STATE OF MICHIGAN

COURT OF APPEALS

BUREAU OF HEALTH PROFESSIONS, Petitioner-Appellee,	UNPUBLISHED November 14, 2013
v	No. 304710 Department of Community Health
CLAUDE C. RODGERS, III, LMSW, Respondent-Appellant.	LC No. 2006-001206

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Respondent appeals as of right the May 3, 2011, order of the Disciplinary Subcommittee of the Bureau of Health Professions' Board of Social Work revoking his license to practice as a licensed master's social worker following an 18-day hearing. Because respondent was not denied due process, the hearing referee did not err by striking respondent's exceptions to the referee's proposal for decision, the failure to adhere to the statutory time requirements does not warrant reversal, and respondent abandoned appellate review of his remaining claims, we affirm.

At the heart of this appeal is respondent's unethical conduct that resulted in the revocation of his license. Petitioner originally filed a complaint dated March 20, 2006, alleging three counts of unethical conduct based on an alleged sexual relationship that respondent had with one of his married clients. At issue, however, is petitioner's "first superseding administrative complaint," filed July 21, 2008, in the State Office of Administrative Hearings and Rules (SOAHR). Petitioner alleged 23 counts asserting violations of the Public Health Code, MCL 333.1101 *et seq.*, including incompetence, lack of good moral character, unprofessional conduct, and numerous rule violations.[1] The factual basis of the complaint focused on respondent's treatment of three clients, referenced by their initials for the sake of confidentiality: "MMC" (an adult female), her teenage son "MC," and MMC's friend, "JR" (an

[1] Specifically, petitioner alleged violations of MCL 333.16221(a), (b)(*i*), (b)(*vi*), (e)(*i*), and (h). Under subsection (h), which proscribes violations of the Administrative Code, respondent is alleged to have violated Mich Admin Code R 338.2909(1)(a), (c), (d), (e), (f), and (g) and 1979 AACS R 338.2909(1)(d), (e), and (i).

adult female). The complaint alleged that respondent maintained a sexual relationship with MMC while she was his client from approximately May 2003 to early 2005, that he misrepresented his professional status by telling MMC that he was a doctor, that he failed to provide for the continuation of services after terminating the treatment of MMC and MC, and that he improperly engaged in a dual relationship with MMC and her family by initiating a business relationship with MMC and her brother. The hearing testimony substantiated the allegations against respondent, including demonstrating that respondent engaged in several sexual encounters with MMC in his office during purported therapy sessions with her.

After the hearing had concluded, the hearing referee issued his proposal for decision. Although respondent took exception to much of the proposal, the disciplinary subcommittee (DSC) adopted the referee's findings and issued a final order revoking respondent's license. This appeal followed.

A final decision of a disciplinary subcommittee appointed under MCL 333.16216 of the Public Health Code "may be appealed only in the manner provided in [MCL 24.303 to MCL 24.306 of the Administrative Procedures Act]. A final decision of a disciplinary subcommittee . . . may be appealed only to the court of appeals." MCL 333.16237(6). This Court may set aside a decision if it "determines that a final decision or order of a disciplinary subcommittee prejudices substantial rights of the [licensee] for 1 or more of the grounds listed in . . . MCL 24.306,[2] and holds that the final decision or order is unlawful . . . ." MCL 333.16226(2). In *Dep't of Community Health v Risch*, 274 Mich App 365, 371; 733 NW2d 403 (2007), this Court stated:

> [J]udicial review of the disciplinary subcommittees' orders is limited to that set forth in Const 1963, art 6, § 28, which provides in relevant part:
>
> > 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

[2] Grounds for reversal exist if the decision is:

> (a) In violation of the constitution or a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the agency.
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law. [MCL 24.306(1).]

> 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 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.

Further, this Court recently explained:

> Although the agency was required to prove its case by the preponderance of the evidence in the proceedings below, MCL 333.16237(4); *Morreale v Dep't of Community Health*, 272 Mich App 402, 405; 726 NW2d 438 (2006), appellate review does not entail a determination de novo whether this standard was satisfied. 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. [*Dep't of Community Health v Anderson*, 299 Mich App 591, 598; 830 NW2d 814 (2013) (quotation marks and citation omitted).]

