IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2019 Term

No. 18-0715

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

OMAR KHALID HASAN, M.D.,
Petitioner Below, Petitioner

V.

WEST VIRGINIA BOARD OF MEDICINE,
Respondent Below, Respondent

Appeal from the Circuit Court of Kanawha County
The Honorable Tod J. Kaufman, Judge
Civil Action No. 17-AA-53

AFFIRMED

Submitted: October 16, 2019
Filed: November 8, 2019

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JUSTICE JENKINS delivered the Opinion of the Court.

JUSTICE HUTCHISON concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. When the West Virginia Board of Medicine has utilized a hearing examiner to conduct disciplinary proceedings, the Board may, pursuant to W. Va. C.S.R. § 11-3-14.1. (2010), adopt, modify, or reject the recommended findings of fact and conclusions of law submitted by the hearing examiner. However, if the Board modifies or rejects the hearing examiner's recommended findings of fact, the Board must explain the rationale and evidentiary basis for such modification or rejection in a reasoned, articulate decision.

2. Under Rule 901(a) of the West Virginia Rules of Evidence, text messages may be authenticated in numerous ways including, for example, by a witness who was a party to sending or receiving the text messages, or through circumstantial evidence showing distinctive characteristics that link the sender to the text messages.

Jenkins, Justice:

Doctor Omar Hasan ("Dr. Hasan"), petitioner herein, appeals a final order entered in the Circuit Court of Kanawha County on July 13, 2018, that affirmed a decision by the respondent herein, the West Virginia Board of Medicine ("the Board"), that imposed professional discipline, including a one-year suspension of his medical license with the requirement that he petition for reinstatement. Before this Court, Dr. Hasan contends that the Board erred by failing to adopt recommended findings of fact by its hearing examiner, by improperly considering the content of text messages, and by misstating various facts in its final order. Based upon our thorough consideration of this appeal, we conclude that the Board has the authority to amend findings of fact recommended by its hearing examiner so long as it provides a reasoned, articulate decision that explains the rationale for its changes. Because we find the Board provided such rationale, did not err in considering the text messages, and did not commit reversible error by misstating certain evidence, we affirm.

I.

FACTUAL AND PROCEDURAL HISTORY

Dr. Hasan, a psychiatrist, has practiced psychiatry at Raleigh Psychiatric Services, Inc., in Beckley, West Virginia, since 2007. In November 2011, Dr. Hasan began

providing psychopharmacological[1] care to a patient we will identify as M.B.[2] In September 2014, M.B. filed a complaint with the Board[3] alleging that Dr. Hasan engaged in an improper sexual relationship with her; that the relationship included, among other things, texting, phone calls, gifts, and sexual encounters on numerous occasions at various locations; and that the relationship led her to attempt suicide when it was ended by Dr. Hasan. The Board investigated M.B.'s allegations.[4] At the conclusion of its investigation,

[1] "Psychopharmacology" refers to "1. the scientific study of the effects of drugs on behavior and normal and abnormal mental functions. 2. the use of these drugs in the treatment of mental illness." *Mosby's Medical Dictionary* 1484 (9th ed. 2013).

[2] We follow our normal practice in cases with sensitive facts and refer to Dr. Hasan's patient by her initials to protect her identity. *See, e.g., In re Jeffrey R.L.*, 190 W. Va. 24, 26 n.1, 435 S.E.2d 162, 164 n.1 (1993). M.B. was being psychopharmacologically treated by Dr. Hasan for the psychiatric conditions of major depressive disorder and anxiety disorder.

[3] The Board is made up of sixteen members, fifteen of whom are appointed by the Governor of West Virginia. The fifteen members appointed by the governor include eight physicians; two podiatric physicians; two physician assistants; and three members of the public. *See* W. Va. Code § 30-3-5 (LexisNexis 2018). The sixteenth member is the West Virginia State Health Officer, who serves as the Secretary of the Board. *See id.* and *id.* § 30-3-8.

[4] During the course of the Board's investigation, Dr. Hasan filed a petition for writ of prohibition in this Court seeking to prevent the Board from taking further action on M.B.'s complaint. Dr. Hasan alleged that the Board had failed to timely act upon the complaint. This Court found that the Board had complied with the relevant statute that permitted an extension of time and denied Dr. Hasan's petition. *See State ex rel. O.H. v. W. Va. Bd. of Med.*, 238 W. Va. 139, 792 S.E.2d 638 (2016).

the Board found probable cause to institute disciplinary proceedings against Dr. Hasan for professional misconduct.[5]

The Board ultimately issued and served upon Dr. Hasan its Amended Complaint and Notice of Hearing. The Board's Amended Complaint set out six separate counts against Dr. Hasan: Count I charged him with exercising influence within a patient-physician relationship for the purpose of engaging a patient in sexual activity in violation of W. Va. Code § 30-3-14(c)(8) (LexisNexis 2018)[6] and W. Va. C.S.R. § 11-1A-12.1.e. (2007);[7] Count II charged him with failing to immediately terminate the physician-patient

[5] The Board designated the matter as Complaint Number 14-89-S.

[6] Pursuant to W. Va. Code § 30-3-14(c)(8) (LexisNexis 2018),

> (c) The [B]oard may . . . discipline a physician or podiatrist licensed or otherwise lawfully practicing in this state who, after a hearing, has been adjudged by the [B]oard as unqualified due to any of the following reasons:
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> . . . .
>
> (8) Exercising influence within a patient-physician relationship for the purpose of engaging a patient in sexual activity[.]

The version of W. Va. Code § 30-3-14 in effect at the time Dr. Hasan was charged had been enacted in 2016. Although W. Va. Code § 30-3-14 has since been amended, the language applicable to the instant matter has not changed. Accordingly, we cite to the current enactment of this provision.

[7] Pursuant to W. Va. C.S.R. § 11-1A-12.1.e. (2007):

> 12.1. The Board may deny an application for a license, place a licensee on probation, suspend a license, limit or restrict

relationship when the interactions and/or communications became sexual in nature in violation of W. Va. Code § 30-3-14(c)(17),[8] and W. Va. C.S.R. §§ 11-1A-12.1.e.,[9] 11-1A-

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> a license or revoke any license heretofore or hereafter issued by the Board, upon satisfactory proof that the licensee has:
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> . . . .
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> 12.1.e. Engaged in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public or any member thereof[.]

