STATE OF MICHIGAN

COURT OF APPEALS

HAROLD D. ESLER,

Petitioner-Appellant,

v

CONSUMER & INDUSTRY SERVICES,

Respondent-Appellee.

UNPUBLISHED
June 25, 1999

No. 209036
Consumer & Industry Services
LC No. 97-000283

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

The Department of Consumer and Industry Services Board of Psychology Disciplinary Subcommittee (disciplinary subcommittee) issued a final order, which partially granted and partially denied petitioner's petition to reclassify his license to practice psychology. Petitioner appeals by leave granted, and we reverse and remand.

In 1981, petitioner's license to practice psychology was revoked after the Michigan Board of Psychology determined that petitioner had engaged in sexual relations with two patients.[1] Petitioner attempted on numerous occasions to have his license reinstated in the ensuing years. Finally, in July 1995, petitioner's license was reinstated, but only as a limited license. The order granting reinstatement contained a restriction that required petitioner to have a licensed psychologist present at all consultations and sessions with patients. Petitioner filed a request for reconsideration, and in December 1995, the Board of Psychology modified petitioner's limited license. Petitioner was thereafter prohibited from treating female patients, but no longer had to have a licensed psychologist present at his consultations. A fully licensed psychologist only needed to be on-site during petitioner's treatment sessions with patients. On February 7, 1997, petitioner filed a petition to have his license reclassified from a limited license to a full, unrestricted license. A hearing on the petition was subsequently held before an administrative law judge, who thereafter issued a proposal for decision. The administrative law judge concluded "that clear and convincing evidence has been shown that it would be in the public interest to remove the limitations from Dr Esler's license to practice". In spite of the conclusions of the administrative law judge in the proposed decision, the disciplinary subcommittee did not reclassify petitioner's license to a full, unrestricted one. It accepted the administrative law judge's findings of fact,

but rejected her conclusions. The disciplinary subcommittee concluded that petitioner had not "sufficiently established by clear and convincing evidence that it would be in the public's best interest to remove all limitations from Petitioner's license at this time." It modified the restrictions, however, to allow petitioner to treat female patients.

On appeal, petitioner argues that the disciplinary subcommittee's decision was arbitrary and capricious where it accepted the administrative law judge's findings of fact, but rejected the conclusions of law. He claims that the facts, as found by the administrative law judge, do not support the conclusion that petitioner must continue to perform his services under the general supervision of a fully licensed psychologist. He concludes that the order of the disciplinary committee is defective and constitutes error requiring reversal where it fails to explain the facts and basis for its decision. We agree.

We review the decision of the disciplinary subcommittee pursuant to Const 1963, art 6, § 28 and MCL 24.306; MSA 3.560(206). Const 1963, art 6, § 28 provides, in part, that final decisions of administrative agencies are reviewed to determine whether the final decision is authorized by law and supported by competent, material and substantial evidence on the record. MCL 24.306(1)(d) and (e); MSA 3.560(206)(1)(d) and (e) provide, in part, that the decision must be set aside if substantial rights of the petitioner have been prejudiced because the decision or order is not supported by competent, material and substantial evidence on the whole record or is arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion. An abuse of discretion is found when an unprejudiced person, upon considering the facts on which the decision was made, would say there was no justification or excuse for the ruling. *Medbury v Walsh*, 190 Mich App 554, 556-557; 476 NW2d 470 (1991).

In this case, the disciplinary subcommittee's decision failed to comport with the Administrative Procedures Act of 1969, MCL 24.201 *et seq.*; MSA 3.560 (101) *et seq.* MCL 24.285; MSA 3.560(185) provides:

> A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law separated into sections captioned or entitled "findings of fact" and "conclusions of law", respectively. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. . . . *Each conclusion of law shall be supported by authority or reasoned opinion*. . . [Emphasis added.]

Similarly, 1996 AACS, R 338.1630 provides in pertinent part:

> (4) After reviewing the findings of fact and conclusions of law, the disciplinary subcommittee, board, or task force may make revisions. In making revisions, the disciplinary subcommittee, board or task force *shall specifically identify those portions of the findings of fact or conclusions of law, or both, that it is modifying or rejecting and identify evidence from the record that supports its revisions.*
>
> (5) A disciplinary subcommittee, board, or task force, in its final order, may adopt, modify, or reject, in whole or in part, the opinion or proposal for decision of the

> administrative law judge. *If the disciplinary subcommittee, board, or task force modifies or rejects the opinion or proposal for decision, the reasons for that action shall be stated in the final order.* [Emphasis added.]

