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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2018

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Alabama State Personnel Board

v.

Sherryl Palmore

Appeal from Walker Circuit Court
(CV-15-900137)

PITTMAN, Judge.

The Alabama State Personnel Board ("the Board") appeals from a judgment of the Walker Circuit Court ("the circuit court") reversing an order of the Board that had upheld the dismissal of Sherryl Palmore from her employment with the

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Alabama Department of Public Health ("DPH"). We reverse and remand.

Facts and Procedural History

In September 2014, DPH sent Palmore, who was employed by DPH as a staff nurse in Walker County, a "Notice of Pretermination Conference" notifying her that her supervisors had recommended that she be dismissed from her employment with DPH because, her supervisors said, on July 7, 2014, she had not taken the blood pressure of a patient ("the patient") or calculated the patient's body mass index ("BMI") before giving the patient an intramuscular injection ("the injection"); because, her supervisors said, she had not properly recorded the patient's blood pressure and BMI in the patient's chart when she saw the patient; and because, her supervisors said, she had subsequently entered false blood-pressure and BMI information in the patient's chart. On October 8, 2014, DPH held a pretermination conference at which Palmore was afforded the opportunity to respond to the charges and to present evidence in opposition to the charges. On October 15, 2014, DPH sent Palmore a letter notifying her that her employment as

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a staff nurse with DPH would be terminated at the close of business on October 16, 2014.

Thereafter, Palmore timely appealed to the Board. Her appeal was assigned to an administrative-law judge ("the ALJ"), who conducted a de novo hearing. On January 1, 2015, the ALJ sent the Board a recommended order in which he recommended that the Board uphold Palmore's dismissal. In his recommended order, the ALJ made the following findings of fact:

"Having reviewed the documentary evidence, having heard the witnesses' testimony, having observed the witnesses' demeanor, and assessed their credibility, the undersigned finds the greater weight of the evidence supports the following findings of fact:

". . . .

"C. Facts Forming the Basis of Dismissal

"Palmore has been a Registered Nurse ('RN') since 1999. Palmore had prior experience working as a Staff Nurse at Cooper Green Hospital (1994-1999); Birmingham Veterans Administration Hospital (1991-1993); and Baptist Medical Center-Princeton (1990-1991).

"Palmore taught nursing classes for Fortis, a proprietary School of Nursing in 2014, during her employment at DPH Walker County. Palmore also taught nursing at Bevill State Community College ('Bevill') during 2011, while employed by DPH at the [Walker County Health Department] Clinic [('the Clinic')].

"Palmore's lateral transfer from case management to providing direct patient care at the Clinic was accompanied by training and orientation in the health care modules utilized by the Clinic. From October 2013 until February 2014, Palmore had written protocol materials and preceptor oversight in transitioning into her clinical role. Palmore insists that her training was inadequate and that her guidance by preceptors was compromised by the retirements of two of her preceptors. Her third preceptor, Karla Legg ('Legg'), was present at the Clinic from the time of Palmore's clinical activities in October 2013 until the termination of her employment in [October] 2014. Legg provided direct preceptor guidance to Palmore from March 2014 until July 2014. DPH provided training and then retraining to Palmore when she expressed her discomfort over the training DPH had given her. Nurse Educator Marilyn Knight and Dr. John Hankins ('Dr. Hankins') responded to Parmore by having her retrained in the extant modules.

"Dr. Hankins testified that an RN, by virtue of the training required to achieve that designation, should be competent to follow protocols and to recognize the critical importance of accurate documentation in a patient's chart.

"Considering her lengthy experience as an RN and her teaching of nursing at Fortis and Bevill, one could expect that Palmore could accurately take vital signs and properly record them in a patient's chart. With written protocols to guide her activities at the Clinic, one could expect that a nurse with Palmore's experience could deliver nursing services consistent with established protocols.

"Palmore failed to follow the DPH written protocols in providing services to patients. When Palmore failed to give hemoglobin tests to five [Women Infants and Children Program ('WIC')]

patients at the Clinic in March 2014, Dr. Hankins ordered that Palmore be retrained in various modules. Palmore acknowledged her mistake with the WIC patients. Palmore said she could not remember all the protocols. Palmore was removed from providing clinical services to WIC patients in March 2014. Palmore received training in providing WIC services to patients by LeAnn Colvin, a Registered Dietician at the Clinic. Palmore insists that she was not 'certified' in the WIC Program.

