STATE OF MICHIGAN

COURT OF APPEALS

ROLAND C. BROCKRIEDE, D.D.S.,

Petitioner-Appellant,[1]

v

DEPARTMENT OF CONSUMER & INDUSTRY SERVICES,

Respondent-Appellee.[2]

UNPUBLISHED
March 15, 2002

No. 228678
Bureau of Health Services
LC No. 98-000063

Before: Sawyer, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Roland C. Brockriede, D.D.S., appeals as of right from the final order of the Department of Consumer & Industry Services Bureau of Health Services Board of Dentistry Disciplinary Subcommittee ("BDDS") adopting the hearing referee's proposal for decision (PFD). We affirm.

Brockriede was a licensed dentist in Michigan with a license to prescribe controlled substances. Rebecca Johnson became one of Brockriede's patients after he met her outside of the office. Brockriede prescribed Valium, Percodan, Vicodin, and Tylenol No. 3 to her. Brockriede knew that Rebecca Johnson had a prior drug abuse problem when he prescribed controlled substances to her. However, he thought she had completed a drug rehabilitation program. Brockriede then hired Rebecca Johnson to work for him. As an employee of Brockriede, Rebecca Johnson had access to the computers that could alter prescriptions. During her employment, Brockriede caught Rebecca Johnson changing the amount of refills on her prescriptions. He then terminated her employment with him. After this date, Brockriede continued to prescribe Tylenol No. 3 for her.

[1]Although the docket sheet refers to Brockriede as "petitioner" and the Department of Consumer & Industry Services as "respondent," the Department of Consumer & Industry Services Bureau of Health Services Dentistry Disciplinary Subcommittee filed the administrative complaint against Brockriede.

[2] See n 1.

Brockriede treated Deanne Beatty for two abscessed teeth and prescribed Vicodin and Tylenol No. 3 for her. However, Brockriede's dental records only showed that he had prescribed Tylenol No. 3 for her. Brockriede could not explain why the Vicodin prescriptions were not included in Beatty's dental records. Brockriede also prescribed Percodan and Valium for Stacy Johnson. At one point, Brockriede noticed that there was a problem with the amount of Percodan he was prescribing, so he stopped prescribing it for her.

A woman named Samantha Fox originally made allegations against Brockriede that he was over-prescribing drugs. A pharmacist at Meijer's then contacted the Michigan Health Regulatory Department regarding Brockriede's questionable prescriptions of drugs. Defendant then began an investigation of Brockriede, which included, *inter alia*, interviews and subpoenaing dental records. After the investigation, the BDDS filed an administrative complaint against Brockriede, alleging that he violated various sections of the Public Health Code, MCL 333.1101 *et seq.*, by treating his patients negligently, by lacking good moral character, by prescribing excessive amounts of controlled substances, and in failing to record all of his prescriptions in dental records. At the administrative hearing, Brockriede and Carol Haynes-Hall, a pharmacy inspector for the Michigan Health Regulatory Department, testified about these charges. During his examinations of Haynes-Hall and Brockriede, Brockriede's attorney attempted to ask questions about the BDDS's basis for investigating Brockriede, but the hearing referee did not allow the questions.

After Brockriede and Haynes-Hall had testified, the hearing referee stated that it would allow further testimony by way of deposition transcripts. The hearing referee also ordered Brockriede to turn over Rebecca Johnson's and Stacy Johnson's dental records. Both parties later deposed their own expert witness and submitted this testimony to the hearing referee. Defendant's expert, Dr. L. George Upton, opined that Brockriede was negligent in treating and hiring Rebecca Johnson and had over-prescribed drugs for Rebecca Johnson, Deanne Beatty, and Stacy Johnson. Brockriede's expert, Dr. Donald Wolford, opined that Brockriede had not acted negligently or over-prescribed any of his patients.

