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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-264

Filed: 16 October 2018

Durham County, No. 16 CVS 3036

ANNETTE BAKER, Ph.D., Plaintiff,

v.

THE NORTH CAROLINA PSYCHOLOGY BOARD, Defendant.

Appeal by plaintiff from order entered 29 November 2017 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 19 September 2018.

*Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin and Michael J. Tadych, for plaintiff-appellant.*

*Attorney General Joshua H. Stein, by Assistant Attorney General Sondra C. Panico, for defendant-appellee.*

DAVIS, Judge.

Dr. Annette Baker, a licensed psychologist, appeals from the trial court's order upholding the imposition of disciplinary sanctions upon her by the North Carolina Psychology Board (the "Board"). After a thorough review of the record and applicable law, we affirm.

### **Factual and Procedural Background**

This matter is before this Court for the second time. The factual background of this case is contained in more detail in our decision in *Baker v. N.C. Psychology Bd.*, 805 S.E.2d 147, 2017 N.C. App. LEXIS 573 (2017) (unpublished) (hereinafter “*Baker I*”). However, the pertinent facts are set out below.

The Board investigated a complaint filed against Dr. Baker in 2016 in connection with a 2012 court-appointed child custody evaluation. She was appointed to perform this evaluation for former spouses Mark and Christa Vilas, who shared joint custody of their children. Mr. Vilas requested this evaluation after Ms. Vilas was charged with driving while impaired on two occasions within a two year period. He specifically requested that the court appoint Dr. Baker based on the recommendation of his attorney, Archie Futrell. The court granted his request and issued a custody evaluation order on 7 September 2012.

Dr. Baker first met with Mr. Vilas on 25 September 2012. She told him the evaluation would take four to six months to complete. She subsequently met with the Vilases and their children several times over the next few months.

In November 2012, Dr. Baker informed Mr. Vilas that she had been diagnosed with breast cancer but that her diagnosis would not delay the evaluation. However, Mr. Vilas did not hear from Dr. Baker again until sometime during the spring of 2013. Despite repeated phone calls by him, he did not hear from her again until August

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2013. Mr. Vilas told Futrell he was concerned that he would never receive the custody evaluation, and on 3 September 2013 Futrell wrote a letter to Dr. Baker explaining that he was “pretty embarrassed . . . since [Futrell had] enthusiastically recommended [Dr. Baker] for this evaluation.” On several occasions, Dr. Baker told Mr. Vilas and Futrell that she would finish the evaluation by certain specified dates but failed to follow through on these representations. Dr. Baker did not actually provide the evaluation to the parties until 23 September 2014.

The parties ultimately resolved their custody dispute, but the delay and lack of communication by Dr. Baker caused stress to the entire family and harmed the relationship between Futrell and Mr. Vilas. On 20 July 2014, Mr. Vilas and his current wife, Katherine Vilas, filed a complaint against Dr. Baker with the Board. The Board held a hearing on 4 February 2016 during which it heard testimony from six witnesses. At the hearing, Futrell described the breakdown in communication with Dr. Baker and its impact on his relationship with Mr. Vilas.

I think [Dr. Baker] and I had a good rapport or good communications. Initially she was, I would say, right on top of it . . . .

And then as it proceeded, we had less communications . . . . And there were gaps when we couldn't get in touch with anyone.

I guess it became frustrating as time wore on. And what we were hoping would be four to six months turned out to be two years. And it was just a — not a good experience.

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....

I was having some personal concerns that my client at some point might — I’m going to use the word file a complaint against me or be dissatisfied with me, you know, “You recommended Dr. Baker and come on, this is — nothing is happening and you need to make something happen,” and, you know, “Do I need to get another evaluator,” you know, “What do I need to do?”

So the client at this point was very angry and upset with me as well.

*Baker I* at \*\*5-6, 8-9.

In addition, Mr. Vilas testified as to the negative impact that Dr. Baker’s failure to communicate had on his family:

[T]his was really stressful. I mean, you know, watching my children go through this and for months and, you know, not feeling like I had any control over the situation, it was extremely stressful to me for the entire course of the evaluation. You know, I was going through this. My children were going through this. My wife was going through this. My ex-wife was going through this . . . .

I just kept getting, you know, the cold shoulder. I kept getting told that, you know, “We don’t know when this will be done. It will be four to sixth [sic] months,” you know . . . .

[M]y relationship with my wife and my relationship with my ex-wife was very damaged by this whole process. And I don’t know that I’ve actually — either one of those relationships has actually recovered from it, to be honest.

*Id.* at \*\*7-8.

