

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0098**

In the Matter of the License of
Herman Thompson, M.Eq., L.P. License No. LP2769

**Filed September 23, 2019
Affirmed
Johnson, Judge**

Minnesota Board of Psychology
File No. OAH 71-0907-34423

Larry E. Reed, Minneapolis, Minnesota (for relator Herman Thompson)

Keith Ellison, Attorney General, Nicholas Lienesch, Assistant Attorney General, St. Paul,
Minnesota (for respondent Minnesota Board of Psychology)

Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Klaphake,
Judge.*

S Y L L A B U S

1. The Minnesota Board of Psychology is authorized to commence and maintain a disciplinary proceeding against, and to impose discipline on, a psychologist whose license no longer is valid because it was not renewed, so long as the license has not been terminated.

2. There is no limit on the time in which the Minnesota Board of Psychology may commence a disciplinary proceeding against a licensed psychologist if the complaint alleges the type of sexual misconduct described in section 148.941, subdivision 7(b)(2), of

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

the Minnesota Statutes. The seven-year limitation period in section 148.941, subdivision 7(a), does not apply to such a complaint.

OPINION

JOHNSON, Judge

The Minnesota Board of Psychology revoked Herman Thompson's license to practice psychology based on a finding that he engaged in sexual misconduct toward a patient. Thompson argues that the board did not have authority to discipline him because his license had expired, that the board's disciplinary proceeding is barred by a statute of limitation, and that the board's decision is not supported by substantial evidence. We reject each of his arguments and, therefore, affirm.

FACTS

Thompson was first licensed by the board as a psychotherapist in 1985. He thereafter renewed his license at two-year intervals. Between August 2003 and May 2005, Thompson treated a patient, J.W., who was between the ages of 16 and 17 years old. In 2016, when J.W. was 28 years old, the board received two complaints that Thompson had sexually abused J.W. while he was a patient and shortly after the therapeutic relationship ended. One complaint was filed by J.W.'s then-current therapist; the other complaint was filed by a sergeant with the Minneapolis Police Department.

The board conducted an investigation. On May 30, 2017, the board's complaint-resolution committee served a notice of contested-case hearing on an attorney who had been communicating with the board on Thompson's behalf. Thompson did not make any attempt to renew his license by June 30, 2017, the last day on which the license was valid.

On August 2, 2017, the attorney who was representing Thompson appeared before the board and asserted that Thompson had not authorized him to accept service of the notice and that the board's complaint-resolution committee should serve the notice on Thompson personally. The board's complaint-resolution committee did so two days later.

Thereafter Thompson and his attorney made several attempts to dismiss the disciplinary proceeding without an evidentiary hearing. In August 2017, he moved to dismiss on two grounds: (1) that the board lacks jurisdiction over him because his license had expired and he had retired, and (2) that the disciplinary proceeding is time-barred. An administrative-law judge (ALJ) denied the motion. Thompson filed a motion for reconsideration and amended findings, which the ALJ denied. In April 2018, Thompson filed a motion for summary disposition based on the same grounds as his motion to dismiss. The ALJ denied that motion for the same reasons. In May 2018, Thompson petitioned this court for a writ of prohibition or a writ of mandamus to require the dismissal of the disciplinary proceeding. This court denied the petition. *In re License of Thompson*, No. A18-0710 (Minn. App. May 15, 2018) (order).

The ALJ conducted a three-day evidentiary hearing in July and August of 2018. The board called seven witnesses, including J.W. and Thompson, and introduced six exhibits. Thompson called one witness, J.W.'s foster parent in 2003, and introduced one exhibit, his records of J.W.'s treatment.

In October 2018, the ALJ issued a 30-page report and memorandum with findings of fact, conclusions of law, and a recommendation. The ALJ concluded that the board's complaint-resolution committee had satisfied its burden of proof with respect to its factual

allegations. The ALJ recommended that the board take disciplinary action against Thompson.

In December 2018, the board held a hearing at which the attorneys for the board's complaint-resolution committee and for Thompson presented oral arguments and responded to questions from the board. Later that month, the board issued an order in which it adopted the ALJ's findings of fact and conclusions of law in their entirety and revoked Thompson's license to practice psychology. Thompson appeals by way of a writ of certiorari.

ISSUES

I. Does the board of psychology have authority to discipline Thompson in light of the fact that his license to practice psychology no longer is valid because he did not renew it?

II. Is the board of psychology's disciplinary proceeding against Thompson barred by a statute of limitation?

III. Is the board of psychology's decision to revoke Thompson's license to practice psychology supported by substantial evidence?