In this case, after adopting the administrative law judge's findings of fact, the disciplinary subcommittee stated its own conclusion, which was contrary to the administrative law judge's proposed conclusion. It completely failed to articulate its reasoning or to articulate facts that supported its decision to deny reclassifying petitioner's license to a fully, unrestricted one. We cannot review the decision under such circumstances. *Viculin v Dep't of Civil Service*, 386 Mich 375, 404-405; 192 NW2d 449 (1971). See also *Butcher v Dep't of Natural Resources*, 158 Mich App 704, 707; 405 NW2d 149 (1987) (to facilitate appellate review, an agency must provide a precise statement of the evidence that supports its ruling and the conclusions of law). We note that the administrative law judge's findings of fact supported her proposed legal conclusion that there were no objective indicators to suggest a need to continue limiting petitioner's license. Her findings do not appear to support the opposite conclusion. Moreover, we note that no adverse witnesses were called at the hearing and the only testimony provided focused on petitioner's qualifications for reclassification and not on his deficiencies, if any. There was simply no evidence or any rational basis on the record to support that petitioner failed to sustain his burden of proof on his application for reclassification. The disciplinary committee's failure to include evidentiary support for its decision is cause for a remand. *Luther v Bd of Ed of the Alpena Public Schools*, 62 Mich App 32, 37-38; 233 NW2d 173 (1975).

In making our ruling, we reject respondent's argument that, although the final order did not set forth factual findings to support its conclusion or the reasoning utilized in reaching its conclusion, any error is harmless because the disciplinary subcommittee's reasoning is apparent from the record. Contrary to respondent's position, we cannot discern the path by which the disciplinary subcommittee reached its decision, *Viculin, supra*. In fact, our review of the record does not reveal any justification or reason for the disciplinary board's action. It appears contrary to all logic that the disciplinary subcommittee lifted the restriction against petitioner treating female patients, but continued to require a fully licensed psychologist to be on the premises. We acknowledge that respondent's counsel attempts to explain the rationale of the disciplinary subcommittee's decision. Respondent wants us to accept that explanation as sufficient to affirm the order of the disciplinary subcommittee. We decline to do so. We are limited to making our decision based on the record and may not guess at the agency's reasoning to overcome the apparent deficiencies in the final order. See *Smith v Crime Victims Compensation Bd*, 130 Mich App 625, 628-629; 344 NW2d 23 (1983), citing *People v Semchena*, 7 Mich App 302, 311; 151 NW2d 895 (1967).

Petitioner also argues on appeal that the disciplinary subcommittee impaired his rights when it did not require him to present any special or specific information to demonstrate that his license should be reclassified, but then denied his reclassification. He complains that the "we-know-it-when-we-see-it" method of determining when a person has met the criteria for reclassification is improper. It appears that petitioner wants the disciplinary subcommittee to set forth a specific criteria that would lead to reclassification. Petitioner cites to no authority to support such a proposition. This Court will not search for authority to sustain or reject petitioner's position. *Magee v Magee*, 218 Mich App 158, 161; 553

NW2d 363 (1996). Moreover, we believe that the Legislature intended the disciplinary subcommittee to have wide discretion in determining when members of its own profession are competent to practice, and did not intend for it to establish a bright line test.

MCL 333.16249; MSA 14.14(16249) provides:

> A board *may* reclassify a license limited under this part to alter or remove the limitations *if*, after a hearing, *the board is satisfied* that the applicant will practice the profession safely and competently within the area of practice and under conditions stipulated by the board, and should be permitted in the public interest to so practice. The board may require the submission of information necessary to make the determination required for reclassification. . . .[Emphasis added.]

The use of the word "may" indicates that any action taken by the disciplinary board is permissive, *see Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993), and the phrase "the board is satisfied" indicates that there is a discretionary component to the determination. MCL 24.277; MSA 3.560(177) supports that the Legislature intended there to be discretion. It provides, in part, that an "agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it." The disciplinary subcommittee did not violate any of petitioner's rights where it failed to require specific information and instead, reviewed the evidence and testimony that was presented at the hearing and rendered its own conclusions based on that evidence and its experience, technical competence and specialized knowledge.

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy

[1] Petitioner denied, and continues to deny, these allegations.