. (*Cartwright v. Board of Chiropractic Examiners* (1976) 16 Cal.3d 762, 767.) Here, the Board seeks to discipline Dr. Menaster for the *possibility* that his mental illness in the future may endanger public safety. In effect, the Board asks us to construe section 822 as authorizing discipline if a physician

might treat patients ineffectively because of the physician's mental illness, therefore endangering public safety.

Section 822 does not support such an interpretation and we find *Griffiths* and *Watson* distinguishable.

Conclusion

The trial court concluded the Board failed to establish by clear and convincing evidence that Dr. Menaster's mental condition impairs his ability to practice psychiatry with safety to the public. Substantial evidence supports the trial court's conclusion.

All the experts, and Dr. Menaster himself, agree he suffers from personality disorder NOS. In the prior disciplinary proceeding, Dr. Menaster's behavior fully justified the Board's discipline. He successfully completed probation, and none of those specific behaviors (weapons possession, errors in patient care) have recurred.

We agree with the trial court that Dr. Menaster's behavior at the DSS could be described as "odd, aberrant, and even troubling," but that is not the test for discipline under section 822. Dr. Menaster's personality disorder caused him to act in inappropriate ways, display poor judgment, and overreact to stress. However, there is no evidence that he threatened anyone. Even during the incident over the "illegal" bake sale, while Dr. Menaster dissolved into anger and profanities, he did not make any threats of violence to himself or others. Although during this period Dr. Menaster saw only a limited number of

patients, there is no evidence of any deficiencies in his treatment of his patients.

We agree with the trial court that Dr. Menaster's behavior at the DSS, in itself, does not invoke discipline under section 822. His behavior must be linked to safety concerns through expert testimony demonstrating that his disorder is likely to manifest itself in ways that actually risk causing harm to patients.

Dr. Dolgoff and Dr. Tatomer both testified Dr. Menaster could practice safely despite his personality disorder. Dr. Tatomer testified that Dr. Menaster presented no danger to the public and had managed to better control his anxiety. Dr. Dolgoff stated Dr. Menaster understood his problems and his impairment did not affect patient care.

Only Dr. Seaman's testimony raised the specter of Dr. Menaster's professional performance forming a threat to public safety. Dr. Seaman testified the stresses that brought on Dr. Menaster's behavior at the DSS were not unique and could recur in the context of his medical practice. However, Dr. Seaman also testified he felt with reasonable medical certainty that Dr. Menaster is currently able to practice medicine with safety to the public. Dr. Seaman also made it clear the lack of information because of Dr. Menaster's low patient load prevented him from saying with a reasonable certainty that the physician's practice was unsafe.

While Dr. Seaman expressed legitimate concerns about Dr. Menaster's effectiveness as a psychiatrist because of his

impairment, these concerns do not rise to the level of presenting a threat to public safety. As the trial court noted: "Dr. Seaman's testimony does not establish that less-than-optimal judgment under stress or a failure to manage interpersonal conflict in the context of psychiatric practice necessarily translates to the potential for harm to patients, as opposed to treatment that is less effective than it would be otherwise."

Dr. Seaman's testimony does not link Dr. Menaster's personality disorder to any potential practice errors that would put patients at risk of harm or to a potential for violence against his patients, both of which would indicate the psychiatrist poses a risk to public safety. The evidence does not establish that Dr. Menaster's mental disorder renders him an unsafe psychiatrist whose incompetence makes him a danger to his patients as required for discipline under section 822.

DISPOSITION

The petition for writ of mandate is denied. Real party in interest is awarded costs in this original proceeding. (Cal. Rules of Court, rule 8.493(a)(1)(A).)

RAYE, P. J.

I concur:

BUTZ, J.

Mauro, J., concurring:

In this case we hold that the Medical Board cannot place a mentally ill psychiatrist on probation with evaluation, therapy and monitoring because, although he may not be an *effective* psychiatrist, there is insufficient evidence that he is currently an *unsafe* psychiatrist. I write separately to acknowledge that this holding is counter-intuitive and could be cause for public concern. Nonetheless, because I believe this result is compelled by the applicable law as applied to these specific facts -- constraints also noted by the trial court -- I concur in the holding.

Business and Professions Code section 822¹ specifies that the Medical Board may take action against a licentiate if the Board determines that the licentiate's "ability to practice his or her profession safely is impaired because" either (1) "the licentiate is mentally ill," or (2) the licentiate is "physically ill affecting competency" The statute focuses on safe practice for both the mentally ill and the physically ill, but only the language pertaining to physical illness references competency. The statutory language confirms that for mentally ill licentiates, evidence of ineffectiveness or incompetence does not necessarily establish unsafe practice.

¹ Undesignated statutory references are to the Business and Professions Code.

The language in section 822 regarding mentally ill licentiates is very different from the statutory language analyzed in *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757. That case involved section 2239, which expressly provides that an alcohol-related conviction is conclusive evidence of unprofessional conduct that may be the subject of discipline. No such equivalent language is found in section 822 regarding mentally ill licentiates.

Here, the record shows continuing concern about Dr. Menaster's effectiveness as a psychiatrist, but insufficient evidence that he is currently unable to practice medicine with safety to the public. Stated another way, while there may be concern that Dr. Menaster does not adequately help his patients, there is no evidence that he currently harms them. Given the language of section 822, substantial evidence supports the trial court's ruling.

MAURO, J.