Respondent first argues that the hearing referee improperly precluded him from testifying on his own behalf in his case-in-chief. According to respondent, the referee lacked authority to impose such a sanction, which denied respondent his right to due process.

A hearing began in November 2008. Petitioner called respondent as its first, hostile witness, with respondent's counsel beginning his cross-examination of respondent in the final hours of the third day of the hearing. At the close of that day, the parties discussed when the hearing would be continued because it was apparent that the five days scheduled in November would not be enough time. By the end of the fifth day, respondent's counsel had still not finished cross-examining respondent. The hearing was scheduled to resume on March 3, 2009.

On March 2, 2009, the hearing referee learned that respondent's counsel had contacted petitioner's counsel to inform her that respondent would not be available to testify the following day because he was under time pressures at work.[3] In a telephone conference, the referee instructed respondent's counsel to contact respondent and inform him that he was required to be at the hearing the following morning at 9:00 a.m. When respondent failed to appear, his counsel stated that respondent had so far fully participated in the hearing, but that after having spent so much time at the hearing, respondent's annual leave was "pretty much exhausted." Counsel produced a memorandum faxed to him, purportedly by respondent's direct supervisor, stating that respondent was too busy to leave work. Respondent's counsel suggested that petitioner proceed with other witnesses until respondent was available. Petitioner's counsel, however, was unwilling to take her witnesses out of order on the basis that respondent would then tailor his

[3] Respondent worked as a Department of Community Mental Health social worker, providing services for a Department of Corrections facility, and also offered services through a private firm.

testimony to respond to that of the other witnesses. She further asserted that respondent had tried to delay the proceedings for years and asked for a default pursuant to MCR 2.506(F)(6). The hearing referee took the request for a default under advisement and ordered that respondent appear at 9:00 a.m. the next day, March 4, 2009.

The following morning, respondent again failed to appear. According to respondent's counsel, respondent had told him that his employer would not release him because of a work commitment. When the hearing referee called respondent's regional director, however, he was informed that respondent had ample leave time available and could have used it to attend the hearing. Petitioner again asked that a default be entered. After determining that respondent had not failed to appear as a party, but rather failed to appear as a witness, the referee granted respondent's request for an adjournment, but limited it to one day. The next day, when respondent appeared, the referee granted petitioner's request that respondent be allowed to finish his testimony as petitioner's hostile witness only and that he not be permitted to testify as a witness on his own behalf during subsequent direct examination or rebuttal. Respondent's testimony concluded shortly thereafter.

We conclude that the referee did not violate respondent's due process rights by barring his direct testimony after he disregarded orders to appear and lied regarding the reason for being absent. Under MCL 24.280(1)(d), a presiding officer over a contested case hearing may "[r]egulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents." A presiding officer may also "[s]ign and issue subpoenas in the name of the agency, *requiring attendance and giving of testimony by witnesses* and the production of books, papers, and other documentary evidence." MCL 24.280(1)(b) (emphasis added). In *Baker v Gen Motors Corp*, 420 Mich 463, 507; 363 NW2d 602 (1984), aff'd 478 US 621; 106 S Ct 3129; 92 L Ed 2d 504 (1986), our Supreme Court declined to limit the powers of a presiding officer when the statutory language did not expressly provide for such a limit: "Absent any stated legislative limit on the chairperson's power to regulate the course of the hearings . . . we shall not create one. The Legislature committed this power to the discretion of the chairperson."

Respondent had a right to procedural due process, i.e., a right to "adequate notice" and an "opportunity to be heard," *Livonia v Dep't of Social Servs*, 423 Mich 466, 505; 378 NW2d 402 (1985), and to a hearing held in accordance with administrative rules. MCL 333.16231a(1); Mich Admin Code, R 338.1602; see also *In re Petition of Attorney Gen for Investigative Subpoenas*, 274 Mich App 696, 706; 736 NW2d 594 (2007). Under those rules, respondent was entitled to notice of the hearing and an opportunity to make an opening statement and present proofs. Mich Admin Code, R 338.1614(1); R 338.1619(a). It is up to the presiding officer to control the course of the hearing, including ruling "on motions and on the admissibility of evidence." MCL 24.280(1)(d); Mich Admin Code, R 338.1621(4). Our Supreme Court has held that in proceedings involving license revocations, the licensee "must be afforded what has come to be called rudimentary due process." *Bundo v Walled Lake*, 395 Mich 679, 696; 238 NW2d 154 (1976) (quotation marks and citation omitted). Rudimentary due process entails three general requirements in the context of this case: (1) "timely written notice detailing the reasons for proposed administrative action;" (2) "an effective opportunity to defend by confronting any adverse witnesses and by being allowed to present in person witnesses, evidence, and