ANALYSIS

A person who wishes to practice psychology in Minnesota is required to hold a license issued by the Minnesota Board of Psychology. Minn. Stat. § 148.907, subd. 1 (2018). The board is composed of eleven Minnesota residents, including at least six licensed psychologists, who are appointed by the governor to four-year terms. Minn. Stat. §§ 148.90, subds. 1, 2, 3; 214.09, subd. 2 (2018). The board's duties are defined by statute

and include “adopt[ing] and enforc[ing] rules for licensing psychologists and for regulating their professional conduct.” Minn. Stat. § 148.905, subd. 1(1) (2018). “The board may adopt rules necessary to define standards or to carry out the provisions of” the Minnesota Psychology Practice Act (MPPA), Minn. Stat. §§ 148.88-.98 (2018), pursuant to chapter 14 of the Minnesota Statutes. Minn. Stat. § 148.905, subd. 2. The board has adopted rules for that purpose. *See* Minn. R. 7200.0110-.6105 (2017). The MPPA and the board’s rules promote the legislative policy of “protect[ing] the public through licensure and regulation to promote access to safe, ethical, and competent psychological services.” Minn. Stat. § 148.881.

A decision by the board to discipline a psychologist is subject to judicial review pursuant to the Minnesota Administrative Procedure Act. *See* Minn. Stat. § 14.63 (2018); *Dragonosky v. Minnesota Bd. of Psychology*, 367 N.W.2d 521, 523-24 (Minn. 1985); *In re Schroeder*, 415 N.W.2d 436, 438-39 (Minn App. 1987), *review denied*, (Minn. Jan. 28, 1988). This court may reverse or modify an administrative agency’s decision if it (a) violates constitutional provisions, (b) exceeds the authority of the agency, (c) was made using unlawful procedure, (d) was affected by an error of law, (e) is unsupported by substantial evidence, or (f) is arbitrary or capricious. Minn. Stat. § 14.69 (2018).

I.

Thompson first argues that the board does not have authority to discipline him on the ground that his license expired before the board’s complaint-resolution committee served the notice of contested-case hearing on him personally and before the board imposed discipline on him.

Disciplinary action against psychologists is governed by section 148.941 of the Minnesota Statutes, which begins, “The board may impose disciplinary action . . . against *an applicant or licensee* whom the board, by a preponderance of the evidence, determines” has engaged in a statutorily described form of misconduct. Minn. Stat. § 148.941, subd. 2(a) (emphasis added). If there are “grounds for disciplinary action[,] . . . the board may,” among other actions, “refuse to grant or renew a license,” “revoke a license,” or “suspend a license.” *Id.*, subd. 2(b).

Thompson contends that the board did not have authority to discipline him because he was neither an “applicant” nor a “licensee.” In response, the board concedes that Thompson was not an applicant. Accordingly, the relevant question is whether Thompson was a “licensee” when the board’s complaint-resolution committee properly served the notice of contested-case hearing and when the board imposed discipline on him.

Thompson contends that he ceased being a licensee on June 30, 2017. In response, the board contends that Thompson remained a licensee after his license no longer was valid because the board did not terminate his license. In the alternative, the board contends that, even if Thompson ceased being a licensee on June 30, 2017, the board retained authority to discipline him because the alleged misconduct occurred when he held a valid license. The board contends further that, if it “were to permit a licensee to escape Board jurisdiction by choosing not to renew his license when faced with pending disciplinary action, the Board’s public protection purpose may be compromised.”

The MPPA defines a “licensee” simply as “a person who is licensed by the board.” Minn. Stat. § 148.89, subd. 4. The MPPA does not elaborate on what it means to be

“licensed by the board.” *See generally* Minn. Stat. § 148.89. The board’s administrative rules contain several provisions concerning licensure. A license is valid for two years. Minn. R. 7200.3200. A psychologist who wishes to renew a license must apply for renewal “on or before the last day of the last month during which the license is valid.” Minn. R. 7200.3400. If a psychologist does not apply for renewal within 30 days after the renewal date, the board shall notify him or her “that the renewal is overdue and that failure to pay the current renewal fee . . . within 60 days after the renewal date will result in termination of the license.” Minn. R. 7200.3510, subp. 1. “The board shall terminate the license of a licensee whose license renewal is at least 60 days overdue and to whom notification has been sent” *Id.*, subp. 2. The board’s rules also allow a psychologist to voluntarily terminate a license, as follows:

A license may be voluntarily terminated at any time upon written notification to the board, unless a complaint is pending against the licensee. The notification must be received by the board prior to termination of the license for failure to renew. The board retains jurisdiction over a former licensee for complaints received after termination regarding conduct that occurred while licensed. . . .