"On July 7, 2014, Palmore gave a birth control shot of Depo-Provera to a Clinic patient. Palmore did not follow the Family Planning Clinic Protocol in that she gave the shot without recording a blood pressure and BMI in the patient's chart as required. The patient, with her Clinic chart, next went to a Clinic Social Worker, Melanie Aldeen ('Aldeen'). Aldeen determined from talking to the patient and looking at the chart that Palmore had not taken the patient's blood pressure. Ramona Hawkins, CRNP and Palmore's supervisor, confirmed with the patient on July 8, 2014, that Palmore had not taken the patient's blood pressure during her visit to the Clinic on July 7, 2014.

"At some point after the patient left the Clinic, Palmore retrieved the patient's chart and recorded a blood pressure and a BMI. Palmore insists she had taken the blood pressure and had recorded it on a 'sticky note' instead of in the patient's chart. Palmore never provided the 'sticky note' when questioned by her supervisors and did not provide it during her pre-termination hearing. Palmore says they never asked for it. Palmore, at this hearing, offered Hearing Exhibit 2 which is a copy of a page from Palmore's Daily Patient Log. The Daily Patient Log was a document kept by Palmore for her personal use and was not a DPH record kept in the normal course of business. Line number 8 on page 1 is a reference to the patient to whom Palmore gave the shot on July 7, 2014. Interestingly, the

purported 'sticky note' has a transposed and inaccurate number for the patient's chart and appears in two places. There are no similar entries in Hearing Exhibit 2. The evidence does not reflect when the note was put in Palmore's Daily Patient Log. Palmore did make a progress note in the patient's chart, which established that Palmore had the chart available to properly document the blood pressure and the BMI if she had taken them. With the chart clearly present during the time of the exam, there would have been no need for a 'sticky note.' When Kathi Bailey ('Bailey'), CRNP, saw the patient's chart on July 7, 2014, there was no blood pressure or BMI recorded in it. Palmore told Bailey she had written the information in the patient's chart after the patient had left the Clinic. Palmore did not offer to show Bailey the note where Palmore said she had written the information. The proper procedure for supplying the missing information would have been for Palmore to record a 'late entry' in the patient's chart and acknowledge the late entry or to do an 'addendum' explaining the matter.

"Palmore had been counseled by ... Legg ... on numerous (twenty) occasions about her failure to properly document information directly in patient charts and other protocol violations. Failure to properly document patient charts is a serious and dangerous practice. Other health care providers rely on a patient's chart to decide, plan, and deliver safe and effective health care services. Proper and accurate charting is critical. Dr. Hankins testified that such charting failures can result in harm to a patient up to and including death. Dr. Hankins testified that Palmore 'exhibited a consistent pattern of poor nursing practices.' Dr. Hankins said an RN should, by virtue of being an RN, be able to properly chart, document and follow written protocols. Dr. Hankins has reported Palmore to the State Board of Nursing indicating Palmore falsified information in a patient's chart and that 'he

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considered Palmore a danger to patients and that she was an unsafe nurse for not following protocols.'" "

(Footnotes omitted.)

Palmore submitted exceptions to the ALJ's recommended order; DPH submitted a response. Palmore also requested and was granted an opportunity to present oral argument to the Board. On February 18, 2015, the Board issued an order incorporating the ALJ's findings of fact and conclusions of law and upholding Palmore's dismissal.

Thereafter, Palmore timely filed a notice of appeal and cost bond with the Board. On April 10, 2015, Palmore petitioned the circuit court for judicial review of the Board's decision. The Board transmitted the record on appeal to the circuit court and answered Palmore's petition. In December 2016, the circuit court entered an order establishing a schedule for the parties to submit briefs and set the final hearing for February 21, 2017. Thereafter, the parties submitted their briefs. On February 21, 2017, the circuit court held a final hearing at which the parties were afforded an opportunity to present oral argument. On September 19, 2017, the circuit court entered a final judgment in which it found that the Board's decision to uphold the termination of

