

November 8, 2019

released at 3:00 p.m.
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Hasan v. W.Va. Board of Medicine, 18-0715**Hutchison, J., concurring:**

As the majority discusses, the Board of Medicine is permitted to modify or reject the recommendations of its hearing examiner, but it must explain its rationale and evidentiary basis for doing so. I write separately to emphasize that the Board must also pay appropriate deference to the hearing examiner's factual findings regarding witness credibility.

It is well-established that the official who presides over witness testimony is always in the best position to evaluate credibility. *Sims v. Miller*, 227 W.Va. 395, 402, 709 S.E.2d 750, 757 (2011) (“the hearing examiner who observed the witness testimony is in the best position to make credibility judgments.”); *e.g. Dale v. Veltri*, 230 W.Va. 598, 604, 741 S.E.2d 823, 829 (2013) (noting that “[t]he hearing examiner was in a position to observe the demeanor of the witness, noted the obvious difference between the allegations . . . , and resolved the conflict” in the evidence); *Stephen L.H. v. Sherry L.H.*, 195 W.Va. 384, 396, 465 S.E.2d 841, 853 (1995) (superseded by statute) (explaining that “deference” to family law master’s factual findings “is appropriate . . . because the family law master is in a position to see and hear the witnesses and is able to view the case from a perspective that an appellate court can never match.”) (internal quotation marks and citation omitted)¹;

¹ *Stephen L.H.* was decided in the context of our State’s old family law master system, where a family law master held the evidentiary hearings and submitted recommended findings of fact and conclusions of law to a circuit court for decision.

Syl. Pt. 3, in part, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994) (“[F]actual findings based, at least in part, on determinations of witness credibility are accorded great deference.”). As the Court has explained,

[t]here are many critical aspects of an evidentiary hearing which cannot be reduced to writing and placed in a record, e.g., the demeanor of witnesses. These factors may affect the mind of a trier of fact in forming an opinion as to the weight of the evidence and the character and credibility of the witnesses.

Stephen L.H., 195 W.Va. at 395, 465 S.E.2d at 852. When members of the Board of Medicine are not present at an evidentiary hearing, they do not have the benefit of seeing the witnesses and hearing the testimony. Just as “[a] reviewing court cannot assess witness credibility through a record[,]”² neither can the Board.

If an administrative agency fails to give suitable deference to the credibility findings made by the person who actually heard and saw the witness testimony, a circuit court should not hesitate to declare the agency’s actions to be arbitrary and capricious. A recent example of this may be found in *In re Attersen*, No. 17-0506, 2018 WL 2753849 (W.Va. June 8, 2018) (memorandum decision). In *Attersen*, the West Virginia Division of Justice and Community Services (“Division”) appointed an administrative law judge (“ALJ”) to develop a factual record and provide recommended findings of fact and conclusions of law regarding the possible decertification of a law enforcement officer for misconduct. *Id.* at *2. The ALJ held a three-day hearing and then recommended to the

² *Michael D.C. v. Wanda L.C.*, 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997).

Division's executive director that the police officer not lose his certification. *Id.* However, the executive director rejected the ALJ's findings and ordered decertification. *Id.* The matter was appealed to circuit court, which declared the executive director's actions to be arbitrary and capricious, characterized by an unwarranted exercise of discretion, or clearly wrong in view of the record evidence. *Id.* The circuit court observed that the ALJ had heard approximately thirty hours of testimony and had based his determinations "upon more than just [the witnesses'] words" but also upon "their demeanor, appearance, and the appearance of bias or hostility[,] while the executive director had relied only upon the "cold transcripts' to make his own credibility determinations." *Id.* at *2, *4. Our Court affirmed the circuit court, stating "[w]e cannot overlook the role that credibility places in factual determinations, a matter reserved exclusively for the trier of fact." *Id.* at *3 (quoting *Martin v. Randolph Cty Bd. of Educ.*, 195 W.Va. 297, 306, 465 S.E.2d 399, 408 (1995)).

In this case, the Board of Medicine's Final Order rejected some of the hearing examiner's findings of fact regarding witness credibility. I think that in some instances, the Board skated close to crossing the line into making its own credibility decisions based upon the cold record. However, after considering the entire record, I agree with the majority's conclusion that the Board has adequately justified its decision with reasoned, evidence-based explanations. As such, I respectfully concur.