[8] Pursuant to W. Va. Code § 30-3-14(c)(17),

> (c) The [B]oard may . . . discipline a physician or podiatrist licensed or otherwise lawfully practicing in this state who, after a hearing, has been adjudged by the [B]oard as unqualified due to any of the following reasons:
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> . . . .
>
> (17) Violating any provision of this article or a rule or order of the [B]oard or failing to comply with a subpoena or subpoena duces tecum issued by the [B]oard[.]

[9] For the text of W. Va. C.S.R. § 11-1A-12.1.e., see note 7, *supra*.

12.1.j.,[10] and 11-1A-12.2.d.;[11] Count III charged him with entering into a sexual relationship with M.B. in violation of W. Va. Code § 30-3-14(c)(17),[12] and W. Va. C.S.R.

[10] Pursuant to W. Va. C.S.R. § 11-1A-12.1.j.,

> 12.1. The Board may deny an application for a license, place a licensee on probation, suspend a license, limit or restrict a license or revoke any license heretofore or hereafter issued by the Board, upon satisfactory proof that the licensee has:
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> . . . .
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> j. Engaged in unprofessional conduct, including, but not limited to, any departure from, or failure to conform to, the standards of acceptable and prevailing medical or podiatric practice, or the ethics of the medical or podiatric profession, irrespective of whether or not a patient is injured thereby, or has committed any act contrary to honesty, justice or good morals, whether the same is committed in the course of his or her practice or otherwise and whether committed within or without this State[.]

[11] Pursuant to W. Va. C.S.R. § 11-1A-12.2.d.,

> 12.2. Acts declared to constitute dishonorable, unethical or unprofessional conduct: As used in this rule at subdivision 12.1.e, "Dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public or any member thereof" includes, but is not limited to:
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> . . . .
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> d. Conduct which is calculated to bring or has the effect of bringing the medical or podiatric profession into disrepute, including, but not limited to, any departure from or failure to conform to the standards of acceptable and prevailing medical or podiatric practice within the state, and any departure from or failure to conform to the current principles of medical ethics of the AMA available from the AMA in Chicago, Illinois, or the principles of podiatric ethics of the APMA available from

§§ 11-1A-12.1.e.,[13] 11-1A-12.1.j.,[14] and 11-1A-12.2.d.;[15] Count IV charged him with failing to appropriately respond to M.B.'s reports of suicidal ideation in violation of W. Va. Code § 30-3-14(c)(17)[16] and W. Va. C.S.R. § 11-1A-12.1.x.;[17] Count V charged him with failing to consider the clinical significance of his out-of-office communications with M.B. in violation of W. Va. Code § 30-3-14(c)(17)[18] and W. Va. C.S.R. § 11-1A-12.1.x.;[19] and

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> the APMA in Bethesda, Maryland. For the purposes of this subsection, actual injury to a patient need not be established[.]

[12] For the text of W. Va. Code § 30-3-14(c)(17), see note 8, *supra*.

[13] For the text of W. Va. C.S.R. § 11-1A-12.1.e., see note 7, *supra*.

[14] For the text of W. Va. C.S.R. § 11-1A-12.1.j., see note 10, *supra*.

[15] For the text of W. Va. C.S.R. § 11-1A-12.2.d., see note 11, *supra.*

[16] For the text of W. Va. Code § 30-3-14(c)(17), see note 8, *supra*.

[17] Pursuant to W. Va. C.S.R. § 11-1A-12.1.x.,

> 12.1. The Board may deny an application for a license, place a licensee on probation, suspend a license, limit or restrict a license or revoke any license heretofore or hereafter issued by the Board, upon satisfactory proof that the licensee has:
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> . . . .
>
> 12.1.x. Engaged in malpractice or failed to practice medicine or podiatry with that level of care, skill and treatment which is recognized by a reasonable, prudent, physician or podiatrist engaged in the same or a similar specialty as being acceptable under similar conditions and circumstances[.]

[18] For the text of W. Va. Code § 30-3-14(c)(17), see note 8, *supra*.

[19] For the text of W. Va. C.S.R. § 11-1A-12.1.x., see note 17, *supra*.

Count VI charged him with failing to properly document his out-of-office communications with M.B. in violation of W. Va. Code § 30-3-14(c)(11),[20] and W. Va. C.S.R. §§ 11-1A-12.1.u.,[21] and/or 11-1A-12.1.jj.[22]

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[20] Pursuant to W. Va. Code § 30-3-14(c)(11),

> (c) The [B]oard may . . . discipline a physician or podiatrist licensed or otherwise lawfully practicing in this state who, after a hearing, has been adjudged by the [B]oard as unqualified due to any of the following reasons:
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> . . . .
>
> (11) Failing to keep written records justifying the course of treatment of a patient, including, but not limited to, patient histories, examination and test results, and treatment rendered, if any[.]

[21] Pursuant to W. Va. C.S.R. § 11-1A-12.1.u.,

> 12.1. The Board may deny an application for a license, place a licensee on probation, suspend a license, limit or restrict a license or revoke any license heretofore or hereafter issued by the Board, upon satisfactory proof that the licensee has:
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> . . . .
>
> 12.1.u. Failed to keep written records justifying the course of treatment of the patient, including, but not limited to, patient histories, examination results and test results and treatment rendered, if any[.]

[22] Pursuant to W. Va. C.S.R. § 11-1A-12.1.jj.,

> 12.1. The Board may deny an application for a license, place a licensee on probation, suspend a license, limit or restrict a license or revoke any license heretofore or hereafter issued by the Board, upon satisfactory proof that the licensee has:
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> . . . .