Minn. R. 7200.3700. Neither the MPPA nor the board’s rules contain any provisions concerning the “expiration” of a license or the “retirement” of a psychologist.

Thompson’s argument requires this court to interpret the board’s administrative rules to determine whether he was a licensee when the disciplinary proceeding was commenced and when disciplinary action was imposed. If “the language of the regulation is clear and capable of understanding, we give no deference to the agency’s interpretation and we may substitute our own judgment for that of the agency.” *In re Cities of Annandale*

& *Maple Lake NPDES/SDS Permit Issuance*, 731 N.W.2d 502, 515 (Minn. 2007) (*Annandale*). If a rule is unambiguous, “we construe the rule according to the common and approved usage of its words and phrases and do not disregard the rule’s plain meaning to pursue its spirit.” *Troyer v. Vertlu Mgmt. Co.*, 806 N.W.2d 17, 24 (Minn. 2011). If an administrative rule is “unclear or susceptible to different reasonable interpretations, *i.e.*, ambiguous, we will give deference to the agency’s interpretation and will generally uphold that interpretation if it is reasonable.” *Annandale*, 731 N.W.2d at 515; *see also St. Otto’s Home v. Minnesota Dep’t of Human Services*, 437 N.W.2d 35, 40 (Minn. 1989). Whether a rule is ambiguous does not depend on a reading of words or phrases in isolation “but relies on the meaning assigned to the words or phrases in accordance with the apparent purpose of the regulation as a whole.” *J.D. Donovan, Inc. v. Minnesota Dep’t of Transportation*, 878 N.W.2d 1, 5 (Minn. 2016) (quoting *Annandale*, 731 N.W.2d at 517).

Thompson notes that the board’s rules do not contain any provision that expressly states that a psychologist whose license no longer is valid remains a licensee if the board has not formally terminated the license. In response, the board contends that its rules do not provide that a psychologist whose license no longer is valid is *not* a licensee for that reason alone, that the rules indicate that the board has discretion to not terminate a license if a complaint is pending and retains authority to discipline a psychologist who engaged in misconduct while licensed, and that its interpretation of its own rules is consistent with its statutory duty to protect the public.

We agree with both parties that the board’s rules do not expressly address this particular situation. “When a statute or regulation is silent on a precise issue, that silence

may be evidence of ambiguity.” *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 311 (Minn. 2009). The absence of a provision specifically addressing the present situation might indicate that a psychologist is not a licensee if his or her license no longer is valid. Yet the rules governing termination of a license also might indicate that a psychologist remains a licensee until termination occurs. *See* Minn. R. 7200.3400, .3510, .3700. Furthermore, the rule concerning voluntary termination states that a psychologist may not voluntarily terminate a license if a complaint is pending against the psychologist. Minn. R. 7200.3700. The rule further states that the board retains jurisdiction over a psychologist whose license has been voluntarily terminated if the board subsequently receives a complaint concerning the psychologist’s conduct while he or she was licensed. *Id.* That rule tends to indicate that the board’s disciplinary authority extends not only to psychologists whose licenses have been terminated but also to psychologists whose licenses have not yet been terminated. Because the board’s rules are subject to varying interpretations, they are ambiguous with respect to the question whether a psychologist is a licensee if his or her license no longer is valid because it was not renewed but if the license has not been terminated.

Because the board’s rules are ambiguous with respect to the issue on appeal, we must determine whether the board’s interpretation is reasonable. *See Annandale*, 731 N.W.2d at 515; *St. Otto’s Home*, 437 N.W.2d at 40. We note that the board’s interpretation gives meaning to the rules concerning termination of a license. Under Thompson’s preferred interpretation, the rules concerning termination of a license that has not been renewed would be superfluous. In addition, the board’s interpretation is in

harmony with the rule that expressly provides that a psychologist may not voluntarily terminate a license if a complaint is pending and that, in certain circumstances, the board may impose discipline on a psychologist who has voluntarily terminated his or her license. Accordingly, the board's interpretation promotes consistency with respect to psychologists who engage in misconduct while licensed. Furthermore, the board's interpretation prevents a psychologist from escaping responsibility for misconduct that occurred while licensed simply because his or her license no longer is valid. Consequently, we conclude that the board's interpretation of its rules is reasonable. The board of psychology is authorized to commence and maintain a disciplinary proceeding against, and to impose discipline on, a psychologist whose license no longer is valid because it was not renewed, so long as the license has not been terminated.

