

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. H.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 396 C.D. 2010
	:	
Commonwealth of Pennsylvania,	:	Submitted: August 12, 2011
Bureau of Professional and Occupational:	:	
Affairs, State Board of Social Workers,	:	
Marriage and Family Therapists and	:	
Professional Counselors,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: November 30, 2011

M.H. petitions for review of the Final Adjudication and Order as Amended on Remand (Amended Adjudication) of the Bureau of Professional and Occupational Affairs (BPOA), State Board of Social Workers, Marriage and Family Therapists and Professional Counselors (Board). In the Amended Adjudication, the Board sets forth its rationale for the conditions of M.H.'s probation on the stayed three-year suspension of her license to practice clinical social work. M.H. argues that: (1) the Board abused its discretion by imposing onerous conditions of probation that do not fit M.H.'s circumstances, which do not

warrant probation; (2) the Board failed to provide a rationale or additional findings of fact to justify the conditions it placed on M.H.’s probation, in violation of this Court’s Order in M.H. v. Department of State, Bureau of Professional and Occupational Affairs, State Board of Social Workers, Marriage and Family Therapists and Professional Counselors (M.H. I), No. 2036 C.D. 2008, 2010 Pa. Commw. Unpub. LEXIS 366, (Pa. Cmwlth. 2010); and (3) the conditions of probation imposed by the Board are arbitrary and capricious because the Board had the option of simply directing M.H. to submit to the care of a Board-designated physician.

In M.H. I, this Court held that the Board did not err in holding that M.H. violated Section 11(a)(8) of the Social Workers, Marriage and Family Therapists and Professional Counselors Act (Act)¹ by being “unable to practice the profession with reasonable skill and safety to patients by reason of illness, addiction to drugs or alcohol, or mental impairment.” (Final Adjudication, Conclusions of Law ¶ 4.) This Court, however, held that the Board provided insufficient rationale for the

¹ Act of July 9, 1987, P.L. 220, as amended, 63 P.S. § 1911(a)(8). Section 11(a)(8) of the Act provides, in pertinent part:

(a) Grounds.—The board may refuse, suspend, revoke, limit or restrict a license or reprimand a licensee for any of the following:

....

(8) Being unable to practice with reasonable skill and safety by reason of illness, drunkenness, excessive use of drugs, narcotics, chemicals or any other type of material, or as a result of any mental or physical condition. In enforcing this paragraph, the board shall, upon probable cause, have authority to compel a licensee to submit to a mental or physical examination by a physician approved by the board.

Id.

conditions of M.H.’s probation to allow us to determine whether the Board abused its discretion in imposing those conditions. We, therefore, vacated “that part of the Board’s Order imposing the conditions of M.H.’s probation, and remand[ed] this matter to the Board to either provide a rationale for these conditions, or, if it [could] not do so, craft conditions of probation that more closely fit M.H.’s circumstances.” M.H. I, at *25. On remand, the Board imposed substantially the same conditions of probation as it did in its original Final Adjudication; however, the Amended Adjudication contains discussion explaining the Board’s reasoning in imposing these conditions.

In its Final Adjudication and Amended Adjudication, the Board found that:

34. [M.H.]’s medical records indicate, *inter alia*, that she suffers from major depression, with a history of past suicide attempts.

35. [M.H.]’s medical records also reflect a history that includes but is not limited to alcohol abuse, bingeing and purging, disabling depressive episodes, and self-mutilation.

.....
38. [M.H.]’s current diagnosis is major depressive disorder, borderline personality disorder and histrionic traits.

.....
40. Dr. [Pogos H.] Voskanian[, M.D., the Board’s expert who examined M.H.] opines that [M.H.] is fit for duty and can practice her profession safely as long as she continues treatment and monitoring by a psychiatrist and is treated for her “self-medicating” with alcohol.