In the hearing referee's PFD, he found that Brockriede was negligent in regard to his treatment of Rebecca Johnson by failing to investigate her substance abuse history, by hiring her in a position where she could alter prescription refills, by prescribing controlled substances to her without first having obtained information regarding her substance abuse problem, and by failing to consult a pain management specialist for her, in violation of MCL 333.16221(a). The hearing referee found that Brockriede had also violated MCL 333.16221(b)(i) by his incompetent treatment of Rebecca Johnson. However, the hearing referee found that Brockriede had not over-prescribed controlled substances to Rebecca Johnson or Beatty, and therefore, had not violated MCL 333.16221(c)(iv). Next, the hearing referee held that the BDDS had failed to prove that Brockriede lacked good moral character or had violated MCL 333.16221(b)(vi). Finally, the hearing referee found that Brockriede violated MCL 333.11120(2)(d) by failing to record Beatty's Vicodin prescriptions. Both parties filed exceptions to the PFD. The BDDS subsequently issued a final order adopting the PFD and ordering that: (1) Brockriede's dentistry license be limited for at least one year so that he could not prescribe any Schedule II controlled substances, (2) Brockriede be placed on probation for at least one year, (3) Brockriede perform one-hundred hours of community service, and (4) Brockriede be fined $1,000.

"There are three ways to seek review of a decision by an administrative agency: (1) review pursuant to a procedure specified in a statute applicable to the particular agency, (2) the method of review for contested cases under the APA [The Administrative Procedures Act, MCL 24.201 *et seq.*], or (3) an appeal pursuant to § 631 of the Revised Judicature Act (RJA), MCL 600.631, in conjunction with MCR 7.104(A)." *Attorney General v Public Service Comm No 1*, 237 Mich App 27, 40; 602 NW2d 207 (1999). Under MCL 333.16238, a final decision of a disciplinary subcommittee rendered after January 1, 1995, may be appealed only to the Court of Appeals. Brockriede argues that he is entitled to review under the APA, citing MCL 24.306. The APA provides the following standard of review:

> Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the agency.
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law. [MCL 24.306(1).]

Brockriede argues that the standard of review for this issue is de novo. This Court has held that review under the APA is not de novo. *Michigan Waste Systems v Dep't of Natural Resources*, 147 Mich App 729, 735; 383 NW2d 112 (1985). However, Brockriede's arguments involve some statutory interpretation. Questions of statutory interpretation are questions of law that are reviewed de novo on appeal. *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

Brockriede argues that the hearing referee denied his right to due process by not allowing him to cross-examine Haynes-Hall regarding the propriety of the BDDS's investigation of Brockriede. Brockriede argues that there were several procedural problems with the BDDS's investigation: the allegation against him that began the investigation was not in writing and the BDDS did not file a formal complaint against him within the required time. Brockriede argues that he was prejudiced by being prevented from cross-examining Haynes-Hall regarding these issues.

"A party's right to cross-examine adverse witnesses is a basic due process right." *Great Lakes Division of National Steel Corp v City of Ecorse*, 227 Mich App 379, 426; 576 NW2d 667

(1998). "Although agencies need not adhere to evidentiary rules as rigidly as courts, agencies must respect the due process rights of parties to cross-examine adverse witnesses." *Cooper v Chrysler Corp*, 125 Mich App 811, 818; 336 NW2d 877 (1983). In the instant case, Brockriede was given the opportunity to cross-examine Haynes-Hall, but the hearing referee did not allow questions concerning the propriety of the investigation of Brockriede. The only case cited by Brockriede in support of his position that this was an infringement of his due process rights is *Bohannon v Sheraton-Cadillac Hotel, Inc*, 3 Mich App 81, 82; 141 NW2d 722 (1966), which states, in pertinent part, that "[w]hen an administrative agency promulgates a rule for the benefit of the litigants and then deprives a litigant of this right, it is a violation of the due process clauses of both the 1908 and 1963 Michigan Constitutions." Brockriede does not cite any administrative rule that the hearing referee violated by disallowing these questions. Brockriede goes on to argue reasons why the BDDS's investigation of him was procedurally flawed, but does not cite any applicable law in support of his argument that the hearing referee erred in disallowing cross-examination concerning this subject.

Where an appellant gives only cursory consideration to an argument that he was denied a right to cross-examine witnesses at a hearing, this Court need not address the issue. *Great Lakes Division of National Steel Corp, supra* at 425. Even if this Court were to address Brockriede's cross-examination argument, the facts that Brockriede was trying to elicit on cross-examination related to meritless arguments. The hearing referee did not allow Brockriede to cross-examine the witnesses regarding the BDDS's alleged violations of MCL 333.16211(2) and MCL 333.16231(5). These sections of the Public Health Code do not provide for sanctions for non-compliance. Following the reasoning of *Dep't of Consumer and Industry Services v Greenberg*, 231 Mich App 466, 468-469; 586 NW2d 560 (1998), the language in these sections of the Public Health Code should be construed as being permissive. Therefore, even if we were to address the merits of Brockriede's argument that the hearing referee improperly disallowed him from asking certain questions on cross-examination, the issues Brockriede was trying to raise on cross-examination were without merit. Furthermore, Brockriede has not shown that his substantial rights were prejudiced by the hearing referee's ruling.