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Palmore's employment was not supported by substantial evidence and reversed the Board's decision. The circuit court stated that "the only individuals who had first-hand knowledge as to whether Palmore [had] ... assessed the [patient's] blood pressure and body mass index prior to administering a contraceptive medication ... are Palmore and the ... patient"; that "Palmore [had] testified ... that she [had taken] the patient's blood pressure and assessed the patient's BMI prior to giving the shot"; that "[t]he only other witness with first-hand knowledge regarding this matter who could provide non-hearsay testimony regarding alleged misconduct was the ... patient" who "did not testify"; and "[t]hus Palmore's testimony is the only non-hearsay evidence regarding what, in fact, took place regarding the assessment conducted prior to administering the shot." The circuit court further stated that the issue whether Palmore had added false information to the patient's chart "turns on competent and legal evidence of whether Palmore did, in fact, assess the patient's blood pressure and BMI prior to administering the shot" and that "the only non-hearsay evidence regarding these very serious allegations that impact on [Palmore's] professional Registered

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Nurse license ... is Palmore's testimony that the information that she placed in the chart came from her actual assessment of the patient prior to administering the medication." Therefore, the circuit court concluded, "the Board based its finding that Palmore [had] not assess[ed] [the patient] on unsworn testimony from [the patient] -- not what [the patient had] said, but what Aldeen says [the patient] said," and, "[a]ccordingly, the Board's order discharging Palmore [was] due to be ... set aside because it improperly relie[d] on hearsay testimony to establish the wrongful conduct accused -- that Palmore purportedly failed to properly assess the patient's [blood pressure] and BMI and falsified this information in [the patient's] chart." After the circuit court entered its judgment, the Board timely appealed to this court.

Standard of Review

"The standard of appellate review to be applied by the circuit courts and by this court in reviewing the decisions of administrative agencies is the same. See Alabama Dep't of Youth Servs. v. State Pers. Bd., 7 So. 3d 380, 384 (Ala. Civ. App. 2008). That prevailing standard is deferential toward the decision of the agency:

"Judicial review of an agency's administrative decision is limited to determining whether the decision is supported by substantial evidence, whether

the agency's actions were reasonable, and whether its actions were within its statutory and constitutional powers Judicial review is also limited by the presumption of correctness which attaches to a decision by an administrative agency.'

"Alabama Medicaid Agency v. Peoples, 549 So. 2d 504, 506 (Ala. Civ. App. 1989). Also, the Alabama Administrative Procedure Act provides that,

''[e]xcept where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute.'

"Ala. Code 1975, § 41-22-20(k). 'Neither this court nor the trial court may substitute its judgment for that of the administrative agency.' Alabama Renal Stone Inst., Inc. v. Alabama Statewide Health Coordinating Council, 628 So. 2d 821, 823 (Ala. Civ. App. 1993). 'This holds true even in cases where the testimony is generalized, the evidence is meager, and reasonable minds might differ as to the correct result.' Health Care Auth. of Huntsville v. State Health Planning Agency, 549 So. 2d 973, 975 (Ala. Civ. App. 1989).

"Further, this court does not apply a presumption of correctness to a circuit court's judgment entered on review of an administrative agency's decision 'because the circuit court is in no better position to review an agency's decision than this court.' Alabama Bd. of Nursing v. Peterson, 976 So. 2d 1028, 1033 (Ala. Civ. App. 2007). Finally, in order for the Board's decision to uphold the termination of an employee to warrant affirmance, that decision would have to be supported

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by 'substantial evidence,' which in an administrative context is 'relevant evidence that a reasonable mind would view as sufficient to support the determination.' Ex parte Personnel Bd. of Jefferson County, 648 So. 2d 593, 594 (Ala. Civ. App. 1994)."

Alabama State Pers. Bd. v. Dueitt, 50 So. 3d 480, 482 (Ala. Civ. App. 2010).

Analysis

The Board argues that the circuit court erred in concluding that the Board's decision was not supported by substantial evidence. We agree.

"[A]dministrative boards are not restricted to a consideration of evidence which would be legal in a court of law and may consider evidence of probative force even though it may be hearsay," Estes v. Board of Funeral Serv., 409 So. 2d 803, 804 (Ala. 1982),¹ although hearsay evidence "'cannot provide the sole basis for an administrative ruling,'" Alabama State Pers. Bd. v. Miller, 66 So. 3d 757, 763 (Ala. Civ. App.

¹Palmore asks this court to overrule Estes based on her contention that it conflicts with § 41-22-13, Ala. Code 1975, which sets forth the rules regarding evidence in administrative contested cases. However, Estes is a decision of our supreme court; this court is bound by the decisions of our supreme court, not vice versa. § 12-3-16, Ala. Code 1975.