Dr. Hasan submitted his Answer to the Amended Complaint in which he admitted to engaging in out-of-office communications with M.B., but he claimed the communications were for treatment purposes. The Board appointed a hearing examiner, and a public hearing was held from April 25, 2017, through April 28, 2017. The evidence presented at the hearing included significant details provided by M.B. regarding dates and locations where M.B. and Dr. Hasan had met and either engaged in sexual activities or discussed their ongoing affair. In addition, according to Dr. Hasan's own AT&T phone records, he and M.B. exchanged more than four thousand text messages between January 2013 and January 2014,[23] and spent more than sixteen hours engaged in phone calls. This evidence was particularly striking given that Dr. Hasan had treated M.B. with psychopharmacological care and treatment, and had not treated her with psychotherapy; thus there appeared to be no medical reason for Dr. Hasan to engage in such numerous and

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> jj. Fail[ed] to maintain a medical record for each patient which is adequate to enable the physician or podiatrist to provide proper diagnosis and treatment, and/or to keep such patient medical records for a minimum of three (3) years from the date of the last patient encounter and in a manner which permits the former patient or a successor physician or podiatrist access to them within the terms of this rule and as set forth in W. Va. Code § 16-29-1 et seq.

[23] The Board explains that Dr. Hasan and M.B. texted regularly from late January 2013 until January 2014; however, only sample periods during this time were surveyed. Because the sample periods actually surveyed amounted to less than half of the actual time period between January 2013 and January 2014, the Board avers that the total number of texts that occurred between Dr. Hasan and M.B. is significantly higher. There also were indications that private texting applications had been used toward the end of the relationship, which also would increase the total number of text messages exchanged.

lengthy communications with M.B. outside of the office setting. Additionally, there were no out-of-office communications with M.B. documented by Dr. Hasan in M.B.'s medical record. Although Dr. Hasan has disputed the content of the texts, the fact that this volume of texts occurred is not disputed.[24]

Following the hearing, the hearing examiner issued his recommended findings of fact and conclusions of law on June 13, 2017, in which he found that the Board had failed to prove by clear and convincing evidence that Dr. Hasan had committed the violations alleged in Counts I, II, III, IV, and V of its amended complaint. The hearing examiner further found that the Board did prove by clear and convincing evidence that Dr. Hasan had committed the violation alleged in Count VI, by failing to properly document his out-of-office communications with M.B. With respect to sanctions, the hearing examiner recommended that Dr. Hasan (1) be assessed a fine of $3,000.00; (2) be ordered to pay the costs of the proceedings and of the investigation; (3) be publically reprimanded; and (4) have his license placed on probation for a period of three years during which he could practice medicine and surgery in the State of West Virginia subject to the following

[24] With respect to content, the Board asserts that Dr. Hasan could not produce much text content from his own phone because the text messages were wiped from his phone when it was reset while being restored from a backup approximately one week before Dr. Hasan sent his phone for forensic evaluation. According to the Board, although Dr. Hasan's AT&T phone records reflected that he had sent and received over 4,000 text messages from January 2013 through January 2014, Dr. Hasan's forensic expert was able to recover only ninety-six text messages from the phone. Twenty of these messages were duplicates, and forty were related to communications with M.B. Dr. Hasan's forensic expert was not able to explain how a nominal amount of text messages that pre-dated the reset remained on the phone.

limitations: (a) that he enroll in and successfully complete, within ninety days and at his own expense, a course designated and approved by the Board providing no fewer than fifteen continuing medical education hours on the subject of medical records and documentation; (b) a chart review of Dr. Hasan's medical records be conducted; and (c) Dr. Hasan appear before the Board annually to discuss his practice and matters relative to these terms and conditions.

After considering the record and the hearing examiner's recommended findings of fact, conclusions of law, and proposed discipline, the Board issued its final order on June 21, 2017. The Board modified the hearing examiner's recommendations and found that Dr. Hasan had violated Counts I, III, V, and VI of the Amended Complaint. The Board concluded that violations of Counts II and IV of the Amended Complaint had not been proven. Accordingly, the Board imposed various sanctions, which included: (1) suspending Dr. Hasan's West Virginia medical license for a period of one year, to remain in effect until lifted or otherwise modified by the Board; (2) a public reprimand; (3) completion by Dr. Hasan, at his own expense, of the Multidisciplinary Assessment & Evaluation of Professionals program at the Professional Renewal Center in Lawrence, Kansas; (4) a requirement that, before the Board will consider lifting or modifying the sanctions imposed, Dr. Hasan must make a written request that his suspension be modified and/or lifted and must provide proof that he complied with certain conditions related to his completion of the Multidisciplinary Assessment & Evaluation of Professionals program; (5) appearing before the Board or a designated committee thereof on an annual basis, or at

any other time requested, to discuss his practice and matters relative to the terms and conditions of his discipline; and (6) payment by Dr. Hasan of the costs and expenses of the proceedings.

Dr. Hasan appealed the Board's decision to the Circuit Court of Kanawha County. The circuit court affirmed the decision and this appeal followed.

II.

STANDARD OF REVIEW

This case is presently before this Court on appeal from the circuit court's order affirming the administrative decision of the Board. Appeal to this Court from an adverse decision of the circuit court in an administrative proceeding is authorized by W. Va. Code § 29A-6-1 (LexisNexis 2018), which provides that

> [a]ny party adversely affected by the final judgment of the circuit court under this chapter may seek review thereof by appeal to the Supreme Court of Appeals of this State, and jurisdiction is hereby conferred upon such court to hear and entertain such appeals upon application made therefor in the manner and within the time provided by law for civil appeals generally.

In exercising our authority to consider an administrative appeal, "[t]his Court reviews decisions of the circuit [court] under the same standard as that by which the circuit [court] reviews the decision of the ALJ. . . . We review *de novo* the conclusions of law and application of law to the facts." *Martin v. Randolph Cty. Bd. of Educ.*, 195 W. Va. 297,

304, 465 S.E.2d 399, 406 (1995). With respect to the circuit court's review, we have explained that,

> "'[u]pon judicial review of a contested case under the West Virginia Administrative Procedure[s] Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are "(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."' Syl. Pt. 2, *Shepherdstown Volunteer Fire Department v. Human Rights Commission*, 172 W. Va. 627, 309 S.E.2d 342 (1983)." Syllabus Point 1, S*t. Mary's Hospital v. State Health Planning and Development Agency*, 178 W. Va. 792, 364 S.E.2d 805 (1987).

