IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Debra (Kali) MILLER, Ph.D.,
Petitioner,

v.

BOARD OF PSYCHOLOGIST EXAMINERS,
Respondent.

Board of Psychologist Examiners
2013048; A158014

Submitted March 3, 2017.

Debra (Kali) Miller, Ph.D., filed the briefs *pro se*.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Jona J. Maukonen, Assistant Attorney General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

SHORR, J.

Order revoking petitioner's license to practice psychology and imposing a $5,000 fine reversed and remanded; order temporarily suspending petitioner's license to practice psychology affirmed.

SHORR, J.

Petitioner seeks reversal of two final orders of the Oregon Board of Psychologist Examiners (board), one which temporarily suspended her license to practice psychology following a hearing on the board's issuance of an emergency suspension order, and another which permanently revoked her license to practice psychology and imposed a $5,000 fine. Petitioner challenges the emergency suspension order on the basis that the board's determination was not supported by substantial evidence. We reject that assignment of error without discussion. Petitioner also challenges the permanent revocation order and $5,000 fine, which was decided on the board's motion for summary determination, arguing that the board erred in concluding that issue preclusion barred petitioner from litigating factual issues that had already been decided at the hearing on the emergency suspension. For the reasons that follow, we conclude that the board erred in applying issue preclusion and granting summary determination in the permanent revocation proceeding. We therefore affirm the order temporarily suspending petitioner's license, but reverse and remand the order permanently revoking petitioner's license and imposing a $5,000 fine.

I. FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts, which are largely procedural, are taken from the board's final revised order revoking petitioner's license and imposing sanctions. In January 2012, petitioner, a licensed psychologist, began treating the client, a then nine-year-old boy. After several months of therapy, petitioner diagnosed the client with reactive attachment disorder (RAD) and recommended a number of exercises and techniques for the client and his parents. In September 2013, the client was hospitalized after he attempted to strangle himself, which prompted an investigation by the board into petitioner's treatment of the client.

A. *The Emergency Suspension Proceeding*

In March 2014, the board issued an order of emergency suspension of petitioner's license to practice psychology,

under ORS 183.430(2) and OAR 137-003-0560(1).[1] The emergency suspension order was based on the board's determination that petitioner's conduct and continued practice constituted a serious danger to public health or safety:

> "[Petitioner] failed to recognize or address [the client's] symptoms of depression, and made a diagnosis of RAD [Reactive Attachment Disorder] even though [the client] did not meet the diagnostic criteria for RAD, either the inhibited or disinhibited type.
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> "* * * * *
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> "The techniques promoted by [petitioner] in regard to grade school aged children, to include bottle feedings (while sitting in a parent's lap and maintaining eye contact), baby-birding, crawling on the floor, enforced sitting in a specified position, isolation from the family, and various exercises, are not supported by any valid psychological or physiological theory, and are not supported by empirical research, and may actually serve to increase emotional lability. The techniques recommended by [petitioner] in this case (or taught by unlicensed practitioners that [petitioner] referred her clients to) created the potential for misinterpretation by the parents and a high risk for physical and psychological damage to the child that could have contributed to [the client's] feelings of hopelessness, which is a significant predictive factor for suicide."

Petitioner requested a contested-case hearing on the emergency suspension order. That hearing took place before an administrative law judge (ALJ) over four days in

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[1] ORS 183.430(2) provides, in part:

> "In any case where the agency finds a serious danger to the public health or safety and sets forth specific reasons for such findings, the agency may suspend or refuse to renew a license without hearing, but if the licensee demands a hearing within 90 days after the date of notice to the licensee of such suspension or refusal to renew, then a hearing must be granted to the licensee as soon as practicable after such demand, and the agency shall issue an order pursuant to such hearing as required by this chapter confirming, altering or revoking its earlier order."

