

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Earl E. Walker, Jr., Ed.D.
9 Morning Dew Drive
Middletown, Delaware 19709
Appellant

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Deputy Attorney General
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***Re: Earl E. Walker, Jr. v. Board of Examiners of
Psychologists***
C.A. No. 10A-02-006

Submitted: February 3, 2011
Decided: March 22, 2011

On Appeal from a Decision of the Board of Examiners of Psychologists.
AFFIRMED.

Dear Dr. Walker and Ms. Oliva,

INTRODUCTION

This appeal requires the determination of whether the decision of Board of Examiners of Psychologists (the “Board”) to place Earl E. Walker, Jr. (Appellant) on a six month probationary period, subject to limitations and conditions, was supported by substantial evidence. Appellant was subject to this disciplinary action after the Board found that he failed to meet the prescribed continuing education requirements, but erroneously attested to fulfilling such requirements when completing his licensure renewal application.

This Court holds that the Board's decision was supported by substantial evidence. Although Appellant contends that the Board's decision was disproportionate to his infraction and offers various examples of the Board's allegedly disparate disciplinary actions against other licensed psychologists to support this position, it remains that administrative determinations, such as the instant decision, are inherently fact-sensitive and unique to each individual case. Consequently, the Board is in the optimum position to weight evidence, find facts, and impose the disciplinary action most appropriate to each individual case.

In this case, there is no real dispute that Appellant failed to satisfy the Board's continuing education requirements, and he nonetheless represented that he had satisfied such requirements when applying for renewal of his licensure; after Appellant was provided a full and fair opportunity to be heard by the Board, the Board determined the sanction it deemed appropriate for Appellant. It is not this Court's role to weigh the relevant evidence or devise the appropriate sanction for infractions of the Board's administrative rules in a given case. To the contrary, the Board possesses broad discretion in weighing evidence and reaching conclusions, and this Court may not disturb the findings of the Board if such findings are supported by substantial evidence. Likewise, with respect to Appellant's contention that procedural deficiencies in providing this Court with a certified copy of the record below should result in a reversal of the Board's decision, Appellant has demonstrated no actual prejudice from any alleged procedural deficiency. Moreover, the delay was, at least in part, attributable to Appellant. Accordingly, the decision of the Board of Examiners of Psychologists is **AFFIRMED**.

FACTS AND PROCEDURAL HISTORY

This case arises from a February 2, 2010 decision of the Board placing Appellant's license on probation for six months, requiring Appellant to complete 28.75 hours of continuing education, requiring Appellant to be supervised by a Board-approved senior Delaware licensed psychologist during his probationary period, and requiring Appellant to be evaluated by a Delaware licensed psychologist to assess if his reported disorganization is causing any impairment to his work as a psychologist.¹ The Board reached its decision after completing a "Show Cause" Hearing (the "Hearing"); the

¹ Decision of the Board of Psychologists of Feb. 1, 2010 at 3.

Hearing was held after a random audit revealed that Appellant had not satisfied the requisite 40 hours of continuing education, but nonetheless represented that he had fulfilled the required continuing education when completing his license renewal application.²

In reaching its decision, the Board noted that Appellant established only 11.25 hours of acceptable continuing education, a deficiency of 28.75 hours; Appellant nonetheless represented that he had met the requisite number of hours on his licensure renewal application.³ Additionally, the Board was troubled by Appellant's alleged misunderstanding in calculating the number of satisfactory hours of continuing education.⁴ The Board acknowledged Appellant's personal and financial difficulties, but noted that he "did not ask for help, or request an extension under the Board's rules, or reach out in any fashion."⁵ Thus, the Board held that, while suspension or revocation of Appellant's license was not warranted, "in the interest of protecting the public safety, [Appellant's] license should be placed on probation with some conditions and limitations."⁶

CONTENTIONS OF THE PARTIES

Appellant's Opening Brief alleges that the Board of Examiners of Psychology "misused their power and authority to: 1) Administer a penalty that was unprecedented and excessive for the nature of [Appellant's] infraction; 2) Make unfounded assertions of professional incompetence; 3) Utilize[] procedures that were flawed, impractical, and inappropriate to derive an opinion of competence; [and] 4) "Recommended an evaluation that lacks the validity to prove professional, clinical, and/or psychological competence."⁷ To support his assertion that the Board "assessed unusually harsh and unprecedented penalties on [Appellant] given the type and severity of his infraction," Appellant included a table which enumerated the allegations made against several other licensed psychologists and the resulting disciplinary action; according to Appellant, this table "reveals that the

² *Id.* at 1-2.

³ *Id.* at 2.

⁴ *Id.* at 2-3 ("[A]lthough one might misread 1.5 as hours, it is difficult to understand how one can expect to get 5 hours of CE units if one is only in attendance at a CE activity for 1.5 hours.").

