

STATE OF MICHIGAN
COURT OF APPEALS

In re ELAINE D. ZAKS, MFT, CSW.

DEPARTMENT OF CONSUMER & INDUSTRY
SERVICES,

Petitioner-Appellee,

v

ELAINE D. ZAKS, MFT CSW,

Respondent-Appellant.

UNPUBLISHED
January 13, 2004

No. 241534
Board of Marriage and Family
Therapy Disciplinary
Subcommittee
LC No. 2001-000438

In re ELAINE D. ZAKS, CSW, MFT.

DEPARTMENT OF CONSUMER & INDUSTRY
SERVICES,

Petitioner-Appellee,

v

ELAINE D. ZAKS, CSW, MFT,

Respondent-Appellant.

No. 242218
Board of Social Work
Disciplinary
Subcommittee
LC No. 2001-000438

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Respondent appeals as of right in these consolidated cases from final orders of the Michigan Board of Social Work Disciplinary Subcommittee and the Michigan Board of Marriage and Family Therapy Disciplinary Subcommittee placing her on six months' probation for violation of MCL 333.16221(g). We affirm.

I. Basic Facts And Procedural History

A. The MHPRC Interviews And The Sakis Report

Respondent Elaine Zaks is a certified social worker and licensed marriage and family therapist. This matter commenced in April of 2000 when respondent's brother, Jeffrey Zaks, M.D. learned that respondent was behaving erratically and may have been using alcohol to cope with the stressful family environment that she was experiencing. Dr. Zaks approached respondent about these concerns and convinced her to go to the Michigan Health Professional Recovery Corporation (MHPRC) to have her alcohol use evaluated. MHPRC is a private non-profit corporation established pursuant to MCL 333.16165-16170a to provide an opportunity for individual health professionals to receive treatment; it functions as an alternative to disciplinary sanctions pursuant to MCL 333.16221.

Respondent met with the MHPRC's recommended evaluator, social worker Penelope Sakis, at the Eastwood Clinic in Rochester Hills on May 4, 2000. Respondent completed a number of forms before her meeting with Sakis, including an "adult personal history form." Under the heading "alcohol and drug usage," respondent reported drinking on an average of three or four days weekly, consuming one or two drinks – "almost always gin and tonic" – on those days that she drank. Respondent also wrote, "Brother [Jeffrey Zaks] worries about how much I drink to cope with stress," and she identified "gin and tonic" as her first "drug of choice." Sakis met with respondent again on May 8, 2000.

In her undated report, Sakis diagnosed respondent with "alcohol dependence" and "dysthymic disorder," a mild form of chronic depression. Sakis also stated in her report that, "[A]t the age of 20, [respondent] started drinking wine but soon using the Jack Daniel's and [g]in daily up to 3-4 drinks at one sitting or 'three fingers of Jacks [sic] Daniel's[]' to help her sleep." Sakis testified that respondent told her during their interview sessions that she was drinking daily, not three to four times weekly as respondent indicated on her adult personal history form. Respondent, however, later disputed this statement.

Sakis later admitted making a number of errors in her rush to complete the report before a trip she had planned and within the MHPRC's five-day deadline for evaluations. Among those mistakes were the length of respondent's second marriage, her father's age when he died, and her placement in the birth order of her siblings. Sakis concluded her report by recommending respondent for "intensive outpatient treatment" and an MHPRC monitoring agreement. Before leaving on her trip, Sakis called respondent to tell her that an intensive outpatient program was recommended and that respondent would not be allowed to work for four weeks. Respondent sought more information regarding how Sakis arrived at her conclusion, but she was not successful in obtaining the Sakis report from either Sakis or the MHPRC.