OAR 137-003-0560(1) similarly provides:

> "If the agency finds there is a serious danger to the public health or safety, it may, by order, immediately suspend or refuse to renew a license. For purposes of this rule, such an order is referred to as an emergency suspension order. An emergency suspension order must be in writing. It may be issued without prior notice to the licensee and without a hearing prior to the emergency suspension order."

August 2014. Petitioner, who was represented by counsel, testified, presented expert witnesses and exhibits, cross-examined witnesses, and submitted legal arguments to the ALJ.

On September 4, 2014, the ALJ issued a proposed order that included 85 findings of fact. Based on those findings, the ALJ concluded that (1) petitioner's acts and conduct with regard to the client and petitioner's continued practice posed a serious danger to the public health or safety and (2) circumstances at the time of the hearing justified confirmation of the emergency suspension order. On September 22, 2014, the board issued a final order adopting the ALJ's findings and conclusions and confirming the emergency suspension.

B. *The Permanent Revocation Proceeding*

On July 21, 2014, a few weeks before the hearing on the emergency suspension order, the board issued a notice of proposed disciplinary action to petitioner, seeking to permanently revoke petitioner's license to practice psychology and to impose a $5,000 civil penalty. The notice alleged that petitioner's treatment of the client constituted a violation of ORS 675.070(2)(d) and five ethical standards under OAR 858-010-0075.[2]

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[2] ORS 675.070(2)(d) provides:

"(2) The board may impose a sanction listed in subsection (1) of this section against any psychologist *** when, in the judgment of the board, the person:

"*****

"(d) Is guilty of immoral or unprofessional conduct or of gross negligence in the practice of psychology, including but not limited to:

"(A) Any conduct or practice contrary to recognized standard of ethics of the psychological profession or any conduct or practice that constitutes a danger to the health or safety of a patient or the public, or any conduct, practice or condition that adversely affects a psychologist or psychologist associate's ability to practice psychology safely and skillfully.

"(B) Willful ordering or performing of unnecessary tests or studies, administration of unnecessary treatment, failure to obtain consultations or perform referrals when failing to do so is not consistent with the standard of care, or otherwise ordering or performing any psychological service or treatment which is contrary to recognized standards of practice of the psychological profession[.]"

Under OAR 858-010-0075, the board has adopted as its code of professional conduct the American Psychological Association's "Ethical Principles of

Petitioner requested a contested-case hearing on that notice. However, in December 2014, before the scheduled hearing before a different ALJ, the board moved for summary determination. The board argued that it was entitled to summary determination because the doctrine of issue preclusion prevented petitioner from relitigating the ALJ's factual determinations made following the four-day hearing on the emergency suspension order. The board contended that the ALJ's findings in that proceeding, which were approved by the board in its September 22 final order, were binding in the permanent revocation case, and thus no genuine issues of material fact remained to be litigated. The board then argued that, based on those findings, as a matter of law, petitioner had "engaged in immoral or unprofessional conduct or gross negligence in the practice of psychology," in violation of ORS 675.070(2)(d), and had violated the five ethical standards alleged in the notice of proposed disciplinary action.

Petitioner filed a written response to the board's motion for summary determination, arguing that issue preclusion should not apply to a hearing on an emergency suspension order because the issues related to temporary license suspension are different from the issues related to permanent license revocation. Specifically, petitioner contended that she was not given an opportunity to address the allegations that she had "engaged in immoral or unprofessional conduct or gross negligence" and that she had committed several ethical code violations. Petitioner argued further that there were issues of fact that were in dispute, such as whether petitioner's recommended treatments and techniques were appropriate, whether petitioner was responsible for any harm caused to the client, whether the board's evidence was reliable, and whether the board's evidence met the appropriate legal standard.