Thus, Thompson was a "licensee" when the board's complaint-resolution committee served notice of a contested-case hearing and when the board imposed discipline on him. Because he was a licensee at all relevant times, the board had authority to impose discipline on him.

II.

Thompson next argues that the board's disciplinary proceedings are barred by a statute of limitation.

The MPPA limits the time in which the board's complaint-resolution committee may commence a disciplinary proceeding. In general, "A board proceeding against a provider must not be instituted unless it is begun within seven years of the date of some portion of the alleged misconduct that is complained of." Minn. Stat. § 148.941, subd. 7(a).

The MPPA defines the term “provider” to mean “any individual who is regulated by the board.” Minn. Stat. § 148.89, subd. 4a. For purposes of subdivision 7, the term “proceeding” is defined to mean “the service of a notice of conference, or in cases in which a notice of conference was not served, a notice of hearing.” Minn. Stat. § 148.941, subd. 7(e).

There are two exceptions to the seven-year limitation period. *Id.*, subd. 7(b). The first exception is triggered if a provider has engaged in certain types of criminal or fraudulent conduct or has been disciplined in another state. *Id.*, subd. 7(b)(1); *see also id.*, subd. 2(a)(2), (4), (5), (6). The second exception is triggered if there are

complaints alleging sexual intercourse or other physical intimacies with a client, or any verbal or physical behavior that is sexually seductive or sexually demeaning to the client; or complaints alleging sexual intercourse or other physical intimacies with a former client, or any verbal or physical behavior that is sexually demeaning to the former client, for a period of two years following the date of the last professional contact with the former client, whether or not the provider has formally terminated the professional relationship. Physical intimacies include handling of the breasts, genital areas, buttocks, or thighs of either sex by either the provider or the client.

Id., subd. 7(b)(2). In this case, the board’s complaint-resolution committee’s notice of contested-case hearing plainly refers to complaints that are within the second exception to the seven-year limitation period.

Nonetheless, Thompson contends that the disciplinary proceeding is untimely on the ground that another provision in section 148.941, subdivision 7, governs. The other provision states, “If alleged misconduct is complained of that involves a client who is a

minor, the limitation period in paragraph (a) does not begin until the minor reaches the age of 18.” *Id.*, subd. 7(d). Thompson’s position is that the seven-year limitation period expired in 2012, seven years after J.W. turned 18.

The plain language of subdivision 7(d) refers to the seven-year limitation period in subdivision 7(a). In a case in which the alleged misconduct involved a minor patient and the complaints are *not* within either exception in subdivision 7(b), the seven-year limitation period would “not begin until the minor reaches the age of 18.” *Id.*, subd. 7(d). But in a case in which the alleged misconduct *is* within an exception in subdivision 7(b), that subdivision precludes the operation of the seven-year limitation period in subdivision 7(a), regardless whether the alleged misconduct involved a minor patient. *See id.*, subd. 7(b). In that situation, there is no limitation period at all and, thus, no limitation period to be postponed. Thus, there is no limit on the time in which the board of psychology may commence a disciplinary proceeding against a licensed psychologist if the complaint alleges the type of sexual misconduct described in section 148.941, subdivision 7(b)(2). The seven-year limitation period in section 148.941, subdivision 7(a), does not apply to such a complaint.

Thompson contends in the alternative that the board is constrained by a statute of limitations in chapter 541 of the Minnesota Statutes, which establishes various limitations periods for civil actions. His contention is contrary to the plain language of the MPPA, which governs disciplinary proceedings by the board of psychology. The limitation provision in the MPPA is directly applicable and plainly is more specific than the general provisions concerning statutes of limitation in chapter 541. Thus, the statute of limitation

in the MPPA applies. *See Patton v. Yarrington*, 472 N.W.2d 157, 160-61 (Minn. App. 1991).