B. The Interim Monitoring Agreement

At a case conference review meeting in late May of 2000, the MHPRC clinical team recommended that respondent complete an intensive outpatient program. This recommendation was based on Sakis's diagnosis of respondent as alcohol dependent. MHPRC Intake Coordinator Kathleen Hungerford then sent respondent an interim monitoring agreement that required, among other things, that respondent (1) "acknowledge [her] impairment," (2) refrain from working

without MHPRC approval, and (3) acknowledge that the MHPRC was required by law to notify the Department of Consumer and Industry Services if respondent failed to comply with the recovery agreement's provisions.

Respondent did not sign the interim monitoring agreement. She later testified that to do so in light of all of her unanswered questions regarding the evaluation process "would have been worse than crazy." Respondent did not learn at the time that her refusal to sign meant that her file would be closed and she would be reported to the Department of Consumer and Industry Services (the Department). Soon thereafter, respondent wrote to the MHPRC, revoking her consent to release her information and stating that she was "deferring [her] decision whether to proceed with counseling services." Hungerford then wrote to respondent, informing her that her file with the MHPRC was closed and had been forwarded to the Department.

C. The Investigative Order And The Administrative Complaint

In early September of 2000, the Department issued an "investigative order" requiring respondent to submit to a substance abuse evaluation within thirty days of the order. Respondent answered the order but on October 31, 2000, the Department issued an opinion and order finding that respondent "failed to show good cause to overturn [the investigative] order."

Respondent did not comply with the Department's October 31 opinion and order, and in mid-January of 2001, the Health Professionals Division of the Attorney General's Office filed an administrative complaint, alleging that respondent's failure to complete the ordered evaluation constituted a violation of MCL 333.16221(g). Thereafter, hearings were held before an administrative law judge (ALJ) in June and July of 2001.

D. The ALJ's Proposal For Decision

In mid-November of 2001, the ALJ concluded that the petitioner [referring to the Department and including the disciplinary subcommittees of the Boards of Social Work and Marriage and Family Therapy] failed to meet its burden to show by a preponderance of the evidence that respondent violated the Public Health Code. The ALJ found that the Sakis report and her testimony "were not trustworthy and should not be used as a basis for requiring the Respondent to submit to chemical dependency/substance abuse evaluation." The ALJ recommended that the administrative complaint be dismissed because the record did not show "that Respondent had a substance abuse problem in April 2000 or a current substance abuse problem which would adversely affect her ability to safely and competently practice social work and marriage and family therapy."

E. The Disciplinary Subcommittees' Actions

The Board of Social Work's Disciplinary Subcommittee rejected the ALJ's conclusions of law. While its review of the record left it "not convinced that Respondent has a substance abuse problem," the Disciplinary Subcommittee found that it was an "uncontroverted fact" that respondent deliberately failed to comply with the requirements of the Department's October 31, 2000 opinion and order. The Disciplinary Subcommittee placed respondent on six months' probation and ordered her to undergo a substance abuse evaluation with the MHPRC. The Board of Marriage and Family Therapy's Disciplinary Subcommittee reached the same conclusion in its

findings of fact and conclusions of law and it, too, ordered that respondent be subject to six months' probation. Respondent appealed both these decisions and these appeals have been consolidated in this Court.

II. Statutory And Administrative Provisions

A. Examinations

MCL 333.16236 authorizes mental or physical examinations, providing in pertinent part:

(1) In a hearing or an investigation where . . . substance abuse under section 16221 or impairment is alleged, a disciplinary subcommittee or a hearings examiner or the department with the approval of a disciplinary subcommittee may require the applicant, licensee, or registrant to submit to a mental or physical examination conducted by physicians or other appropriate health professionals designated by the disciplinary subcommittee or the department.

(2) For purposes of this section, an individual licensed or registered under this part who accepts the privilege of practicing in this state, by so practicing or by receiving a license or renewal to practice or by receiving registration . . . consents to submit to a mental . . . examination under subsection (1) when directed to do so in writing by a disciplinary subcommittee, a hearings examiner, or the department.

