STATE OF MICHIGAN

COURT OF APPEALS

HAROLD D. ESLER, PH.D.,

Plaintiff-Appellant,

v

DEPARTMENT OF CONSUMER & INDUSTRY SERVICES,

Defendant-Appellee.

UNPUBLISHED
February 15, 2002

No. 226347
Dept of Consumer & Industry Services
Case No. 97-000283

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Plaintiff's license to practice psychology, which was revoked in 1981, was reinstated on a limited basis in 1995, the restrictions modified in December of that year. In 1997, plaintiff requested a reclassification of his license to a full, unrestricted one. This request was denied, but his restrictions were again modified. Plaintiff appealed this decision and this Court remanded the case because the reasoning behind the Michigan Board of Psychology's disciplinary subcommittee's decision was insufficient for review. On March 9, 2000, the disciplinary subcommittee issued its findings of fact and conclusions of law and on March 16, 2000, entered its final order affirming its 1997 decision. Plaintiff appeals by leave. We now affirm.

Plaintiff argues that the final order in this case is void because it was issued by defendant and not by the disciplinary subcommittee. We disagree. An order of an administrative agency may be set aside if it is in excess of the statutory authority or jurisdiction of the agency, where substantial rights of the petitioner have been prejudiced. MCL 24.306(b).

The disciplinary subcommittee discussed this Court's remand order at its November 11, 1999, meeting and articulated its reasoning for rejecting in part and accepting in part the administrative law judge's proposed decision. On March 9, 2000, the disciplinary subcommittee met again, adopted the drafted findings of fact and conclusions of law, and affirmed its December 15, 1997, denial of plaintiff's request for reclassification.

The final order in this case was signed by Thomas C. Lindsay, the director of the Bureau of Health Services. The contents of this order mirror the findings of fact and conclusions of law, which the disciplinary subcommittee adopted on March 9, 2000. MCL 333.16141(1) provides that "the department shall furnish office services to the committee, the boards, and the task

forces; … and perform managerial and administrative functions for them." We believe that Lindsay was merely performing an administrative act and that the order was "issued" by the disciplinary subcommittee.

Furthermore, we note that all of the final orders in this case are signed by whomever was the director of health services at the time the order was issued. Above and below this signature on each order is the name of the issuing division. Therefore, we conclude that the final order is not void and there is no need to address the issue of whether the disciplinary subcommittee's findings of fact and conclusions of law could constitute a final order.

Plaintiff next argues that the disciplinary subcommittee's March 9, 2000, findings of fact and conclusions of law ("March 9, 2000 opinion") was prepared in violation of MCL 24.282 and the Due Process Clause because of the participation in drafting of Deborah Chivis, who appeared as an ex officio member of the Michigan Board of Psychology at plaintiff's July 1, 1997, evidentiary hearing. Again, we disagree.

An order of an administrative agency must be set aside if it violates the Constitution or a statute or if the ruling contains a substantial and material error of law. MCL 24.306(1)(a). Issues of statutory interpretation present questions of law subject to de novo review. *Ronan v Michigan Public School Employee Retirement System*, 245 Mich App 645, 648; 629 NW2d 429 (2001).

MCL 24.282 provides, in pertinent part:

> Unless required for disposition of an exparte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case.

One purpose of MCL 24.282 is "to ensure the impartiality of the administrative tribunal acting in an adjudicative capacity." *Hanselman v Killeen*, 112 Mich App 275, 283; 316 NW2d 237 (1982), rev'd on other grounds, 419 Mich 168; 351 NW2d 544 (1984). There is no evidence in the record that Chivis had any contact with the disciplinary subcommittee members before they made their final decision on November 18, 1999, other than mailing record materials. We do not believe that MCL 24.282 was violated because Chivis' involvement occurred after the disciplinary subcommittee reviewed the record, discussed the matter, and voted. At that point, Chivis could not "taint" the disciplinary subcommittee, thereby affecting its decision.

Plaintiff also asserts that Chivis' involvement violated his due process rights. Procedural due process requires that an individual be given notice and an opportunity to be heard in a meaningful manner before being subjected to a deprivation of life, liberty or property. *Mudge v*

Macomb Co, 458 Mich 87, 101; 580 NW2d 845 (1998). Plaintiff contends that he did not receive notice that Chivis was going to be heard by the disciplinary subcommittee nor of her involvement in the drafting of the disciplinary subcommittee's findings of fact and conclusions of law.

Plaintiff cites no authority to support his contention that he was entitled to know about Chivis' involvement in the drafting. A party may not leave it up to this Court to search for authority to support its position. *Mudge, supra* at 105.

Plaintiff further argues that the disciplinary subcommittee's order was not supported by competent, material and substantial evidence. We disagree. An order of an administrative agency must be set aside if substantial rights of the petitioner have been prejudiced because the order is not supported by competent, material and substantial evidence on the whole record. MCL 24.306(1)(d).

A person seeking reclassification of his license bears "the burden of proving, by clear and convincing evidence, that the requirement and conditions for … reclassification have been satisfied." 1996 AACS, R 338.1624(2). A disciplinary subcommittee may reclassify a limited license

> if, after a hearing, it is satisfied that the applicant will practice the profession safely and competently within the area of practice and under conditions stipulated by the disciplinary subcommittee, and should be permitted in the public interest to so practice. [MCL 333.16249.]