⁵ *Id.*

⁶ *Id.* at 3.

⁷ Appellant's Opening Br. at 2.

penalties assessed to [Appellant] appear to be outliers from those assessed to the other psychologists.”⁸ Appellant notes that “in all of [his] 10 years of practicing in the mental health field, he has not had a single claim filed against him, not one ethical violation, and not one poor clinical evaluation from his supervisors,” and he is “absolutely dumbfounded and utterly amazed that the Board is disproportionately punishing [him] relative to other psychologists for falling short of their [continuing education] requirement. . . .”⁹

Appellant argues that the Board’s contention the instant disciplinary action was imposed to further its primary objective of safeguarding the public is belied by the fact that the Board’s Answering Brief was filed one year after the Rule to Show Cause Hearing.¹⁰ Appellant argues that this delay “means that [Appellant] had been practicing for a full year from the time the Board initially identified its concern regarding [Appellant’s] competency to the time the Board[] submitted [its] answering brief,” which in turn “means that [Appellant] had been potentially endangering the public, specifically his patients, for one full year from the time that the Board became initially concerned about his competence.”¹¹

Appellant also contends that, procedurally, the Board’s decision was fatally defective.¹² Appellant notes that Rule 72(e) of the Superior Court Civil Rules requires that the Board provide the Court a certified copy of the record of proceedings below within 20 days from receiving the citation from the

⁸ *Id.* at 2-3. However, Appellant did not raise this issue during the Hearing; thus, pursuant to the waiver rule, Appellant may not advance this argument on appeal. *See, e.g., Danby v. Osteopathic Hosp. Ass’n. of Del.*, 104 A.2d 903, 907 (Del. 1954) (observing “the well settled rule which precludes a party from attacking a judgment on a theory which was not advanced in the court below.”); *Down Under, Ltd. v. Del. Alcoholic Beverage Control Comm’n*, 576 A.2d 675, 677 (Del. Super. Ct. 1989) (“Under the waiver rule, issues and arguments not raised to an administrative agency cannot be considered by a reviewing court. . . . This rule furthers the goal of permitting agencies to apply their specialized expertise, correct their own errors, and discourage litigants from reserving issues for appeal.”).

⁹ *Id.* at 6.

¹⁰ Appellant’s Reply Br. at 4.

¹¹ *Id.*

¹² Appellant’s Opening Br. at 1.

Prothonotary, and the record was not filed until 70 days had elapsed.¹³ Consequently, Appellant requests that, “[b]ased on this procedural error. . .the Court [] dismiss the action taken by the Board against [Appellant].”¹⁴

The Board responds that a period of probationary oversight was the appropriate sanction for Appellant’s “abysmal failure to acquire the mandatory 40 [continuing education] credits during the 2007-09 renewal period.”¹⁵ The Board notes that the General Assembly has expressly vested it with the duty to determine whether individuals satisfy the criteria to receive or maintain licensure, and the Board has been granted the authority to assess penalties or sanctions for “unjustified noncompliance” with the continuing education requirements.¹⁶ It is the Board’s position that Appellant’s admitted failure to satisfy the continuing education requirements, as established at the Rule to Show Cause Hearing and confirmed through Appellant’s Opening Brief, constitutes substantial evidence for purposes of this Court’s appellate review.¹⁷

With respect to Appellant’s contention that the disciplinary actions taken against him were excessive in light of the punishments assessed against other psychologists for similar offenses, the Board submits that Appellant’s probationary period was “not only *not* excessive, it was imminently reasonable and necessary to ensure effectuation of the Board’s statutory mandate to protect the public.”¹⁸ The Board acknowledges that, “when considered in a vacuum,” its decision to place Appellant on a six month probationary period for failure to satisfy the continuing education requirements may appear excessive, but argues that, “[w]hen assessed in light

¹³ *Id.* Appellant notes that the citation for this appeal was issued by the Kent County Sheriff’s Office on May 5, 2010, and he was informed on July 13, 2010 that the Court had not yet received a certified copy of the record. Appellant’s Reply Br. at 3.

¹⁴ Appellant’s Opening Br. at 2. Appellant’s moving papers also suggest that his random selection for an audit of his continuing education compliance was not “truly” random, but instead the “result of his reporting a fellow mental health colleague to the [B]oard for suspected ethical infractions” and that his selection may have been racially motivated. Appellant’s Reply Br. at 8 (“How likely is it, in a truly random sampling, that Drs. Walker and Perry, two African American psychologists, are selected for audits in their very first license renewal period?”). Again, these issues were not raised before the Board and, consequently, have been waived for purposes of this appeal. *See supra* note 8.

¹⁵ Appellee’s Answ. Br. at 19.

¹⁶ *Id.* (citing Board of Examiners of Psychologists Regulation 13.5.4).

¹⁷ *Id.* at 21-22.

¹⁸ *Id.* at 22.

of the undisputed record evidence in this case,” such a sanction was appropriate.¹⁹ The Board argues that Appellant’s explanations for his failure to comply with the continuing education requirements “amounted to little more than an attempt to excuse his non-compliance by emphasizing to the Board his transience, domestic problems, financial woes, and professional disorganization.”²⁰ Further, the Board alleges that Appellant “demonstrated his impressive miscomprehension of basic [continuing education] reports,” and that “ordering him to do anything less than complete a probationary period with certain specific conditions including supervisory oversight. . .to determine if his disorganization was impacting his patients would have amounted to the Board’s abdication of its charge to protect the public and regulate in the public interest.”²¹ The Board further argues that the disciplinary actions enumerated in Appellant’s table are “materially distinct” from the instant case, and that, when considering such distinctions, “the discipline the Board imposed on [Appellant] was either comparable to or less harsh than the discipline it imposed on his comparator licensees.”²²

Finally, with regard to Appellant’s contention that the Board’s decision should be reversed based on its failure to provide the certified record within 20 days, as required by Rule 72(e), the Board argues that Appellant failed to file a Notice of Appeal with the Superior Court and failed to serve a copy of a Notice of Appeal on counsel for the Board or anyone at the Division of Professional Regulation.²³ Thus, the Board contends that any delay is attributable to Appellant’s failure to serve the Board or the Division of Professional Regulation with a Notice of Appeal, and, moreover, that Appellant cannot demonstrate actual prejudice from this delay; according to the Board, the validity of an administrative determination is not affected unless actual prejudice is demonstrated.²⁴

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 23.

²² *Id.* at 24.

²³ *Id.* at 29. However, Appellant alleges that he attempted to serve official notice to the Board, but such attempt was made through the wrong county sheriff; Appellant contends that, once he discovered this error, the Board was immediately served notice. Appellant’s Reply Br. at 4.

²⁴ Appellee’s Answ. Br. at 30.

STANDARD OF REVIEW

This Court's review of a Board of Examiners of Psychologists decision is set forth by statute.²⁵ Pursuant to 29 Del. C. § 10142(c), this Court reviews the appeal on the record; arguments that were not raised before the Board and placed into the record of Board proceedings have been waived and are not considered by this Court on appeal.²⁶ In reviewing the record doing, the Court must "take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted."²⁷ Consequently, absent actual fraud, this Court's review is "limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency."²⁸ Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²⁹ When reviewing determinations of the Board, this Court "does not weigh the evidence, determine questions of credibility, or make its own factual findings."³⁰ If the Board's decision is supported by substantial evidence and free from legal error, it must be affirmed.³¹

DISCUSSION

The sole issue for this Court to resolve is whether the Board's decision to discipline Appellant with a six month probationary period, including limitations and conditions during this period, was supported by substantial evidence. In this case, the Board's decision was rendered only after Appellant was provided a full and fair opportunity to be heard by the Board; moreover, the record of proceedings before the Board confirms that the Board members considered the information presented during the hearing and deliberated prior to reaching a decision.³² It should be noted that the contents of the Board members' deliberation undermine Appellant's

²⁵ 29 Del. C. §10142(a) ("Any party against whom a case decision has been decided may appeal such decision to the Court.").

²⁶ *See supra* note 8.

²⁷ 29 Del. C. §10142(d).

²⁸ *Id.*

²⁹ *Fink v. Bd. of Exam'rs of Psychologists*, 693 A.2d 321, 324 (Del. Super. Ct. 1996) (citations omitted).

³⁰ *Id.* (citations omitted).

³¹ *Id.*

³² Transcript of Show Cause Hearing of Nov. 2, 2009 at 16-21. Notably, the Board's decision on the appropriate disciplinary action was unanimous. *Id.* at 20.

suggestions that the discipline imposed was the result of some ulterior motive or bad faith on the members' part; to the contrary, the Board endeavored to fashion an appropriate sanction that gave due account to Appellant's individual circumstances and would appropriately remedy his infractions.³³

In this case, it is undisputed that Appellant did not complete the required amount of continuing education credits; at the hearing, Appellant testified that he "actually did think" that he had enough continuing education credits, but that he now recognizes that he misread certain credit hour units, mistakenly interpreting ".5" hours as "5" hours.³⁴ Appellant attributed this issue to his "haste" and "not really having the time to sit down and be organized and pay closer attention;" these difficulties were apparently due to Appellant's divorce, "custody battle," and financial issues related to his ex-spouse's bankruptcy filing.³⁵

In its written decision, the Board acknowledged that Appellant was "in a hardship situation," but nonetheless expressed its concern about the facts that Appellant had not sought an extension or otherwise "reach[ed] out in any fashion," and that Appellant's expressed plan for satisfying his future continuing education requirements was "troubling."³⁶ Accordingly, the Board imposed the disciplinary action it deemed necessary to serve its objective of protecting the general public and, specifically, protecting recipients of psychological services.³⁷ Thus, it is manifest that the Board weighed the evidence and arrived at corresponding factual and legal conclusions. That is, when considering the nature of Appellant's infraction, the explanation proffered by Appellant, and the potentially applicable disciplinary actions, the Board imposed the discipline it deemed appropriate. It is not this Court's role to "weigh the evidence, determine questions of credibility, or make its own factual findings."³⁸ Instead, the Court must "take due account of the experience and specialized competence of the

³³ *Id.* at 20-21 (At the conclusion of the hearing, Board members stated that they sincerely hoped "things get better in [Appellant's] life" and that "this will get [Appellant] back on the road to. . .being the great professional that [the Board member is] sure you want to be, and that we never see you again. . .in this capacity.").

³⁴ *Id.* at 6-7.

³⁵ *Id.*

³⁶ Decision of the Board of Psychologists of Feb. 1, 2010 at 2-3.

³⁷ *Id.* at 3.

³⁸ *Id.* (citations omitted).

agency and of the purposes of the basic law under which the agency has acted.”³⁹

Here, the effectively undisputed evidence of Appellant’s failure to satisfy his continuing education requirements, taken together with his admitted personal difficulties, gave rise to the Board’s concerns about Appellant’s ability to satisfy the Board’s requirements for unsupervised licensure; this issue is precisely the type of matter that is within the experience and specialized competence of the Board. It is beyond question that the evidence before the Board was such that “a reasonable mind might accept as adequate” to support its decision in this case.⁴⁰

Although not asserted by the Board, to the extent Appellant relies on his argument that the disciplinary action imposed in this case is disproportionate to other, allegedly similarly situated licensees,⁴¹ or that the disciplinary action imposed was the result of some racial or retaliatory motive by the Board,⁴² these arguments were not raised by Appellant during the Hearing, and consequently have been waived for purposes of this Court’s appellate review.⁴³

Finally, this Court rejects Appellant’s argument that the Board’s decision should be reversed based on a delay in providing certified copies of the proceedings below to this Court. Although Superior Court Civil Rule 72(e) requires that the Board provide a certified copy of the record to this Court within 20 days, and this requirement was not met in this case, this delay was apparently due, at least in part, to Appellant’s failure complete service on the Board.⁴⁴ More significantly, Appellant has not demonstrated that this delay violated his rights to a fair administrative hearing;⁴⁵ the

³⁹ *Id.* § (d).

⁴⁰ *Fink v. Bd. of Exam’rs of Psychologists*, 693 A.2d 321, 324 (Del. Super. Ct. 1996) (citations omitted).

⁴¹ *See supra* text accompanying note 8.

⁴² *See supra* note 14.

⁴³ *See supra* note 8.

⁴⁴ However, Appellant contends that this error was due to service being attempted through the incorrect county sheriff, and that he immediately acted to correct this error. Appellant’s Reply Br. at 4.

⁴⁵ *See, e.g., Bethel v. Bd. of Educ. of Capital Sch. Dist.*, 985 A.2d 389, (Del. 2009) (“In administrative proceedings, ‘rudimentary requirements of fair play satisfy the due process requirements.’”) (citing *XComp, Inc. v. Ropp*, 2002 WL 1753168, *2 (Del. Ch. 2002)).

validity of an administrative agency's determination is not affected unless actual prejudice is shown.⁴⁶

CONCLUSION

In light of the foregoing, the evidence presented in this case constituted substantial evidence for purposes of this Court's review. Similarly, the record of proceedings below discloses no error of law. Given that Board's decision is supported by substantial evidence and free from legal error, it must be affirmed.⁴⁷

Accordingly, for all the reasons stated above, the decision of the Board of Examiners of Psychologists is **AFFIRMED**.

Richard R. Cooch, R. J

oc: Prothonotary
cc: Board of Examiners of Psychologists

⁴⁶ See *Sandefur v. Unemployment Ins. Appeals Bd.*, 1993 WL 389217, *5 ("As a general rule, an individual's due process rights are not violated, and will not [affect] the validity of an administrative determination, unless actual prejudice is shown.").

⁴⁷ *Fink v. Bd. of Exam'rs of Psychologists*, 693 A.2d 321, 324 (Del. Super. Ct. 1996) (citations omitted).