B. Failure To Submit To An Examination

MCL 333.16224(1) authorizes suspension of a license or registration for refusing to submit to an examination, stating:

Failure or refusal to submit to an examination that the department, a disciplinary subcommittee, or a board or task force is authorized to require under this part after reasonable notice and opportunity for a hearing constitutes a ground for denial or suspension of a license or registration until the examination is taken.

C. Sanctions

MCL 233.16221(g)¹ gives disciplinary subcommittees the authority to impose sanctions after an investigation if the licensee is found to have violated a provision of the Public Health Code, stating:

¹ A 2002 amendment changed subdivision (g) to subdivision (h), but left the text unchanged. For the sake of consistency, this opinion will retain the subdivision headings that were in effect when the case arose.

The department may investigate activities related to the practice of a health profession by a licensee, a registrant, or an applicant for licensure or registration. The department may hold hearings, administer oaths, and order relevant testimony to be taken and shall report its findings to the appropriate disciplinary subcommittee. The disciplinary subcommittee shall proceed under section 16226 if it finds that 1 or more of the following grounds exists:

* * *

(g) A violation, or aiding or abetting in a violation of this article or of a rule promulgated under this article.

Sanctions for a violation of MCL 333.16221(g) include “reprimand, probation, denial, suspension, revocation, limitation, restitution, community service, or fine.” MCL 333.16226(1).²

D. Reasonable Basis For An Examination

However, as the ALJ noted, the Department’s authority is not absolute. 1999 AC, R 338.1611(7) states that “[a]n applicant, licensee, petitioner, or registrant may be required to submit to a mental or physical examination if the administrative law judge is satisfied, after reviewing the request and any objections, that a *reasonable basis* has been shown to believe that a mental or physical examination is warranted.” [Emphasis supplied]

III. Standard Of Review

We review a final decision of an administrative agency “to determine whether it is authorized by law and supported by competent, material, and substantial evidence on the whole record.” *Cogan v Bd of Osteopathic Medicine & Surgery*, 200 Mich App 467, 469; 505 NW2d 1 (1993). “The substantial evidence test requires that a decision be supported by evidence that a reasonable person would accept as sufficient.” *Id.* at 469-470. “Substantial evidence has been defined as more than a mere scintilla, but somewhat less than a preponderance.” *Id.* at 470.

IV. Authority Of The Department And The Disciplinary Subcommittees

Respondent argues that the Department and the disciplinary subcommittees were not authorized to place her on probation for acting contrary to MCL 333.16236(1) and MCL 333.16224(1), in violation of MCL 333.16221(g), based on her failure to undergo the ordered substance abuse evaluation. We disagree. We conclude that, because the letter accompanying respondent’s MHPRC file alleged an impairment and indicated that respondent was non-compliant, the Department was authorized to require her to submit to a substance abuse evaluation, pursuant to MCL 333.16236(1). 1999 AC, R 338.1601(a) defines “allegation” as “a document filed by a person or governmental entity which alleges conduct that may be in violation of the code or a rule.” Therefore, we are not persuaded by respondent’s argument that the letter accompanying her file did not constitute an allegation. Consequently, the September

² These sanctions now apply to violations of MCL 333.16221(h).

investigative order to undergo a substance abuse evaluation was authorized, pursuant to MCL 333.16236(1).

V. Reasonable Basis

Respondent asserts that the September investigative order to undergo a substance abuse evaluation required her to “falsely confess[] to impairment.” Again we disagree. While the interim monitoring agreement respondent refused to sign required her to acknowledge her impairment, the September investigative order merely required her to undergo a substance abuse evaluation within 30 days. Further, contrary to respondent’s assertion, we are satisfied that the Department and the disciplinary subcommittees adequately identified the evidence on which they based their rejection of the ALJ’s conclusions of law, in accordance with 1999 AC, R 338.1630(4), which provides in pertinent part:

After reviewing the findings of fact and conclusions of law, the disciplinary subcommittee . . . may make revisions. In making revisions, the disciplinary subcommittee . . . 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.