Syl. pt. 1, *W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (1996). Furthermore,

> [w]e have previously concluded that findings of fact made by an administrative agency will not be disturbed on appeal unless such findings are contrary to the evidence or based on a mistake of law. In other words, the findings must be clearly wrong to warrant judicial interference. *Billings v. Civil Service Commission*, 154 W. Va. 688, 178 S.E.2d 801 (1971). Accordingly, absent a mistake of law, findings of fact by an administrative agency supported by substantial evidence should not be disturbed on appeal. *West Virginia Human Rights Commission v. United Transportation Union*, 167 W. Va. 282, 280 S.E.2d 653 (1981); *Bloss & Dillard, Inc. v. West Virginia Human Rights Commission*, 183 W. Va. 702, 398 S.E.2d 528 (1990).

Modi v. W. Va. Bd. of Med., 195 W. Va. 230, 239, 465 S.E.2d 230, 239 (1995). With these standards in mind, we next consider the issues raised on appeal.

III.

DISCUSSION

Dr. Hasan presents the following assignments of error: (1) the Board and the circuit court acted arbitrarily and capriciously by failing to give deference to the hearing examiner's credibility determinations and factual findings; (2) the circuit court improperly considered the content of the text messages; and (3) the circuit court relied on erroneous factual determinations made by the Board.[25] These issues are addressed in turn.

A. Credibility Determinations and Factual Findings

Dr. Hasan first argues that the Board and the circuit court acted arbitrarily

[25] In addition, Dr. Hasan argues that the Board denied him due process by failing to provide him an advance copy of its final order, by refusing to accept the hearing examiner's findings, and by failing to thoroughly investigate M.B.'s allegations. We will not address this issue because it was not raised below.

> "'This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.' Syllabus Point 2, *Sands v. Security Trust Company*, 143 W. Va. 522, 102 S.E.2d 733 (1958)." Syllabus point 2, *Duquesne Light Co. v. State Tax Department*, 174 W. Va. 506, 327 S.E.2d 683 (1984).

Syl. pt. 2, *State ex rel. Lewis v. Hall*, 241 W. Va. 355, 825 S.E.2d 115 (2019).

and capriciously when they failed to provide deference to the hearing examiner's credibility determinations and factual findings. Dr. Hasan contends that the Board and the circuit court should have upheld the hearing examiner's conclusions as to three specific encounters between Dr. Hasan and M.B., particularly in light of the lack of corroborating evidence to support M.B.'s allegations. The Board responds that the circuit court correctly held that the Board did not substitute its own witness credibility determinations in place of the hearing examiner, as the Board's decision to reject certain findings of the hearing examiner was based upon other evidence in the record that did not rely upon the credibility of a witness and that the hearing examiner either ignored or failed to consider. The Board notes that the hearing examiner found M.B. to be generally credible based upon his observations of her demeanor and sincerity while testifying. The Board contends that, in light of the totality of the evidence, it reasonably disagreed with the hearing examiner's perception that the lack of corroborating witnesses was fatal to M.B.'s claim.

After reviewing the respective roles of the Board and its hearing examiner in carrying out disciplinary proceedings, we will address whether the Board's factual findings were erroneously rendered.

1. Respective roles of the Board and its Hearing Examiner in making findings of fact. This Court has recognized that the West Virginia Medical Practice Act

("Medical Practice Act"), W. Va. Code §§ 30-3-1 to -18 (LexisNexis 2018),[26] "governs the procedures the Board of Medicine must follow in disciplinary proceedings." *State ex rel. Hoover v. Smith*, 198 W. Va. 507, 512, 482 S.E.2d 124, 129 (1997) (footnote omitted). A primary purpose of the Medical Practice Act is to provide for the professional discipline of physicians. *See* W. Va. Code § 30-3-2 (stating in relevant part that "[t]he purpose of this article is to provide for the licensure and *professional discipline* of physicians" (emphasis added)). The Legislature has placed the duty upon the Board to "be a regulatory *and disciplinary* body for the practice of medicine . . . ." *Id.* § 30-3-5 (emphasis added). *See also id.* § 30-3-7(a) ("The [B]oard is autonomous and, in accordance with this article, shall determine qualifications of applicants for licenses to practice medicine . . . , and shall issue licenses to qualified applicants and s*hall regulate the professional conduct and discipline of such individuals*." (emphasis added)). In this regard, the Board "*may discipline* a physician . . . licensed or otherwise lawfully practicing in this state who, *after a hearing*, *has been adjudged by the* [*B*]*oard* as unqualified" due to certain reasons enumerated in the Medical Practice Act. *Id.* § 30-3-14(c) (emphasis added). *See also id.* § 30-3-14(j) ("[*T*]*he* [*B*]*oard* may enter an order imposing one or more of the following [sanctions]" (emphasis added)). Thus, in plain language, the Legislature has expressly conferred upon the Board the sole authority to adjudge a physician as unqualified and to impose consequent discipline. "'[A] statute that is clear and unambiguous will be applied and not construed.'

[26] Some provisions of the Medical Practice Act were amended after the disciplinary charges were brought against Dr. Hasan. However, because the language relevant to the instant matter was not changed, we cite only to the current version of the Act. *See supra* note 6.

Syl. pt. 1, in part, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968)." Syl. pt. 8, *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 787 S.E.2d 546 (2016).

In its exercise of this authority, the Board is authorized to "[h]old hearings and conduct investigations." W. Va. Code § 30-3-7(a)(2). *See also id.* § 30-3-14(c) (allowing the Board to discipline a physician adjudged unqualified "*after a hearing"* (emphasis added)). Moreover, the Legislature has empowered the Board to employ hearing examiners as an aid to carrying out its functions. *See id.* § 30-3-7(a) ("In carrying out its functions, the [B]oard may: . . . (4) Employ . . . hearing examiners . . . ."). Accordingly, the functions of conducting an evidentiary hearing may be delegated by the Board to a hearing examiner:

> The President, with the approval of a majority of the Board, *may appoint hearing examiners* on an annual basis *who shall be empowered to* subpoena witnesses and documents, administer oaths and affirmations, examine witnesses under oath, rule on evidentiary questions, hold conferences for the settlement or simplification of issues by consent of the parties and otherwise *conduct hearings* as provided in Section 11.5 herein. . . .