Plaintiff's license had originally been revoked based on allegations that he had sexual relations with two patients. At the time of the hearing, plaintiff was employed as a school psychologist, interacting with both male and female children, and testified that he had never received a complaint. Since his license was reinstated in 1995 until the hearing in July 1997, plaintiff had treated only one adult male patient for a period of six months in closed-door sessions. Plaintiff testified that he had received therapy himself and that he kept current in his field by reading. Two witnesses testified on behalf of plaintiff, a friend and his supervising psychologist, both of whom testified that plaintiff would be an asset to the community if allowed to practice on an unrestricted basis.

The disciplinary subcommittee determined that

> the administrative record establishes that petitioner saw only one patient for a six-month period during the time Petitioner's license was limited. The Disciplinary Subcommittee concludes that Petitioner did not treat a sufficient number of patients to allow the Disciplinary Subcommittee to appropriately review his practice or to lift the supervision restriction placed on his license. Thus, the purpose underlying the restriction, to monitor Petitioner's practice to ensure the safety with patients, has not been accomplished.

"Substantial evidence" is the amount of evidence which a reasonable mind would accept as sufficient to support a conclusion. *Buchanan v City Council of Flint*, 231 Mich App 536, 543; 586 NW2d 573 (1998), quoting *In re Payne*, 444 Mich 679, 692-639; 514 NW2d 121 (1994).

Although it is more than a scintilla of evidence it can be substantially less than a preponderance of the evidence. *Id*. We believe that a reasonable mind would accept that the treatment of one adult male patient in private practice, regardless of the success of the treatment or competency demonstrated by plaintiff as a school psychologist, is not an adequate number to conclude that plaintiff's license should be reclassified to a full, unrestricted one, especially given the fact that plaintiff's license was originally revoked for improper conduct with adult female patients in private practice. Therefore, we conclude that the disciplinary subcommittee's decision that "plaintiff failed to present clear and convincing evidence that he met the requirements for reclassification" is supported by competent, material and substantial evidence.

Plaintiff asserts that the disciplinary subcommittee's findings of fact are conclusory and are contrary to the findings of fact made by the administrative law judge. However, plaintiff does not cite any specific findings which he believes were conclusory or contrary. An appellant may not simply announce his position in his brief or assert an error and leave it to the appellate court to discover and rationalize the basis for his claims, or to search for authority to sustain his position. *Mudge, supra* at 104-105.

Plaintiff also asserts that the disciplinary subcommittee ignored Dr. Weiner's testimony and did not explain why her testimony did not constitute clear and convincing evidence that plaintiff met the statutory requirements for reclassification. We believe that the import of the disciplinary subcommittee's reasoning was that even if Dr. Weiner's testimony was wholly believed, one patient is simply not enough to assess plaintiff's competency and therefore, plaintiff did not meet his burden.

Additionally, plaintiff argues that the disciplinary subcommittee's decision was arbitrary, capricious, or an abuse of discretion. Again, we disagree. An order of an administrative agency must be set aside if substantial rights of the petitioner have been prejudiced because the order is arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion. MCL 24.306(1)(e). To be arbitrary is to decide without reference to principles, circumstances or significance; and to be capricious is to be apt to change suddenly. *St Louis v MUSTFA Policy Bd*, 215 Mich App 69, 75; 544 NW2d 705 (1996).

Great deference should be given to an agency's choice between two reasonable differing views as a reflection of the exercise of administrative expertise. *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994). Given the disciplinary subcommittee's expertise in psychology, we hold that its determination that one patient is an inadequate number to afford appropriate review, and therefore plaintiff failed to meet his burden, was not an abuse of discretion.

Plaintiff also contends that the disciplinary subcommittee's statement that it "rejects those findings supporting the Administrative Law Judge's Conclusions of law, as set forth on page 6 of the Proposal for Decision," was not sufficient to meet the requirements of 1996 AACS, R 338.1630(4). While we agree with plaintiff that the disciplinary subcommittee could have been more specific, we believe that its statement substantively complied with the requirements of 1996 AACS, R 338.1630(4). The statement was specific enough to enable this Court to discern the path by which the disciplinary subcommittee reached its decision.

We also reject plaintiff's argument that defendant cannot contend that the reason for its decision was plaintiff failed to produce sufficient evidence to met his burden because this Court, in its remand order, held, "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." *Esler v Dep't of Consumer & Industry Services*, unpublished opinion per curiam of the Court of Appeals, issued June 25, 1999 (Docket No. 209036), p 3. However, this was not the holding of the opinion. This Court held that the disciplinary subcommittee's "failure to include evidentiary support for its decision is cause for a remand" because the record was insufficient for review. *Id*. Any commentary by this Court which indicated that it could not understand the logic of the disciplinary subcommittee's decision was dicta. The very reason for the remand was to provide the disciplinary subcommittee with a chance to explain its decision.

Finally, we do not review plaintiff's last two issues. Plaintiff appears to assert the legal proposition that an administrative agency cannot redefine its prior orders. However, plaintiff cites no authority for this proposition. An appellant may not simply announce his position in his brief or assert an error and leave it to the appellate court to discover and rationalize the basis for his claims, or to search for authority to sustain his position. *Mudge, supra* at 104-105.

Plaintiff also argues that "entry" as is defined in MCR 7.202(3) should be construed to include the date of mailing notice of the final order by the Department of Consumer & Industry Services. However, plaintiff did not raise this issue in his application for leave and therefore, it is precluded from review. MCR 7.205(D)(4); *Marshall v D J Jacobetti Veterans Facility (On Remand)*, 205 Mich App 540, 546; 517 NW2d 855 (1994).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer