COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2199 **Cir. Ct. No. 2009CV6395**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

FRANK J. SALVI, M.D.,

PETITIONER-APPELLANT,

V.

MEDICAL EXAMINING BOARD,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Frank Salvi appeals an order of the circuit court that affirmed an order of the Medical Examining Board imposing costs on Salvi for a disciplinary proceeding successfully prosecuted against him. On appeal, Salvi argues that the evidence was insufficient to support the Board's order

imposing costs because the affidavits that the Board relied on had no evidentiary value. We reject Salvi's argument, and affirm.

¶2 When reviewing the decision of an administrative agency, we will affirm the agency's findings of fact if those findings are supported by substantial evidence. ***Knight v. LIRC***, 220 Wis. 2d 137, 149, 582 N.W.2d 448 (Ct. App. 1998). The Medical Examining Board's order states that it reviewed two affidavits, one made by the prosecuting attorney and one made by the administrative law judge. Both affidavits include statements that they were made upon "information and belief" and both state the amount of time spent working on the case and applicable hourly rates.

¶3 Salvi challenges the affidavits on the basis that they were made upon "information and belief" instead of on personal knowledge. To be clear, Salvi does not complain that the affidavits are insufficient because they contain hearsay. Salvi states: "The problem with the affidavits is not that they presented hearsay evidence. The problem is that they presented no evidence at all." It appears that Salvi contends the affidavits here do not even rise to the level of hearsay. Salvi asserts that, "[i]n order for an affidavit to have any evidentiary value whatsoever, it must be based upon the personal knowledge of the affiant, not on 'information and belief.'" We understand Salvi to be arguing that even hearsay is premised on personal knowledge in the sense that the witness—in this instance, the affiant—has personal knowledge of the declaration of another. Such personal knowledge, so Salvi's argument goes, is lacking when an affidavit merely states that assertions contained therein are based on "information and belief."

¶4 Notably, Salvi's argument does not hinge on the particular facts in this case. It appears to be Salvi's position that any affidavit with introductory

"information and belief" language has, as a matter of law, no evidentiary value. While we agree that the use of "information and belief" language in an affidavit is ill advised, we reject the blanket proposition that the use of such language in an introductory section always renders superfluous what follows.

¶5 We reject the blanket proposition because it puts form over substance. An affidavit might use introductory "information and belief" language, but subsequent assertions might make plain that the affiant is, nonetheless, relying on sufficient personal knowledge. Because Salvi does not make a fact-specific argument regarding the particular affidavits in this case, we could stop here. But the agency context here provides a more specific reason why Salvi's argument is unavailing and, for that matter, shows why Salvi's reliance on ***McChain v. City of Fond du Lac***, 7 Wis. 2d 286, 96 N.W.2d 607 (1959), is misplaced.

¶6 In ***McChain***, the court addressed the sufficiency of an affidavit submitted in opposition to a motion for summary judgment. Salvi quotes the following from ***McChain***:

> An affidavit on information and belief is an anomaly. It is not an affirmance on knowledge. It is not proof which would be admitted in evidence on a trial of the issue.... The proof of the fact is not within the affidavit. Facts are established on knowledge, not on information and belief.

Id. at 290-91. Salvi then asserts: "[I]f an affidavit made on information and belief is insufficient to raise a factual issue on summary judgment, such an affidavit cannot possibly be 'substantial evidence.'" We disagree.

¶7 ***McChain***, and similar cases,[1] address whether, in the context of summary judgment, affidavits are problematic because they contain information that is, on its face, hearsay. The summary judgment context in ***McChain*** meant that the affidavit needed to set forth information that was, on its face, admissible evidence. The flawed affidavit in ***McChain*** asserted a series of facts about specific physical characteristics of a sidewalk, but did not assert that the affiant had personal knowledge of such facts. Rather than asserting personal knowledge, the affidavit stated that the witness had been "informed [of] and believed" the asserted facts. ***Id.*** at 288-89. That is, the affidavit appeared to contain nothing more than inadmissible hearsay. The difference here is that the Medical Examining Board was entitled to rely on hearsay. In proceedings before administrative agencies, WIS. STAT. § 227.45(1)[2] provides that the "agency or hearing examiner shall not be bound by common law or statutory rules of evidence" and "shall admit all testimony having reasonable probative value," with certain exceptions. None of those exceptions are argued by Salvi on appeal. *See* ***Gehin v. Wisconsin Group Ins. Bd.***, 2005 WI 16, ¶¶48-50, 278 Wis. 2d 111, 692 N.W.2d 572 (explaining that hearsay statements may constitute "substantial evidence").

¶8 Here, the affidavits are reasonably read as assertions based on personal knowledge and hearsay. The administrative law judge and the

[1] *See, e.g.*, ***Kroske v. Anaconda Am. Brass Co.***, 70 Wis. 2d 632, 640-41, 235 N.W.2d 283 (1975) (explaining that hearsay portions of an affidavit do not meet the summary judgment personal knowledge requirement and should be disregarded), *superseded by statute on other grounds as stated in* ***Mullenberg v. Kilgust Mech., Inc.***, 2000 WI 66, 235 Wis. 2d 770, ¶¶13-14, 612 N.W.2d 327.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

prosecuting attorney have personal knowledge of the time they worked on the case in the sense that they are relying on records of time they reported working. As to the hours other persons worked and the billing rates, it is apparent that the affiants offer hearsay—that is, they rely on the assertions of sources within their agency.

¶9 Salvi does not contend that he lacked an opportunity to test the accuracy of the information in the affidavits. Rather, his only argument is that he did not have to do so because, as a matter of law, the affidavits had no evidentiary value. Having rejected that argument, we affirm the order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.