STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, Petitioner-Appellee,	UNPUBLISHED March 21, 2017
v	No. 330501 Department of Licensing and Regulatory Affairs
NORRIS JEROME HOWARD, JR, RN, LPN, Respondent-Appellant.	LC No. 15-002765

Before: CAVANAGH, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Respondent appeals as of right the November 12, 2015 order issued by the Disciplinary Subcommittee of the Michigan Board of Nursing (Disciplinary Subcommittee), finding that respondent violated MCL 333.16221(a) (failure to exercise due care) and MCL 333.16221(b)(*i*) (incompetence). The Disciplinary Subcommittee placed respondent on probation for a minimum of one day, not to exceed 60 days. The terms of probation required that respondent: (1) complete a minimum of three hours of continuing education in each of five areas (ethics, disciplinary actions, patient privacy, HIPPA,[1] and respecting professional boundaries), (2) comply with the Public Health Code, MCL 333.1101 *et seq*., and (3) pay all costs incurred in complying with the order and a $250 fine. We affirm.

Judicial review of an order rendered by a disciplinary subcommittee "is limited to that set forth in Const 1963, art 6, § 28[.]" *Dep't of Community Health v Risch*, 274 Mich App 365, 370-371; 733 NW2d 403 (2007). Article 6, § 28 provides as follows:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are

[1] Health Insurance Portability and Accountability Act.

> authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record . . . .

"When reviewing whether an agency's decision was supported by competent, material, and substantial evidence on the whole record, a court must review the entire record and not just the portions supporting the agency's findings." *Risch*, 274 Mich App at 372. " 'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998).

"[I]f the administrative findings of fact and conclusions of law are based primarily on credibility determinations, such findings generally will not be disturbed because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence." *Risch*, 274 Mich App at 372. "A reviewing court may not set aside factual findings supported by the evidence merely because alternative findings could also have been supported by evidence on the record or because the court might have reached a different result." *Id.* at 373.

Respondent argues on appeal that the decision reached by the Disciplinary Subcommittee was not supported substantial evidence. We find that determinations of the Disciplinary Subcommittee that respondent failed to exercise the required duty of care, MCL 333.16221(a), and was incompetent, MCL 333.16221(b)(*i*), were supported by competent, material, and substantial evidence.

Respondent is the division manager for the community re-entry program at the Detroit Central City Community Mental Health Agency (DCMHA). Respondent testified that the DCMHA began a pilot program in 2009 called the "Second Chance Program," which was designed "to work with those consumers that have a history of incarceration" and "mental illness or substance abuse issues." The goal of the program, respondent explained, is to reintegrate these individuals "into the community and learn a skill to become certified peer support specialists." Respondent testified that "KT" was hired as a consumer mentor in the Second Chance Program and placed under his supervision. Respondent testified that KT also received services from the DCMHA.

Several times while he was supervising KT, respondent accessed her agency medical records. He provided explanations for each time he accessed those records, including trying to find out information about KT's boyfriend after the boyfriend had allegedly threated an agency employee, investigating whether certified peer support specialist who counseled KT had improperly billed Medicaid for those sessions, checking on whether KT was taking her medication, and confirming KT's living arrangements.

No one, including respondent, disputed that respondent accessed KT's records. The relevant inquiry, however, is whether that access was proper, within the context of the duties proscribed under subsections 16221(a) and (b)(*i*).

Petitioner's expert, Andrea Bostrom, testified that respondent's accessing KT's records was inappropriate and fell beneath the minimum standard of care for a practicing nurse in

Michigan. Bostrom testified that as KT's employer, not her healthcare provider, respondent should not have accessed KT's electronic record and that respondent had other appropriate ways to get the information he needed, such as by talking to KT directly, contacting the human resources department, speaking with employees who were potentially improperly billing, or contacting Information Technology personnel. Bostrom testified that in an employer-employee relationship, the employer does not have "any business" accessing an employee's electronic record without that employee's authorization. Bostrom further testified that although most hospitals have "very clear rules and regulations" about under what circumstances employees have access to electronic health records, it was respondent's obligation to follow and meet the standard of care if respondent's employer had policies that conflicted with the standard of care.

There was testimony provided in support of respondent's position. For example, when asked if it was appropriate for respondent to access KT's records even though respondent was not providing KT with clinical services, respondent's expert testified that in the circumstances presented, it was. She further testified that any prudent psychiatric nurse would do "a lot of things that[] [are] not written in black and white in terms of job descriptions." And, the DCMHA executives agreed that respondent had acted appropriately and within the parameters of his duties as KT's supervisor. But the standard of review does not call on a reviewing court to assess witness credibility or resolve conflicts in the evidence and render a decision anew. Again, "[a] reviewing court may not set aside factual findings supported by the evidence merely because alternative findings could also have been supported by evidence on the record or because the court might have reached a different result." *Risch*, 274 Mich App at 373.

In light of Bostrom's consistent testimony outlining the various ways in which respondent acted improperly when accessing KT's records, petitioner's decision was supported by competent, material, and substantial evidence on the whole record.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Deborah A. Servitto