(Amended Adjudication, Findings of Fact (FOF) ¶¶ 34-35, 38, 40 (citations omitted).) As in the Final Adjudication, the Board concluded that M.H. “is unable to practice the profession with reasonable skill and safety to patients by reason of illness, addiction to drugs or alcohol, or mental impairment.” (Amended Adjudication, Conclusions of Law ¶ 4.) On the basis of this violation, the Board

ordered that M.H.'s license to practice clinical social work be suspended for three years, with that suspension immediately stayed in favor of probation. The conditions of this probation require, among other things, that: M.H. must, upon request of the Professional Health Monitoring Program (PHMP), respond to requests for reports or records at her own expense; receive prior written permission from PHMP before being absent from Pennsylvania for more than 20 days; cease or limit her practice if directed to do so by her PHMP case manager; pursue treatment from a PHMP-approved healthcare provider (provider) and comply with the provider's treatment recommendations; attend support group meetings as recommended by her PHMP case manager or her provider and provide written verification of attendance; abstain from the use of alcohol, controlled substances, and mind- or mood-altering drugs except as prescribed, and notify PHMP within 5 days of any such prescriptions; practice only under monitoring as required by the PHMP; supply the Board's Order to any employer or prospective employer; submit to random observed body fluid toxicology screenings (ROBS) at her own expense; and provide any waivers or releases necessary for PHMP to verify M.H.'s compliance with the terms of her probation. (Amended Order ¶¶ 1-32).

Before this Court, M.H. argues that: (1) the Board abused its discretion by imposing onerous conditions of probation that do not fit M.H.'s circumstances, which do not warrant probation; (2) the Board failed to provide a rationale or additional findings of fact to justify the conditions it placed on M.H.'s probation, in violation of this Court's Order in M.H. I; and (3) the conditions of probation imposed by the Board are arbitrary and capricious because the Board had the

option of simply directing M.H. to submit to the care of a Board-designated physician.

We hold that the Board abused its discretion in setting the terms of M.H.'s probation. As we noted in M.H. I, the Pennsylvania Supreme Court stated in Slawek v. State Board of Medical Education and Licensure, 526 Pa. 316, 586 A.2d 362 (1991) that:

the proper review of the agency's action, assuming that it is not defective under the self-explanatory requirements of the Administrative Agency Law, is *not* whether its order was reasonable, but whether it was made in "accordance with law" (i.e., whether it was made in bad faith, and whether it was fraudulent or capricious). As the Blumenschein[v. Pittsburgh Housing Authority], 379 Pa. 566, 109 A.2d 331 (1954),] court put it, a reviewing court may interfere in an agency decision only when "there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions."

Id. at 322, 586 A.2d at 365 (emphasis in original) (quoting Blumenschein, 379 Pa. at 573, 109 A.2d at 335) (footnotes omitted). However, this Court is also "required to correct abuses of discretion in [the] manner or degree of penalties imposed." Ake v. Bureau of Professional and Occupational Affairs, State Board of Accountancy, 974 A.2d 514, 519 (Pa. Cmwlth. 2009) (quoting Foose v. State Board of Vehicle Manufacturers, Dealers, and Salespersons, 578 A.2d 1355, 1359 (Pa. Cmwlth. 1990)). Under the unique circumstances of this case, and based on the rationale the Board provided in response to this Court's Order in M.H. I, we must hold that the Board, in imposing probationary conditions that are so far

removed from the circumstances of M.H.'s violation² of the Act, acted with a manifest and flagrant abuse of discretion.

On remand, the Board did not substantially change the conditions it imposed on M.H.'s probation but, instead, provided a rationale for those conditions such that this Court can perform appellate review of those conditions to determine whether the Board abused its discretion or was arbitrary or capricious in imposing them.

In its Amended Adjudication the Board explained that, given that M.H. has been diagnosed “with major depressive disorder, borderline personality disorder and histrionic traits” and Dr. Voskanian opined that M.H. should be monitored for “mental impairment and alcohol abuse,” the Board “believes that the conditions of probation set forth in the following order are necessary to permit [PHMP] to effectively monitor [M.H.] while she continues to safely practice her profession.” (Amended Adjudication at 18.) The Board admits that the terms of M.H.'s probation are standard “boilerplate” terms used by various licensing boards in their probationary orders, but it asserts that these terms are necessary to ensure that M.H. cooperates with the PHMP so that she can be effectively monitored during her probation. (Amended Adjudication at 18.) However, the Board's own expert, Dr. Voskanian, opined that M.H. was “fit for duty” at the time of his evaluation of

² Because this Court held in M.H. I that M.H. violated Section 11(a)(8) of the Act by being unfit to practice by reason of mental illness, we cannot now revisit this determination per the doctrine of law of the case. Ario v. Reliance Insurance Co., 602 Pa. 490, 504, 980 A.2d 588, 596 (2009). However, on further reflection and for the reasons discussed below, we very seriously question whether this holding in M.H. I was correct.