Therefore, the issue is not whether the Department or the disciplinary subcommittees required respondent to falsely confess to impairment. The issue is whether there was a reasonable basis for the September investigative order requiring respondent to undergo a substance abuse evaluation. In rejecting the ALJ’s conclusions of law, the disciplinary subcommittees concluded that the record established by a preponderance of the evidence that respondent failed to comply with the September investigative order to undergo a substance abuse evaluation, and was therefore non-compliant with that order. The disciplinary subcommittees rejected the ALJ’s assertion that the September investigative order was based primarily on the Sakis report, and pointed to “respondent’s self-reported . . . concerns about her alcohol consumption,” commenting that “the subsequent chronology of events that brought respondent’s matter to the attention of the disciplinary subcommittee resulted from respondent’s decision to voluntarily self-report her alcohol use to MHPRC.”

We believe that the distinction that the disciplinary subcommittees drew was critical. We agree with the ALJ that the Department’s authority, and that of the disciplinary subcommittees, is not absolute. By rule, the Department must have a reasonable basis to compel a registrant or a licensee to submit to a physical or mental examination. It is certainly true that the Sakis report contained errors and omissions and we find no basis in the record to disagree with the ALJ’s conclusion that “Ms. Sakis’ evaluation report and testimony were not trustworthy and should not be used as a basis for requiring the Respondent to submit to chemical dependency/substance abuse evaluation.” Were the Sakis report the only basis for the issuance of the September investigative order and therefore the foundation upon which the disciplinary subcommittees based their decisions, we might be compelled to reverse.

Again, however, as the disciplinary subcommittees indicated in their decisions, the record demonstrates that respondent herself reported her concerns about her alcohol consumption to MHPRC, without being referred by the Department or as a result of a disciplinary order. This, we conclude, was a reasonable basis for the Department to order respondent to submit to an

examination. The disciplinary subcommittees indicated that “upon receipt of respondent’s closed file from MHPRC, the Bureau of Health Services within the Department had legitimate and reasonable concerns regarding respondent’s ability to practice skillfully and safely, due to allegations of possible substance abuse/chemical dependency.” Therefore, we conclude, the Department properly issued the September investigative order to determine if the allegation of substance abuse/chemical dependency could be substantiated by an appropriate health professional, pursuant to MCL 333.16236(1) and there was a reasonable basis for that order.

We note that the disciplinary subcommittees acknowledged respondent’s concern regarding inaccuracies in the Sakis report, and considered two subsequent evaluations by different doctors. We again observe that the disciplinary subcommittees were not convinced that respondent had a substance abuse problem, but properly noted that the issue was whether respondent deliberately failed to comply with the ordered substance abuse evaluation. We conclude that it is apparent from the record that the Department and the disciplinary subcommittees sufficiently complied with the requirements of 1999 AC, R 338.1630(4).

VI. Stigma

Respondent argues that publication of her name following the administrative disciplinary action of six months’ probation pursuant to MCL 333.16241 creates an “improper stigma” against her. We fail to see how publication of respondent’s name indicating that the nature of the complaint was for a “technical violation of the Michigan Public Health Code” in any way improperly stigmatized her when she, as determined by petitioners, acted contrary to MCL 333.16236(1) and MCL 333.16224(1), in violation of MCL 333.16221(g).

VII. The Fourth Amendment

Respondent asserts that the September investigative order requiring her to undergo a substance abuse evaluation implicates her Fourth Amendment right to be free from unreasonable searches and seizures. Again, while the interim monitoring agreement respondent refused to sign required her to submit to alcohol-screen tests, breathalyzer tests, and urine drug screens, the order in question merely required her to undergo a substance abuse evaluation.

VIII. Conclusion

After reviewing the decisions of the disciplinary subcommittees, we believe that they were authorized by law and supported by competent, material, and substantial evidence on the whole record, *Cogan, supra* at 469, and we affirm.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Pat M. Donofrio