W. Va. C.S.R. § 11-3-14.1. (2010) (emphasis added).

Notably,

> [h]earings conducted by the Board *or by a hearing examiner appointed by the Board*, upon a complaint issued by the Board, *are a continuance of the investigation designed to enable the Board to properly discharge its administrative functions and authority*. The purpose of such hearing is to afford the respondent an opportunity, in person or by counsel

> or other representative, to respond to the complaint, to present his or her position, to present evidence in support of his or her contention, to examine and cross-examine evidence and witnesses produced in support of the complaint and to argue orally at the hearing.

Id. § 11-3-11.5.d. (emphasis added). Furthermore, the hearing examiner is afforded no authority to declare findings of fact or conclusions of law that are in any way final. Instead, the hearing examiner's authority extends only to *proposing* such findings and conclusions to the Board, who then is tasked with rendering a final determination: "[i]f a hearing examiner is appointed under this section, he or she shall make *proposed* findings of fact and conclusions of law." *Id.* § 11-3-14.1. (emphasis added). *See also Berlow v. W. Va. Bd. of Med*., 193 W. Va. 666, 669, 458 S.E.2d 469, 472 (1995) (recognizing that "[t]he Board, not the hearing examiner, 'shall be a regulatory and disciplinary body for the practice of medicine and surgery. . . .' *W. Va. Code* 30-3-5 . . . ."). By rule, the Board is afforded broad authority after receiving a hearing examiner's recommended findings of fact and conclusions of law, and "may adopt, modify or reject such findings of fact and conclusions of law." W. Va. C.S.R. § 11-3-14.1.

There is, however, a limitation on the Board's exercise of this authority. As demonstrated by the following cases, when modifying the findings and conclusions of its appointed hearing examiner, the Board must present a "reasoned, articulate decision." *Berlow*, 193 W. Va. at 670, 458 S.E.2d at 473 (quotations and citation omitted).[27] *Cf.* Syl.

[27] Dr. Hasan relies on *Webb v. West Virginia Board of Medicine*, 212 W. Va. 149, 569 S.E.2d 225 (2002), for the proposition that "credibility determinations by the

pt. 6, *White v. Miller*, 228 W. Va. 797, 724 S.E.2d 768 (2012) ("'Where there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not select one version of the evidence over the conflicting version *unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court*.' Syl. pt. 6, *Muscatell v. Cline, Comm'r*, 196 W. Va. 588, 474 S.E.2d 518 (1996)." (emphasis added)).

In *Berlow*, this Court considered whether the Board was required to adopt a *sanction* that had been recommended by the hearing examiner. In analyzing the issue, the *Berlow* Court observed generally that, "[a]lthough the Board is not required to accept automatically the recommendations of a hearing examiner, the Board must present 'a reasoned, articulate decision.'" *Berlow*, 193 W. Va. at 670, 458 S.E.2d at 473 (quoting *Citizens Bank of Weirton v. W. Va. Bd. of Banking & Fin. Insts.*, 160 W. Va. 220, 230, 233 S.E.2d 719, 726 (1977)). The Court in *Berlow* upheld the Board's decision to impose its own sanction in lieu of adopting the sanction that had been recommended by the hearing examiner, because "the Board provided an understandable justification for modifying the Hearing Examiner's recommended sanction." *Berlow*, 193 W. Va. at 670, 458 S.E.2d at 473.

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finder of fact in an administrative proceeding are binding unless patently without basis in the record." *Id*. at 156, 569 S.E.2d at 232 (quotations and citation omitted). Dr. Hasan's reliance on *Webb* is misplaced. *Webb* did not address the interplay between the Board and its hearing examiner with respect to findings of fact. Rather, the foregoing principle was stated in *Webb* in the context of the review of factual findings by an appellate court.

Shortly after the Court announced its decision in *Berlow*, it again addressed the authority of the Board to reject a recommendation made by a hearing examiner in *Modi v. West Virginia Board of Medicine*, 195 W. Va. 230, 465 S.E.2d 230. *Modi* addressed, in part, evidentiary findings made by the Board upon its rejection of certain conclusions of law made by its hearing examiner. The Court in *Modi* found the Board's decision lacked proper reasoning and articulation, and observed that,

> the Board order, cobbled together by the expedient of additions to and excisions from the hearing examiner's report, is barely intelligible, if at all. . . .
>
> Likewise, we are unable to discern from the Board order "a reasoned, articulate decision which sets forth the underlying evidentiary facts which lead the agency to its conclusion", as is required by syllabus point 2 of *Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions*, [160 W. Va. 220, 233 S.E.2d 719 (1977)].

Modi, 195 W. Va. at 240, 465 S.E.2d at 240.[28] The Court ultimately held,

> [w]here an administrative agency has conducted a contested hearing through a hearing examiner and determines

[28] Pursuant to Syllabus point 2 of *Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions*, 160 W. Va. 220, 233 S.E.2d 719 (1977):

> When *W. Va. Code*, 29A-5-3 (1964) says: "Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. . . ." the law contemplates a reasoned, articulate decision which sets forth the underlying evidentiary facts which lead the agency to its conclusion, along with an explanation of the methodology by which any complex, scientific, statistical, or economic evidence was evaluated. In this regard if the conclusion is predicated upon a change of agency policy from former practice, there should be an explanation of the reasons for such change.

> that it should amend the findings of fact or conclusions of law recommended by the hearing examiner, a reasoned, articulate statement of the reasons for the amended findings of fact or conclusions of law adopted by the agency is essential to the validity of those findings or conclusions and to their ready acceptance by reviewing courts. Such is particularly the case where the agency is making its decision based on economic or scientific data within the presumed expertise of the agency or where the agency has not heard or received the underlying evidence from which it is drawing conclusions different from those of the hearing examiner.