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On 11 April, 2016, the Board issued a Final Decision containing extensive findings of fact as well as its determination that Dr. Baker had committed six violations of the statutory and ethical requirements applicable to licensed psychologists. As sanctions, the Board censured Dr. Baker's license and prohibited her from taking new forensic cases for six months. In addition, the Board required that she complete eight hours of tutorials and two years of monitoring to ensure that her cases were being handled in a timely manner with adequate communication. The Board also reserved the right to require more tutorials and monitoring until it deemed her progress satisfactory. Finally, Dr. Baker was also required to pay the costs of the disciplinary proceeding as well as all costs and expenses incurred in connection with the tutorials and monitoring.

Dr. Baker subsequently filed a petition for judicial review of the Board's Final Decision in Durham County Superior Court. The trial court entered an order on 29 July 2016 vacating the Board's Final Decision after determining that it was "unsupported by substantial evidence in the record . . . ." The Board appealed to this Court, and in *Baker I* we reversed, in part, the trial court's 29 July order. Specifically, we held that "the Board's decision to impose discipline under N.C. Gen. Stat. § 90-270.15(a)(19) for failure to cooperate with other professionals to the potential or actual detriment of clients, patients, or other recipients of service is supported by substantial evidence under the whole record test and was not arbitrary or capricious."

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*Baker I* at \*2. Because the trial court had not expressly ruled on the issue of whether the sanctions imposed by the Board were “too harsh and violated [Dr. Baker’s] due process rights,” we remanded the case to the trial court for such a determination. *Id.* at \*\*13-14.

Following our remand, a hearing was held in the trial court on 2 November 2017 before the Honorable Orlando F. Hudson, Jr. On 29 November 2017, Judge Hudson issued an order determining that the sanctions imposed by the Board “were not unreasonable, were not arbitrary or capricious, and were not an abuse of discretion.” Dr. Baker filed a timely notice of appeal.

**Analysis**

“On judicial review of an administrative agency’s final decision, the substantive nature of each assignment of error dictates the standard of review” to be applied by the reviewing court. *Trayford v. N.C. Psychology Bd.*, 174 N.C. App. 118, 120, 619 S.E.2d 862, 863 (2005) (citation and quotation marks omitted), *aff’d per curiam*, 360 N.C. 396, 627 S.E.2d 462 (2006). When the party petitioning for judicial review contends that the agency’s decision “was unsupported by the evidence or was arbitrary and capricious, the trial court applies the whole record test.” *Fehrenbacher v. City of Durham*, 239 N.C. App. 141, 146, 768 S.E.2d 186, 191 (2015) (citation and quotation marks omitted).

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Under the whole record test, the reviewing court must “examine all competent evidence to determine whether the agency decision is supported by substantial evidence.” *Farber v. N.C. Psychology Bd.*, 153 N.C. App. 1, 14, 569 S.E.2d 287, 297 (2002). “Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.” *Trayford*, 174 N.C. App. at 121, 619 S.E.2d at 864 (citation and quotation marks omitted). This Court has explained that “the whole record test does not allow the reviewing court to replace the Board’s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result.” *Farber*, 153 N.C. App. at 14, 569 S.E.2d at 297 (citation and quotation marks omitted). When considering such an order on appeal, this Court must determine “whether the trial court properly applied the whole record test.” *Barron v. Eastpointe Human Servs., LME*, 246 N.C. App. 364, 373, 786 S.E.2d 304, 311 (2016) (citations and quotation marks omitted).

We have held that “[a] decision is arbitrary and capricious if it was patently in bad faith, whimsical, or if it lacked fair and careful consideration.” *Summers v. City of Charlotte*, 149 N.C. App. 509, 518, 562 S.E.2d 18, 25 (2002) (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 355 N.C. 758, 566 S.E.2d 482 (2002). A decision is also considered to be arbitrary and capricious where it “fail[s] to indicate any course of reasoning [or] exercise of judgment.” *Lewis v. N.C. Dep’t of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989)

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(citations and quotation marks omitted). Our caselaw makes clear that “[t]his Court cannot override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law.” *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 153 N.C. App. 652, 661, 571 S.E.2d 262, 269 (2002) (citations and quotation marks omitted).

North Carolina’s Psychology Practice Act (the “Act”) sets out a code of conduct for licensed psychologists in North Carolina. *See* N.C. Gen. Stat. § 90-270.1 *et seq.* (2017). N.C. Gen. Stat. § 90-270.15(a) identifies twenty-three categories of violations. The Act also includes a range of disciplinary actions the Board may take against psychologists found to have violated any of the provisions of § 90-270.15(a). The Act provides, in pertinent part, as follows:

[T]he Board may, in lieu of . . . suspension [ ] or revocation, issue a formal reprimand or formally censure the . . . licensee, may place the . . . licensee upon probation with such appropriate conditions upon the continued practice as the Board may deem advisable, may require examination, remediation, or rehabilitation for the applicant or licensee, including care, counseling, or treatment by a professional or professionals designated or approved by the Board, the expense to be borne by the . . . licensee, may require supervision for the services provided by the . . . licensee designated or approved by the Board, the expense to be borne by the . . . licensee, may limit or circumscribe the practice of psychology provided by the . . . licensee with respect to the extent, nature, or location of the services provided, as the Board deems advisable, or may discipline and impose any appropriate combination of the foregoing.