Thompson contends further that the application of section 148.941, subdivision 7(b)(2), denies him his constitutional right to equal protection on the ground that it denies him a defense that section 541.073 would have provided to him in a civil action brought by J.W. The Equal Protection Clause of the United States Constitution provides, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1; *see also* Minn. Const. art. I, § 2. The federal and state equal-protection provisions are “analyzed under the same principles.” *State v. Johnson*, 813 N.W.2d 1, 11 (Minn. 2012) (quotation omitted). Neither provision absolutely “forbid[s] classifications”; instead, both provisions “keep[] governmental decisionmakers from treating differently persons who are in all relevant aspects alike.” *Id.* at 12 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 2331 (1992)). The threshold issue is whether the “claimant is treated differently from others to whom the claimant is similarly situated in all relevant respects.” *Id.* Thompson cannot satisfy the threshold requirement because a person defending against a tort claim brought in district court is not “similarly situated in all relevant respects” to a person defending his license to practice psychology in the face of allegations that he engaged in sexual misconduct toward a patient. *See Johnson*, 813 N.W.2d at 12. Thus, section 148.941, subdivision 7, does not violate Thompson’s constitutional right to equal protection.

In sum, the board's disciplinary proceeding against Thompson is not barred by the statute of limitation in section 148.941, subdivision 7(a), which does not apply because of the exception in subdivision 7(b)(2).

III.

Thompson last argues that the board's decision is not supported by substantial evidence.

As stated above, this court may reverse or modify an administrative decision if, among other reasons, the decision is unsupported by substantial evidence. Minn. Stat. § 14.69(e). The term "substantial evidence" means "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minnesota Ctr. for Env'tl. Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

In this case, the board adopted the ALJ's findings of fact in their entirety. The ALJ found that Thompson first engaged in sexual misconduct toward J.W. during a therapy session in October 2003, during which Thompson engaged in oral sex on J.W. The ALJ found that Thompson gave J.W. a small amount of money and told him not to tell anyone. The ALJ also found that Thompson sexually abused J.W. during therapy sessions on multiple occasions over a period of approximately one year and that, after each session, Thompson gave J.W. a small amount of money. The ALJ further found that, in 2005, less than two years after their therapeutic relationship ended, Thompson engaged in sexual contact toward J.W. at his home and gave him money and food.

The ALJ's findings are supported by the record. At the evidentiary hearing, J.W. testified about the incidents on which the ALJ relied. He testified that Thompson engaged in sexual conduct toward him for the first time during his fifth therapy session, when they wrestled over a ball in his office until the physical activity became sexual, resulting in Thompson engaging in oral sex. J.W. testified that, after that first incident, Thompson gave him money and told him not to tell anyone. J.W. also testified that Thompson engaged in sexual conduct toward him on multiple occasions during the following year. For example, J.W. stated that Thompson took photographs of J.W.'s penis with his cellular telephone, that Thompson looked at him while his pants were down, and that he engaged in oral sex on Thompson on one occasion. J.W. testified that Thompson gave him money after each session in which sexual conduct occurred. J.W. also testified that, after he stopped going to therapy sessions in 2005, he became homeless and went to Thompson's home on a few occasions. J.W. testified that, during those visits, Thompson engaged in oral sex on him and gave him money and food.

Thompson also argues that inappropriate sexual conduct would have been "impossible" because an adult, such as J.W.'s foster parent, always was in a nearby lobby. The ALJ considered Thompson's evidence on that issue but found that J.W.'s foster parent attended only the first four therapy sessions and that J.W. and Thompson typically were alone in a room together with the door closed during therapy sessions. Thompson also refers to J.W.'s testimony that he "never had sex with" Thompson. But J.W. later clarified on re-direct examination that he meant that there never was anal penetration and that the sexual contact was limited to oral sex.

Thompson also argues that J.W.'s testimony is simply false. His argument is consistent with his own testimony at the hearing, in which he denied ever having any sexual contact with J.W. In essence, Thompson challenges J.W.'s credibility. The ALJ, however, found that J.W.'s testimony regarding Thompson's sexual conduct was credible and was corroborated by other evidence. The ALJ also found that Thompson was not a credible witness. It is well-established that appellate courts generally defer to credibility determinations made by an agency's fact-finder, and we see no particular reason to second-guess the ALJ's credibility determinations in this case. *See, e.g., Hengemuhle v. Long Prairie Jaycees*, 358 N.W.2d 54, 59-60 (Minn. 1984); *In re Appeal of Rochelau*, 686 N.W.2d 882, 891-92 (Minn. App. 2004), *review denied* (Minn. Dec. 22, 2004); *Saif Food Mkt. v. Commissioner, Dep't of Health*, 664 N.W.2d 428, 431 (Minn. App. 2003); *County of Nicollet v. Haakenson*, 497 N.W.2d 611, 615 (Minn. App. 1993).

Thus, the board's decision is supported by substantial evidence.

D E C I S I O N

The board of psychology did not err by commencing a disciplinary proceeding against Thompson and by revoking his license to practice psychology.

Affirmed.