The ALJ in the permanent revocation case determined that, although the legal issues in the two proceedings were different, they involved the "same set of operative

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Psychologists and Code of Conduct." Petitioner was alleged to have violated the following five provisions of that code: (1) boundaries of competence; (2) bases for scientific and professional judgments; (3) avoiding harm; (4) use of assessments; and (5) informed consent to therapy.

facts." And, because petitioner was given a full and fair opportunity to, and in fact did, litigate those facts, issue preclusion barred relitigation of the factual findings made by the ALJ and adopted by the board in the emergency suspension proceeding. The ALJ then concluded that those factual findings established the allegations and sanctions set forth in the board's notice of proposed disciplinary action.

In March 2015, the board issued a final order revoking petitioner's license to practice psychology, and assessing a $5,000 civil penalty. In January 2016, the board, on its own motion, withdrew that order for purposes of reconsideration. The same day, the board issued a final revised order that affirmed the ALJ's conclusion that issue preclusion applied in the revocation proceeding, barring relitigation of the facts determined by the board in the emergency suspension proceeding. The board concluded that petitioner had violated ORS 675.070(2)(d) by engaging in immoral or unprofessional conduct or gross negligence in the practice of psychology, as well as the ethical standards alleged in the notice of proposed disciplinary action.

II. ANALYSIS

Petitioner appeals the board's final revised order in the permanent revocation proceeding, arguing that the board erred in concluding that issue preclusion barred relitigation of factual issues that had been determined at the emergency suspension hearing. "We review orders that result from the grant of summary determination for legal error." *Wolff v. Board of Psychologist Examiners*, 284 Or App 792, 800, 395 P3d 44 (2017); *see also* ORS 183.482(8)(a) (we "may affirm, reverse or remand the order" if we find that the agency "has erroneously interpreted a provision of law and that a correct interpretation compels a particular action"). The issue here is whether the board erroneously applied the doctrine of issue preclusion in granting the motion for summary determination in the permanent revocation proceeding.

"The doctrine of issue preclusion operates to prevent the relitigation of issues that have been fully litigated in a prior proceeding between the same parties[,]" *Johnson & Lechman-Su, P.C. v. Sternberg*, 272 Or App 243, 246, 355

P3d 187 (2015), and can apply to issues of fact or issues of law, *Drews v. EBI Companies*, 310 Or 134, 140, 795 P2d 531 (1990). Issue preclusion applies when five requirements are met:

> "1. The issue in the two proceedings is identical.
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> "2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding.
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> "3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue.
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> "4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding.
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> "5. The prior proceeding was the type of proceeding to which this court will give preclusive effect."

Nelson v. Emerald People's Utility Dist., 318 Or 99, 104, 862 P2d 1293 (1993) (citations omitted). "[T]he party asserting issue preclusion bears the burden of proof on the first, second, and fourth [*Nelson*] factors, after which the party against whom preclusion is asserted has the burden on the third and fifth factors." *Barackman v. Anderson*, 214 Or App 660, 667, 167 P3d 994 (2007), *rev den*, 344 Or 401 (2008).

Petitioner argues that the first, third, and fifth requirements were not met, and that the application of issue preclusion was fundamentally unfair. She argues that the board therefore erred in granting the motion for summary determination. The board contends that all five of the *Nelson* elements were met, and that the board correctly granted the motion for summary determination based on the binding factual findings made after the emergency suspension hearing.

We agree with petitioner that the board erred in applying issue preclusion in granting the motion for summary determination, and focus our discussion on the third *Nelson* requirement—whether petitioner was afforded a full and fair opportunity to be heard on the issues related to the revocation proceeding. The board argues that petitioner had a full and fair opportunity to present her factual case at the four-day hearing on the emergency suspension order, noting that petitioner was represented by counsel and actively

participated in the hearing by presenting numerous witnesses and exhibits, cross-examining the board's witnesses, and making arguments, including a written closing argument. Petitioner, however, contends that she litigated the emergency suspension allegations with the belief that there would be two separate hearings. She claims that she "had every reason to believe that she would have time to prepare a full defense against the new 7/21/14 allegations, the ethical allegations, the newly proposed loss of licensure and the addition of a $5000 fine." She argues that, as a result, she was denied the opportunity to present testimony from all of her local and national experts, peer reviewed articles with theory and research to support her treatment plan, and evidence to show that she worked closely with the Department of Human Services in her treatment of the client.