Syl. pt. 5, *id.*

Other jurisdictions similarly allow an administrative agency to alter or reject a hearing examiner's findings of fact when such alteration or rejection is justified. *See Blaine Cty. v. Stricker*, 394 P.3d 159, 165 (Mont. 2017) (explaining that, under the Montana Administrative Procedures Act, "an agency may reject a hearing officer's findings of fact only if, upon review of the complete record, the agency first determines that the findings were not based upon competent substantial evidence" (internal quotations and citation omitted)); *Cavanaugh v. Fayette Cty. Zoning Hearing Bd.*, 700 A.2d 1353, 1355-56 (Pa. Commw. Ct. 1997) ("While a fact finder's observation of the demeanor of a witness has traditionally been viewed as an important factor in determining credibility, administrative adjudicators are permitted to determine the credibility of testimony from the reading of a transcript. . . . Administrative agencies often use a system of adjudication where a hearing examiner or presiding officer takes evidence and the ultimate fact finder is a board or commission, which has the power to make findings of fact based solely on a review of the record. . . . An adjudicative method where the ultimate decision in a case is made by an

administrative fact finder who did not hear the testimony does not deny a litigant due process of law." (footnote and internal citations omitted)); *Robinson v. Williams*, No. 03-13-00244-CV, 2015 WL 3654652, at *6 (Tex. App. June 11, 2015) (observing that Tex. Educ. Code § 21.259(c) "provides that the board may 'reject or change a finding of fact made by the hearing examiner only after reviewing the record of the proceedings before the hearing examiner and only if the finding of fact is not supported by substantial evidence'"); *In re Disciplinary Proceeding Against Petersen*, 329 P.3d 853, 860-61 n.15 (Wash. 2014) ("By regulation, a hearing examiner's findings of fact and recommendation is merely a recommendation to the Board, which has an opportunity to review the findings and to accept, reject, or modify them.").

Based upon the foregoing analysis, we now hold that when the West Virginia Board of Medicine has utilized a hearing examiner to conduct disciplinary proceedings, the Board may, pursuant to W. Va. C.S.R. § 11-3-14.1. (2010), adopt, modify, or reject the recommended findings of fact and conclusions of law submitted by the hearing examiner. However, if the Board modifies or rejects the hearing examiner's recommended findings of fact, the Board must explain the rationale and evidentiary basis for such modification or rejection in a reasoned, articulate decision. Having determined that the Board may modify the recommended findings of fact rendered by a hearing examiner, we next examine the modifications of which Dr. Hasan complains in this matter to see if they were adequately justified by the Board.

2. The Board's factual determinations. Dr. Hasan argues that the Board acted arbitrarily and capriciously when it failed to give deference to credibility determinations and factual findings made by the hearing examiner, particularly with respect to the hearing examiner's conclusions that M.B.'s testimony was not sufficient to establish that M.B. and Dr. Hasan had met at three distinct locations for the purpose of furthering their sexual affair as alleged by M.B. The Board responds by asserting that it did not substitute its own witness credibility determinations in place of the hearing examiner, as its decision was based upon other evidence in the record that was not properly considered by the hearing examiner and that did not rely upon the credibility of witnesses.

To the extent Dr. Hasan contends that the Board's findings are arbitrary and capricious, we observe that

> "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syllabus Point 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

Syl. pt. 2, *Webb v. W. Va. Bd. of Med.*, 212 W. Va. 149, 569 S.E.2d 225 (2002). "'Substantial evidence' requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If an administrative agency's factual finding is supported by substantial evidence, it is conclusive." Syl. pt. 4, *In re Queen,* 196 W. Va. 442, 473 S.E.2d 483.

We have thoroughly examined both the hearing examiner's recommended findings and the Board's final order. We find that the Board provided detailed reasoning and a discussion of the evidence supporting its modifications of the hearing examiner's recommended findings, including a discussion of some of the evidence that had not been addressed by the hearing examiner in his recommended findings. For example, the hearing examiner rejected M.B.'s assertion that the couple had met at a Microtel based upon the testimony of Dr. Hasan and supporting evidence explaining he was elsewhere at the time M.B. claimed they were together at the Microtel. However, the Board explained that close scrutiny of Dr. Hasan's various explanations and evidence for where he purportedly was during the time M.B. claimed they were together at the Microtel actually placed him at two locations at once, which would be impossible. The Board found that this discrepancy in Dr. Hasan's evidence bolstered M.B.'s claim. Another example is a house where, according to M.B., the couple had met on multiple occasions. M.B.'s testimony describing the house contained both accurate and inaccurate information. The hearing examiner focused on the inaccuracies in M.B.'s descriptions and concluded she had not been in the home. The Board, on the other hand, focused on the fact that M.B. had correctly related a large number of details about the house and concluded that she had, in fact, been in the home. Finally there was disputed evidence regarding whether M.B. and Dr. Hasan had met at his sleep center on a specific date. The hearing examiner found they had not, based upon testimony by an employee that she had worked that night and had seen no one. The employee's time-sheet supported that she had worked that night during the time when Dr. Hasan and M.B. would have been there. In reaching a contrary conclusion, the Board

observed conflicts in the employee's testimony. The employee stated that three employees would be present for a sleep study. She also testified that she was administering a sleep study on the night in question, but she claimed to be at the sleep center alone.

Because the Board explained the rationale and evidentiary basis for its modifications of the hearing examiner's recommended findings of fact in a reasoned, articulate decision, the Board demonstrated its findings are supported by substantial evidence contained in the record, and the Board's modified findings are not arbitrary or capricious. Accordingly, we find no error.

B. Content of Text Messages

During the evidentiary hearing, an extensive spreadsheet listing a copious number of the text messages between Dr. Hasan and M.B. that had been extracted from M.B.'s mobile phone[29] was offered by the Board as its Exhibit 1 and received into evidence by the hearing examiner. The spreadsheet identified for each text, among other things: the number from which the text was sent; the name associated with that number, if the number matched an entry in the contact list on M.B.'s phone; the date and time when the text

[29] Dr. Hasan's AT&T records demonstrated that he and M.B. had exchanged well over 4,000 text messages between January 2013 and January 2014. A significant number of these text messages were extracted from M.B.'s mobile phone.

message was sent or received; an indication of whether the text message was an incoming or an outgoing message; and the content of the text messages.[30]

Dr. Hasan argues that the Board erroneously considered these messages because they were admitted in violation of Rule 901 of the West Virginia Rules of Evidence ("Rules of Evidence").[31] The Board contends that the admission of the text messages extracted from M.B.'s cell phone did not violate Rule 901.