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2010) (quoting State Pers. Bd. v. State Dep't of Mental Health & Mental Retardation, 694 So. 2d 1367, 1373 (Ala. Civ. App. 1996)). In effect, the circuit court erroneously determined that the Board's decision had to be supported by eyewitness testimony in the form of the patient's testimony regarding what happened when Palmore saw the patient. The circuit court was correct insofar as it determined that the only eyewitnesses to what occurred while Palmore saw the patient were Palmore and the patient. However, the circuit court erred in determining that only testimony by the patient regarding what had occurred when Palmore saw the patient would be legally sufficient to support the ALJ's findings that Palmore had not taken the patient's blood pressure and had not calculated the patient's BMI before giving the patient the injection. "'Circumstantial evidence is not inferior or deficient evidence.'" Hill v. State, 651 So. 2d 1128, 1130 (Ala. Crim. App. 1994) (quoting Holder v. State, 584 So. 2d 872, 875 (Ala. Crim. App. 1991)). ""Circumstantial evidence is entitled to the same weight as direct evidence, provided it points to the guilt of the accused."" Id. (quoting Holder,

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584 So. 2d at 876, quoting in turn Casey v. State, 401 So. 2d 330, 331 (Ala. Crim. App. 1981)).

The following circumstantial evidence tends to prove that Palmore did not take the patient's blood pressure and did not calculate the patient's BMI before giving the injection. Melanie Aldeen, a social worker at the Walker County Health Department Clinic where Palmore treated the patient, testified that, after Palmore had seen the patient, Palmore had brought the patient to Aldeen, that Palmore had handed the patient's chart to Aldeen, that Aldeen had looked at the patient's chart, and that no blood-pressure reading or BMI calculation for that date had been recorded in the patient's chart. That testimony constitutes circumstantial evidence that not only tends to prove that Palmore did not take the patient's blood pressure and did not calculate the patient's BMI but also impeaches Palmore's testimony that she had not entered the patient's blood-pressure reading and BMI in the patient's chart during the patient's visit because, according to Palmore, she had not had the patient's chart then. Palmore admitted that she had not entered a blood-pressure reading or BMI calculation in the patient's chart until after the patient

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had left, yet she did not comply with the protocol requiring that such entries either be made as a late entry acknowledging that it had not been entered contemporaneously with the patient's visit or that the entry be accompanied by an addendum explaining why the entry had not been made until after the patient had left. Palmore's failure to follow that protocol when she entered a blood-pressure reading and a BMI in the patient's chart after the patient had left constitutes circumstantial evidence tending to prove not only that Palmore did not take the patient's blood pressure and did not calculate the patient's BMI but also that Palmore sought to conceal the fact that she had not taken the patient's blood pressure or calculated the patient's BMI. Palmore's entry of a progress note in the patient's chart when she saw the patient without entering a blood-pressure reading and BMI calculation not only constitutes circumstantial evidence tending to prove that Palmore did not take the patient's blood pressure and did not calculate the patient's BMI but also constitutes circumstantial evidence impeaching Palmore's testimony that she had not entered a blood-pressure reading and BMI calculation in the patient's chart while she was

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seeing the patient because, according to Palmore, she did not have the patient's chart then. Palmore's failure to produce the sticky note she claimed to have used to record the patient's blood-pressure reading and BMI calculation when her supervisors confronted her about her failure to take the patient's blood pressure and to calculate the patient's BMI is circumstantial evidence not only tending to prove that Palmore did not take the patient's blood pressure and did not calculate the patient's BMI but also tending to impeach Palmore's testimony that she had recorded the patient's blood-pressure reading and BMI on a sticky note when she saw the patient. By tending to prove that Palmore had not taken the patient's blood pressure or calculated the patient's BMI, the forgoing circumstantial evidence also tends to prove that the blood-pressure reading and BMI calculation Palmore entered in the patient's chart after the patient had left were false.

In addition to the circumstantial evidence recited above, the ALJ had the opportunity to observe Palmore while she testified and to evaluate her credibility based on her demeanor while testifying, an opportunity that was not

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available to the circuit court and is not available to this court.