In determining whether petitioner had a full and fair opportunity to litigate factual issues during the four-day emergency suspension hearing, we consider fairness to the parties as a paramount concern. As we explained in *Universal Ideas Corp. v. Esty*, 68 Or App 276, 280, 681 P2d 1176, *rev den*, 297 Or 546 (1984):

> "In order to determine whether the parties received a full and fair opportunity to litigate, we make a particularized examination of the prior action. The investigation involves a policy judgment balancing the interests of an individual litigant against the interests of the administration of justice, and we decide where the balance is to be struck in any given case. If actual unfairness will result, [issue preclusion] should not be applied."

See also Minihan v. Stiglich, 258 Or App 839, 855, 311 P3d 922 (2013) ("Even where [the *Nelson*] elements are met, the court must also consider the fairness under all the circumstances of precluding a party." (Internal quotation marks and citation omitted.)).

We also consider the realities of litigation, including petitioner's incentive to vigorously litigate the factual issues at the hearing on the emergency suspension order. *See Thomas v. U.S. Bank National Association*, 244 Or App 457, 472-73, 260 P3d 711, *rev den*, 351 Or 401 (2011) (applying issue preclusion, in part, because the plaintiffs were not

denied the opportunity to fully and fairly litigate an issue, and noting that the plaintiffs "had every incentive to vigorously litigate the issue" in the first proceeding); *Safeco Ins. Co. v. Laskey*, 162 Or App 1, 11, 985 P2d 878 (1999) (noting that it is "not innately inequitable to enforce issue preclusion against an insured who has had a full opportunity, and every incentive, to prove liability in third-party litigation, but has failed to do so); *see also Restatement (Second) of Judgments* § 28(5)(c) (1982) (issue preclusion should not apply when "the party sought to be precluded *** did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action").

Here, we agree with petitioner that she was denied a full and fair opportunity to litigate the facts related to the permanent revocation allegations. Even assuming, as the ALJ did, that the two proceedings involved the "same set of operative facts," the potential sanctions petitioner faced in the permanent revocation proceeding were far greater than the sanctions she faced in the emergency suspension proceeding. When comparing the initial emergency suspension proceeding with the permanent revocation proceeding, there were vastly different potential stakes at issue and outcomes that could result. By their nature, one could result in only a temporary suspension of petitioner's career as a psychologist, while the other could result in the end of her career and a costly fine. Under those circumstances, it is understandable that petitioner might not litigate with the same intensity, breadth, or depth in the former proceeding as in the latter.

As petitioner notes, after she requested a hearing on the emergency suspension order, the board filed a separate notice of proposed disciplinary action seeking to permanently revoke petitioner's license to practice psychology. That notice was filed only a few weeks before the emergency suspension hearing, and there was no indication that the board intended for the two proceedings to be combined in any way. Under those circumstances, petitioner's belief that she would have an opportunity to present different witnesses and evidence at a new hearing on the more severe permanent revocation allegations was reasonable. Because petitioner did not have the same incentive to litigate the

facts at the emergency suspension hearing as she would during a hearing on the permanent revocation allegations, issue preclusion did not apply, and the ALJ erred in granting the board's motion for summary determination.[3]

Order revoking petitioner's license to practice psychology and imposing a $5,000 fine reversed and remanded; order temporarily suspending petitioner's license to practice psychology affirmed.

[3] Because we resolve this case under the third *Nelson* factor, we need not determine whether, by virtue of its temporary nature, the emergency suspension proceeding is "the type of proceeding to which this court will give preclusive effect." *Nelson*, 318 Or at 104.