At the outset, we observe that, pursuant to the Board's procedural rules, "[t]he rules of evidence as applied in civil cases in the circuit courts of this State shall be followed." W. Va. C.S.R. § 11-3-11.5.c. *Accord Univ. of W. Va. Bd. of Trs. ex rel. W. Va. Univ. v. Fox*, 197 W. Va. 91, 94, 475 S.E.2d 91, 94 (1996) ("[T]he West Virginia Rules of

[30] M.B. testified that she changed her phone number at some point prior to the extraction of the messages from her phone. Nevertheless, the witness testifying about the extraction process on M.B.'s phone explained that all the messages contained on the phone were extracted, regardless of whether the phone number assigned to M.B.'s phone at the time the text messages were sent or received was different from the phone number assigned to the phone at the time the messages were extracted.

[31] Dr. Hasan also argues that the spreadsheet of extracted text messages was admitted in violation of Rule 1006 of the Rules of Evidence. Rule 1006 pertains to the use of a "summary, chart, or calculation *to prove the content of voluminous writings*, recordings, or photographs *that cannot be conveniently examined in court*." W. Va. R. Evid. 1006 (emphasis added). We summarily reject this argument because the spreadsheet was not a summary or condensed version of voluminous writings that could not be conveniently examined in court, but are the writings themselves. *See, e.g.*, W. Va. R. Evid. 1001(d) ("An 'original' of a writing or recording means the writing or recording itself or any copy or counterpart intended to have the same effect by the person who executed or issued it. *For electronically stored information, 'original' means any printout – or other output readable by sight – if it accurately reflects the information. . . .*"). Accordingly, Rule 1006 does not apply to the spreadsheet.

Evidence are typically given their full effect in administrative proceedings. Under the State Administrative Procedures Act, West Virginia Code § 29A-5-2(a), '[t]he rules of evidence as applied in civil cases in the circuit courts of this state shall be followed. . . .'" (footnote omitted)).

Rule 901 of the Rules of Evidence pertains to authentication and provides generally that, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." W. Va. R. Evid. 901(a). It has been explained that "authentication requires nothing more than proof that a document or thing is what it purports to be." 2 Louis J. Palmer, Jr., et al., *Handbook on Evidence for West Virginia Lawyers*, § 901.02, at 429 (6th ed. 2015). Furthermore, "'the standard of admissibility under Rule 901(a) is rather slight, *i.e.*, is the evidence sufficient "to support a finding" that the object is authentic.'" *State v. Boyd*, 238 W. Va. 420, 443, 796 S.E.2d 207, 230 (2017) (quoting 2 Palmer, et al., *Handbook on Evidence*, § 901.03, at 431).

A newly announced opinion of this Court has addressed the authentication of text messages sent through social media platforms. *See State v. Benny W.*, No. 18-0349, 2019 WL 5301942 (W. Va. Oct. 18, 2019). After considering how other courts had addressed the authentication of social media text messages, as well as mobile phone text messages, the Court held that,

> [u]nder Rule 901(a) of the West Virginia Rules of Evidence, social media text messages may be authenticated in numerous ways including, for example, by a witness who was a party to sending or receiving the text messages, or through circumstantial evidence showing distinctive characteristics that link the sender to the text messages.

Syl. pt. 2, *Benny W.* The analysis engaged in by this Court in *Benny W.* was not limited to social media text messages, but applied equally to text messages in general. However, the Court's holding in *Benny W.* was directed specifically to the facts of that case, which involved social media text messaging. Accordingly, based upon the analysis set out in *Benny W.*, we similarly hold that, under Rule 901(a) of the West Virginia Rules of Evidence, text messages may be authenticated in numerous ways including, for example, by a witness who was a party to sending or receiving the text messages, or through circumstantial evidence showing distinctive characteristics that link the sender to the text messages.

Applying the foregoing holding to the instant matter, it is clear that the text messages at issue were properly authenticated by the Board through the testimony of M.B., who was a party to sending and receiving the text messages. M.B. testified as follows:

> Q. Okay. Do you know what these are? This is Board Exhibit 1.
>
> A. Yes.
>
> Q. Okay. What are those?
>
> A. This is – these are the text messages. My lawyer sent my phone to have it examined, to have the text messages extracted.

> Q. Okay. If you look on – have you reviewed all those at some point in time?
>
> A. At some point in time. It has been a while ago, yes.
>
> Q. Are those – is the content of those text message accurate?
>
> A. Yes.
>
> Q. Did you manipulate anything within those text messages?
>
> A. No.

The foregoing testimony is sufficient to authenticate the text messages between M.B. and Dr. Hasan. Nevertheless, we note that there was additional evidence showing distinctive characteristics that link M.B. and Dr. Hasan to the text messages. For example, most of the relevant phone numbers on the spreadsheet matched phone numbers belonging to M.B. and Dr. Hasan.[32] The authenticity of the texts also is reinforced because Dr. Hasan's AT&T records, which established the dates and times of texts between Dr. Hasan and M.B. but not their contents, corresponded with the dates and times of the texts on the spreadsheet. Accordingly we find no error.[33]

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[32] M.B. testified that, in January 2014, she and Dr. Hasan began using text messaging applications that could disguise their true phone numbers. Dr. Hasan's phone records showed that he had downloaded several such applications to his mobile phone.