arguments;" and (3) "a written, although relatively informal, statement of findings." *Id*., 696-697 (quotation marks and citations omitted.)

The requirements for rudimentary due process were met in this case. Respondent testified for five days in November 2008 and had the opportunity to continue testifying in March 2009. As soon as respondent took the stand in March 2009, his attorney stated that he was finished cross-examining respondent, and petitioner's counsel stated that she was finished with her direct examination of respondent. Thus, respondent was provided an opportunity to testify at the hearing and he fails to identify any matters that his attorney was prevented from exploring on cross-examination that would have been permitted in a separate direct examination. Respondent was also provided an opportunity to present witnesses and evidence, to cross-examine witnesses against him, and to make arguments on his behalf. As such, respondent was provided an effective opportunity to defend and was not denied his right to due process. *Id*.

Respondent next argues that the DSC failed to consider the entire record before revoking his license because he filed exceptions to the referee's proposal for decision, which the referee disregarded and did not submit to the DSC as part of the record. The referee granted petitioner's motion to strike respondent's exceptions because they were filed late in violation of Mich Admin Code, R 338.1629(4). Under that rule, exceptions were due 15 days after the proposal for decision was issued, which would have been October 30, 2010, but because that date was a Saturday, exceptions were due on Monday, November 1, 2010. See Rule 338.1634(1). Thus, had respondent filed his exceptions on November 1, they would have been timely. Because respondent's facsimile was not received until the early morning of November 2, however, respondent's exceptions were untimely. Accordingly, the referee was not required to accept them or make them part of the record, regardless of whether the short delay prejudiced respondent. Only "pleadings and related materials *that are properly filed* shall be a part of the record of the hearing." Mich Admin Code, R 338.1615(5) (emphasis added).[4]

Respondent next argues that the statutory time requirements for a contested case were not met because the entire process, from the investigation through the final order, was not completed with one year after the consumer complaint was filed as required by MCL 333.16237(5). In this case, six years passed from the date that the consumer complaint was filed until the final order was issued. This Court has held, however, that the statutory time requirements in the Public Health Code are permissive rather than mandatory. *Dep't of Community & Indus Servs v Greenberg*, 231 Mich App 466, 468-469; 586 NW2d 560 (1998). Moreover, respondent never objected to any delay in the proceedings or sought a dismissal once the one-year limit had passed. In addition, both parties requested delays at various points in the proceedings, and respondent was able to retain his license during the entire time that the proceeding was pending.

[4] Respondent also asserts that he filed numerous motions with the SOAHR and DSC that were ignored. By his own correspondence with this Court, however, respondent acknowledged that the DSC intended to consider his motions at a regularly scheduled subcommittee meeting in the future. Thus, we need not address this matter at this time. In any event, respondent has failed to demonstrate prejudice as a result of the failure to consider his motions.

Given the fact that the DSC's ultimate decision was to revoke respondent's license, respondent suffered no prejudice from the considerable delay.

Finally, we note that respondent asserts several other reasons for reversal, including the bias of the hearing referee, evidentiary errors, and misconduct by petitioner's counsel. Respondent, however, provides very little record support for his assertions and no legal authority in support of his claim that the alleged errors warrant reversal.[5] A party may not merely announce a position or assert an error and leave it for this Court to discover and rationalize the basis for his claims or search for authority to support his position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Because respondent has failed to properly present his arguments for appellate review, we need not address them. *Id.*

Affirmed. Petitioner, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra

[5] Because respondent's appellate brief fails to address each issue raised in his statement of questions presented separately, it is unclear which of the arguments presented in the discussion section of his brief pertain to which issues.