her. (Dr. Voskanian’s Report at 42.) The Board, itself, found that M.H. “can safely practice as a clinical social worker so long as she continues in therapy and is monitored by a psychiatrist.” (Amended Adjudication at 17.) Additionally, the Board found that M.H. was treating with a psychiatrist prior to the institution of its investigation and that she was continuing to treat with that psychiatrist. (FOF ¶ 39; Amended Adjudication at 16.) In spite of this finding, however, the Board did not condition M.H.’s probation on the continuation of her treatment with her current treating psychiatrist. Rather, the Board’s Amended Order states that M.H. must receive evaluation and treatment from an unspecified PHMP-approved provider, raising the possibility of disrupting M.H.’s current therapeutic relationship with her treating psychiatrist. The Board offers no rationale as to why M.H. should have to seek treatment from a psychiatrist other than the one she chose herself, in recognition of her own problems, prior to the Board’s investigation and with whom she continued to treat. The Board neither makes an argument, nor does the record reflect, that the psychiatric care that M.H. is receiving is in any way inadequate.

Similarly, the Board conditions M.H.’s probation on her attendance at an unspecified support group; abstention from alcohol and mind- or mood-altering drugs, other than those legitimately prescribed; and submission, at her own expense, to ROBS to ensure such abstention. The Board found that M.H. suffers from “major depressive disorder, borderline personality disorder and histrionic traits.” (FOF ¶ 38.) While the Board noted that its expert opined that M.H. needed to stop “self-medicating” her problems with alcohol, it did not find that she suffered from alcoholism, that she had consumed or abused illegal drugs, or that her use of alcohol had impacted the practice of her profession in any way. Given

these facts, there appears to be no justification for the Board's probationary conditions regarding drugs and alcohol. The Board argues that ROBS are necessary to ensure that M.H. is taking her prescribed psychiatric medications. (Amended Adjudication at 19.) However, the Board's Amended Order, which states that the ROBS are for the purpose of "detection of substances *prohibited* under this Order as directed by the PHMP," does not support this rationale. (Amended Order ¶ 28 (emphasis added).)

This Court acknowledged, in M.H. I, that M.H. was discharged from an employer due to issues with absenteeism and instability in her personal behavior. M.H. I, at *17-*18. However, this case must be viewed in its full context. As discussed in M.H. I, the Board instigated its investigation based on a complaint regarding M.H.'s handling of an incident involving one of her clients and the client's family. M.H. I at *5. The Board ultimately concluded that M.H. committed no professional misconduct with regard to this incident. M.H. I at *7. However, in the course of the investigation into this incident, M.H. turned her medical records over to the BPOA's Bureau of Enforcement and Investigation. On the basis of M.H.'s psychiatric treatment, the Board required M.H. to undergo a mental/physical evaluation with Dr. Voskanian. It is largely on the basis of this evaluation that the Board based its charge of unfitness to practice due to mental illness. The Board never found that M.H.'s mental illness directly impacted the treatment of a client in any way. The Board, as discussed above, did find that M.H. was already seeking help for her mental illness prior to the Board instigating its investigation. However, the Board ordered M.H. to adhere, instead, to an extremely restrictive, one-size-fits-all set of conditions, many of which are not

even tangentially related to M.H.'s mental illness. This Court remanded this matter to the Board in the hopes that the Board would either provide a comprehensible rationale for its conditions or, alternately, craft probationary conditions more suited to the unique circumstances of this case. In response, however, the Board offered only an extremely general and non-specific set of reasons for the conditions, which could have been applied to almost any licensed professional. In M.H. I, this Court stated that "this Court . . . recognizes that it lacks the expertise to craft an administrable framework of probation conditions in a case such as this." M.H. I at *23. However, by failing to provide us with an adequate rationale for the admittedly boilerplate probationary conditions it imposed on M.H., the Board has forced this Court to conclude that the Board manifestly abused its discretion and acted capriciously in imposing these conditions. Because there are no probationary conditions that are not a manifest abuse of discretion, we are constrained to reverse the Board's Final Adjudication and Order as Amended on Remand.

RENÉE COHN JUBELIRER, Judge

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	:	
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ORDER

NOW, November 30, 2011, the Final Adjudication and Order as Amended on Remand of the Bureau of Professional and Occupational Affairs, State Board of Social Workers, Marriage and Family Therapists and Professional Counselors in the above-captioned matter is hereby **REVERSED**.

RENÉE COHN JUBELIRER, Judge