N.C. Gen. Stat. § 90-270.15(b).

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As noted above, in *Baker I* we upheld the Board’s determination that Dr. Baker had violated N.C. Gen. Stat. § 90-270.15(a)(19), which permits the Board to discipline a psychologist where she “[h]as failed to cooperate with other psychologists or other professionals to the potential or actual detriment of clients, patients, or other recipients of service, or has behaved in ways which substantially impede or impair other psychologists’ or other professionals’ abilities to perform professional duties.” N.C. Gen. Stat. § 90-270.15(a)(19). In its Final Decision, the Board made the following specific finding as to Dr. Baker’s violation of this statutory provision:

Respondent’s conduct constitutes a violation of N.C. Gen. Stat. § 90-270.15(a)(19), insofar as she has failed to cooperate with other professionals to the potential or actual detriment of clients, patients, or other recipients of service, or has behaved in ways which substantially impede or impair other psychologists’ or other professionals’ abilities to perform professional duties. Specifically, Respondent’s failure to cooperate with [Mr. Vilas’] attorney, as set forth in the findings of fact, caused stress on [Mark and Christa Vilas and their children], and resulted in a significant delay in the resolution of their custody matter. *This violation alone warrants the disciplinary action taken by the Board.*

(Emphasis added.)<sup>1</sup>

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<sup>1</sup> The Final Decision also made findings determining that Dr. Baker had committed five additional violations of statutory provisions and ethical rules applicable to licensed psychologists, each of which likewise concluded with the statement that “[t]his violation alone warrants the disciplinary action taken by the Board.” However, because our opinion in *Baker I* expressly upheld only the violation of N.C. Gen. Stat. § 90-270.15(a)(19), we confine our analysis to that violation.

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After carefully reviewing the record and the arguments of the parties, we are satisfied that the Board acted within its statutory authority with regard to the sanctions it imposed and that the trial court correctly determined the punishment Dr. Baker received was neither arbitrary nor capricious. Our General Assembly has conferred upon the Board the authority to impose a wide range of disciplinary actions on licensed psychologists ranging from mere reprimand to license revocation. We believe the disciplinary measures chosen by the Board in this case bear a reasonable relation to the conduct that formed the basis for her violation of § 90-270.15(a)(19). The decision to impose these sanctions was made after the Board had conducted a hearing, received evidence, and heard testimony from six witnesses. Our examination of the record reveals no indication that the Board's decision to impose these sanctions was anything other than a proper exercise of the Board's discretion. We observe that the Board possesses the statutory authority to impose harsher sanctions than those at issue here — up to and including the revocation of a psychologist's license. Here, the Board instead merely censured Dr. Baker's license, prevented her from taking new forensic patients for a period of six months, and imposed certain conditions on her involving tutorials and monitoring.

While Dr. Baker contends that the punishment she received is overly harsh for the violation she committed, the whole record test does not permit us to substitute our own judgment for that of the Board simply because we might have opted for lesser

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sanctions. *See Steeves v. Scotland Cty. Bd. of Health*, 152 N.C. App. 400, 409, 567 S.E.2d 817, 823 (2002) (“[W]hile we might have been more leniently inclined if sitting as the Board, we cannot say the decision to dismiss petitioner . . . may fairly be characterized as ‘patently in bad faith’ or failing to indicate any course of reasoning.”), *disc. review denied*, 356 N.C. 444, 573 S.E.2d 512 (2002). Moreover, Dr. Baker’s appellate brief glosses over the adverse effects of her actions, which are fully set out in the record.

Finally, while Dr. Baker argues that it was inherently arbitrary and capricious for the Board to impose the same set of sanctions for each enumerated violation as it did for all six violations collectively, she has failed to cite any legal authority supporting this proposition. Moreover, nothing in the record would allow us to conclude that the Board acted in excess of its statutory authority in determining that each individual violation warranted the sanctions imposed.

In sum, we conclude that Dr. Baker has failed to show that the discipline she received was arbitrary and capricious or otherwise unlawful. As such, the trial court did not err in its order affirming the sanctions contained in the Board’s Final Decision. *See Watkins v. N.C. State Bd. of Dental Exam’rs*, 358 N.C. 190, 209, 593 S.E.2d 764, 775 (2004) (holding board’s determination that petitioner had engaged in improper conduct was within its authority and supported by competent evidence).

**Conclusion**

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For the reasons stated above, we affirm the trial court's 29 November 2017 order.

AFFIRMED.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).