Next, Brockriede argues that the hearing referee erred in allowing additional discovery after the hearing. He argues that the BDDS improperly used its inquisitorial power to build a case against Brockriede. However, Brockriede cites no law in support of his argument that the hearing referee may not order additional discovery after a hearing. Because this argument lacks any citation of supporting authority, this Court declines to address it. *Great Lakes Division of National Steel Corp, supra* at 425. "This Court will not search for authority to support a party's position." *Id.*

Next, Brockriede seems to argue that the hearing referee should have directed a ruling in favor of Brockriede when it was apparent that the BDDS did not have sufficient evidence to support its claims without the expert deposition testimony of Dr. Upton. As discussed, *supra*, Brockriede has not cited any legal authority showing that the hearing referee should not have allowed Dr. Upton's deposition testimony. However, even without Dr. Upton's testimony, there was substantial evidence to support the final order. Brockriede admitted that he knew Rebecca Johnson had a prior drug abuse problem when he prescribed controlled substances to her. Brockriede then hired Rebecca Johnson to work for him where she had access to the computers that could alter prescriptions. He then testified that he caught her changing the amount of refills

on her prescriptions. Even after this date, Brockriede continued to prescribe Tylenol No. 3 for Rebecca Johnson. Brockriede testified that her drug history had no bearing on his prescriptions. Brockriede testified that he did not formally consult with any other dentists or pain management specialists during his treatment of Rebecca Johnson. We find that this was substantial evidence for the hearing referee to find that Brockriede was negligent and fell below the minimum standards in his treatment of Rebecca Johnson. In regard to Beatty, there is evidence that Brockriede had prescribed Vicodin for her. However, Brockriede's dental records only showed that he had prescribed Tylenol No. 3 for her. Brockriede could not explain why the Vicodin prescriptions were not included in Beatty's dental records. This writer opines that this was substantial evidence for the hearing referee to find that Brockriede failed to include Beatty's Vicodin prescriptions in her dental records.

In his deposition after the hearing, Dr. Upton opined that Brockriede was negligent in treating Rebecca Johnson. Dr. Upton testified that Brockriede was incompetent in treating and hiring Rebecca Johnson, who he knew had a history of drug abuse, without verifying her status in a rehabilitation center. Dr. Upton opined that Brockriede should not have prescribed Schedule II drugs to Rebecca Johnson because of her history of substance abuse and because the drugs could have aggravated her sleep problems. Dr. Upton next opined that Brockriede should have referred her to a drug rehabilitation clinic. We find that there is substantial evidence to support the final order without Dr. Upton's testimony, but Dr. Upton's testimony gives even more evidence in support of the final order.

Next, Brockriede seems to argue that the hearing referee erred in failing to direct a verdict in his favor because Dr. Upton did not review the x-rays of Rebecca Johnson. Brockriede's argument seems to attack Dr. Upton's credibility for failing to review the x-ray. Although Dr. Upton admitted that he did not look at Rebecca Johnson's x-rays, Brockriede does not give any indication what was on the x-rays and gives no reason why the x-rays would have changed Dr. Upton's opinion or the outcome of the case. After looking at all of the evidence, the hearing referee believed Dr. Upton and found that Brockriede had been incompetent in his care of Rebecca Johnson. As discussed, this finding was supported by substantial and competent evidence. When there is sufficient evidence, a reviewing court must not substitute its discretion for that of the administrative tribunal, even if the court might have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992).

> It is not a reviewing court's function to resolve conflicts in the evidence or to pass on the credibility of witnesses. Great deference is given to the findings of the hearing examiner because, as the trier of fact, he or she had the opportunity to hear the testimony and view the witnesses. [*Arndt v Dep't of Licensing and Regulation*, 147 Mich App 97, 101; 383 NW2d 136 (1985) (citation omitted).]

Therefore, we defer to the hearing referee's determination that Dr. Upton was a credible witness and accept his finding that Brockriede was incompetent in his care of Rebecca Johnson.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Joel P. Hoekstra