[33] Dr. Hasan additionally has asserted that the probative value of the text message evidence was outweighed by its prejudicial effect. We reject this assertion on two grounds. First, the issue was not adequately briefed. *See* W. Va. R. App. P. 10(c)(7) (directing, in relevant part, that "[t]he brief must contain an argument exhibiting clearly the points of fact and law presented . . . and citing the authorities relied on"); *State v. Trail*, 236 W. Va. 167, 179 n.15, 778 S.E.2d 616, 628 n.15 (2015) (commenting that, when an

C. Erroneous Facts

Lastly, Dr. Hasan contends that the circuit court clearly erred by relying on unsupported and erroneous factual findings by the Board. Dr. Hasan identifies three specific areas where the Board's order is incorrect: (1) it misstates his counsel's efforts to get specific dates from M.B.; (2) it misstates Dr. Hasan's testimony concerning how M.B. acquired a necklace she claims was a gift from Dr. Hasan, implying that Dr. Hasan testified that M.B. stole the necklace when in fact he made no such accusation in his testimony; and (3) it repeatedly misstates evidence concerning whether M.B.'s phone was forensically evaluated for manipulated texts by indicating that no manipulation was found when, in fact, the testimony clearly states that the phone was never evaluated for manipulated texts. Dr.

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issue is raised "without supporting argument or citation to legal authority, . . . we find the issue was not adequately briefed and we deem the matter waived"); *W. Va. Dep't of Health & Human Res. Child Advocate Office ex rel. Robert Michael B. v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995) (commenting that "[a] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim" (internal quotations and citation omitted)). Second, assuming for the sake of argument that the issue was adequately briefed with citations to supporting authority, we still would find no merit to the assertion. We have made clear that

> "Rule 403 was never intended to exclude relevant evidence simply because it is detrimental to one party's case; rather, the relevant inquiry is whether any unfair prejudice from the evidence substantially outweighs its probative value." 1 Palmer, et al., *Handbook on Evidence*, § 403.05[2], at 297. *See United States v. Pitrone*, 115 F.3d 1, 8 (1st Cir. 1997) ("Virtually all evidence is prejudicial–if the truth be told, that is almost always why the proponent seeks to introduce it–but it is only unfair prejudice against which the law protects.")[.]

State v. Sites, 241 W. Va. 430, 441, 825 S.E.2d 758, 769 (2019). Thus, it is only unfair prejudice that is prohibited. In this case, we find no unfair prejudice from the text message evidence.

Hasan argues that the cumulative effect of these misstatements demonstrates a lack of evidence to support the Board's finding that he engaged in an improper sexual relationship with M.B. Notably, however, Dr. Hasan acknowledges that the circuit court corrected the Board's misstatement that a forensic analysis was performed on M.B.'s phone. The Board responds that it acted within its legal authority when it rejected the hearing examiner's recommendations because the hearing examiner ignored the clear facts and weight of the evidence adduced at the hearing.

While we agree that the Board made the three misstatements of which Dr. Hasan complains, we find no grounds to reverse on this issue.[34] Dr. Hasan was not prejudiced by these misstatements. Neither the Board's misstatement regarding how forcefully Dr. Hasan's counsel pressed M.B. to provide specific dates, nor the Board's erroneous implication that Dr. Hasan had accused M.B. of stealing a necklace, are material to the nature of the relationship between M.B. and Dr. Hasan or to any of the disciplinary charges against him. Similarly, we find no prejudice with respect to the Board's repeated incorrect statements indicating that no manipulation had been found with respect to texts on M.B.'s phone, because the Board additionally provided a detailed explanation of why it found the text messages to be authentic. In this regard, the Board explained in paragraphs 88 through 90 of its final order that

[34] While we ultimately find no reversible error in relation to these misstatements, we denounce the Board's carelessness in drafting this final order and admonish it to be more vigilant in drafting its decisions in the future.

> [t]he volume of text messages in Bd. Exs. 1[35] and 3[36] is staggering. The content of the texts in Bd. Ex. 1 depict[s] the deterioration of an inappropriate sexual relationship between Dr. Hasan and M.B. As the relationship ended in January 2014, the texts follow the final stages of their relationship, including one final meeting at Microtel on January 7, 2014.
>
> A reading of the text messages in Bd. Ex. 1 gives credence to their authenticity. The general back and forth and dynamic of the relationship as depicted in the texts is very real. Dr. Hasan's texts generally attempt to avoid conflict and dissipate hostility and frustration coming from M.B. Dr. Hasan is often delicately tending to M.B.'s feelings, who needs constant reassurance that Dr. Hasan cares for her. Dr. Hasan attempts to communicate through reason, while M.B.'s communications are largely based on emotion. For example, Dr. Hasan states he is not a "lovey touchy guy." Dr. Hasan further expresses concern that M.B. is not suited to be around his children, and he states that they argue in an unhealthy manner. When considering the texts in their entirety, it is difficult to fathom how M.B. could manipulate texts to create a back and forth dialog with such diametrically opposed perspectives.
>
> The authenticity of the texts is reinforced because they often refer and correspond to specific events and dates, in addition to containing personal information about Dr. Hasan. There are texts about Dr. Hasan going to a birthday dinner for his father on December 16, his father's actual birthday. There are texts about Dr. Hasan going to a Christmas event for his children and about Dr. Hasan reading to his kids during bedtime. There are texts about Dr. Hasan going out of the country over the New Year, and Dr. Hasan confirmed that he went to Aruba. There are texts about Dr. Hasan's grandfather passing before Dr. Hasan was born, which Dr. Hasan confirmed as true. There are texts about Dr. Hasan's "hole-in-

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[35] Board Exhibit 1 is the spreadsheet of text messages extracted from M.B.'s phone.

[36] Board Exhibit 3 contains Dr. Hasan's AT&T phone records.

> one" golf ball. There are texts about Dr. Hasan's work schedule on given days, such as the number of ECTs performed and appointments at the New River Clinic, that were confirmed as accurate. To manipulate all or parts of thousands of text messages with such intimate detail, and to mesh "real" texts with allegedly "manipulated" texts to form a coherent and authentic dialog would be a massive undertaking on an extreme level, and is not plausible.

(Footnotes omitted). Accordingly, we find no prejudicial error sufficient to warrant reversal of the Board's final order. *See* Syl. pt. 1, in part, *W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (stating, in part, that the court "shall reverse, vacate or modify the order or decision of the agency *if the substantial rights of the petitioner or petitioners have been prejudiced*" (emphasis added)).

IV.

CONCLUSION

Based upon the foregoing analysis, we find no error in the circuit court's order affirming the final order of the Board. Accordingly we affirm the July 13, 2018 order of the Circuit Court of Kanawha County.

Affirmed.