"As the trier of fact in this matter, the ALJ had 'the advantage of observing the witnesses' demeanor and ha[d] a superior opportunity to assess their credibility, [and, therefore, an appellate court] cannot alter the [ALJ's decision] unless it is so unsupported by the evidence as to be clearly and palpably wrong.'" Ex parte Fann, 810 So. 2d 631, 636 (Ala. 2001) (quoting Ex parte D.W.W., 717 So. 2d 793, 795 (Ala. 1998)).

""[The appellate court is not] allowed to reweigh the evidence in this case. This [issue] ... turns on the [trier of fact's] perception of the evidence. The [trier of fact] is in the better position to evaluate the credibility of the witnesses ... and the [trier of fact] is in the better position to consider all of the evidence, as well as the many inferences that may be drawn from that evidence...."

"Ex parte Patronas, 693 So. 2d 473, 475 (Ala. 1997) (quoting Ex parte Bryowsky, 676 So. 2d 1322, 1326 (Ala. 1996)). The ALJ's findings are entitled to deference, and neither the circuit court nor this court is authorized to substitute its judgment as to the findings of the ALJ on this issue. See § 41-22-20(k), Ala. Code 1975 ('the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute'); see also Alabama Bd. of Nursing v. Williams, 941 So. 2d [1990] at 999 [(Ala. Civ. App. 2005)] ('In no event is a reviewing court "authorized to reweigh the evidence or to substitute its decisions as to the weight and credibility of the evidence for those of the agency.'" (quoting Ex parte Williamson, 907 So. 2d 407, 416-17 (Ala. 2004)))."

Alabama Bd. of Exam'rs in Psychology v. Hamilton, 150 So. 3d 1085, 1094 (Ala. Civ. App. 2013). The ALJ implicitly found that Palmore's testimony was not credible, and neither the circuit court nor this court can substitute its judgment for that of the ALJ on that issue.

"Rule 670-X-5-.08(7) [, Ala. Admin. Code (Pers. Bd.),]^[2] prescribes the order of presentation of evidence in a hearing on charges against an employee. The rule does not require the employing agency to call any particular witness; it merely

²Rule 670-X-5-.08(7) provides:

"Procedure. A hearing before a Hearing Officer shall be conducted in accordance with the following order:

"(a) Reading of the dismissal action or other charges against the employee and of other pertinent information from the employee's record. The record shall be available to all parties for reference in connection with the hearing.

"(b) Presentation of charges against the employee, including testimony of witnesses and other evidence. The employee or his counsel and the Hearing Officer may examine the witnesses.

"(c) Presentation of the employee's answer to the charges, including testimony of his witnesses. The parties and the Hearing Officer may also examine these witnesses.

"(d) Summation by the parties, if desired by them."

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requires that the employing agency, as the prosecuting entity, present its evidence to prove the charges against the employee first, before the employee must present any evidence he or she may have to answer those charges. If the employing agency chooses not to call a particular witness, the employee has the opportunity to do so, and the employee's failure to take steps to call that witness is a waiver of the right to confront or cross-examine a witness in an administrative setting, just as it would be in any other civil setting."

Alabama State Pers. Bd. v. Miller, 66 So. 2d at 762-63. Thus, DPH was not obligated to call the patient as a witness in order to prove its case against Palmore. Conversely, Palmore had the opportunity to call the patient as a witness if she wanted to confront the patient regarding what the patient had told Aldeen, and she did not do so.

Accordingly, we conclude that, even without considering the hearsay testimony regarding what the patient had told Aldeen and Ramona Hawkins, Palmore's supervisor, the ALJ had before him "'substantial evidence,' which in an administrative context is 'relevant evidence that a reasonable mind would view as sufficient to support the determination,'" Alabama State Pers. Bd. v. Dueitt, 50 So. 3d at 482 (quoting Ex parte Personnel Bd. of Jefferson Cty., 648 So. 2d 593, 594 (Ala. Civ. App. 1994)), indicating that Palmore had not taken the

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patient's blood pressure, that Palmore had not calculated the patient's BMI, and that Palmore had entered a false blood-pressure reading and a false BMI calculation in the patient's chart after the patient had left. Therefore, we reverse the judgment of the circuit court and remand the cause for the entry of a judgment affirming the Board's decision.

REVERSED AND REMANDED.

Thompson, P.J., and Thomas, Moore, and Donaldson, JJ.,
concur.