

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

DOUGLAS ROBERT BRIGGS,	)	
	)	
Applicant Below	)	
Appellant,	)	
	)	
v.	)	C.A. No. N11A-02-001 JRJ
	)	
BOARD OF MEDICAL LICENSURE	)	
AND DISCIPLINE OF THE STATE	)	
OF DELAWARE,	)	
	)	
Appellee.	)	

Date Submitted: June 17, 2011

Date Decided: August 31, 2011

Upon Appeal of a Decision of the Board of Medical Licensure and
Discipline of the State of Delaware: **REMANDED**

Michael P. Morton, Esquire, Robert J. Valihura, Esq., of Counsel, 1203 North Orange Street, Wilmington, DE 19801, Attorney for Appellant.

Eileen K. Heeny, Esq., Deputy Attorney General, 820 North French Street, 6th Fl., Wilmington, DE 19801, Attorney for Appellee.

Jurden, J.

INTRODUCTION

Appellant, Douglas Robert Briggs (“Briggs”) appeals a decision of the Board of Medical Licensure and Discipline of the State of Delaware (the “Board”) denying Briggs’ application for a license to practice acupuncture in Delaware. For the reasons set forth below, the Court finds the Board failed to set forth a sufficient legal or factual basis to deny Briggs’ application. Accordingly, the Board’s decision is **REMANDED** for further findings consistent with this opinion.

BACKGROUND

On August 27, 2009, Briggs filed an application for an acupuncture license with the State of Delaware Division of Professional Regulation Board of Medical Practice.¹ Briggs is a licensed chiropractor in Delaware and Pennsylvania, and has been practicing acupuncture pain management in conjunction with his chiropractic services since 1996.² In 2008, the Delaware General Assembly and the Governor signed into law the Acupuncture Practitioner Act, which created a licensing scheme for those who wished to practice acupuncture in Delaware.³ The Acupuncture Act established an Advisory Council (the “Council”) comprised of one physician member of the Board and four additional members trained in acupuncture and employed in the practice of acupuncture in Delaware for at least three years prior to their appointment to the Council.⁴ The Council reviews acupuncture license applications, and recommends to the Board whether

¹ See Appendix of Exhibits to Briggs’ Opening Brief (“Appendix”) at p. A-1.

² See Briggs’ Opening Brief at p. 3.

³ See 24 Del. C. § 1796 *et. seq.*

⁴ 24 Del. C. § 1796.

to license a particular applicant. Next, the Board must determine whether to approve or reject said recommendations.⁵

On June 21, 2010, the Council wrote a letter to Briggs' which notified him of the Council's provisional intention to recommend to the Board that Briggs' application be denied.⁶ Briggs was granted a hearing before the Council to determine whether he had met the acupuncture license requirements.⁷ A hearing was held before the Council on September 16, 2010.⁸

On January 11, 2011, the Council mailed Briggs a copy of the Decision and Order which recommended denial of his application.⁹ The Council first assessed Briggs' application under 24 *Del. C.* § 1799A, the Statute's Grandfather Provision.¹⁰ The Council found that Briggs did not meet the requirements of § 1799A (a)(2)a, because he had not graduated from a course of training of at least 1,800 hours in acupuncture accredited by the Accreditation Commission for Acupuncture and Oriental Medicine (the "ACAOM") or graduated from a course equivalent to a course approved by the ACAOM.

⁵ *Id.*

⁶ *See* Appendix at A-33.

⁷ *See id.* at p. A-6.

⁸ *See id.* at p. A-69.

⁹ *Id.* at p. A-120.

¹⁰ 24 *Del. C.* § 1799A: Current practitioners.

(a) Any acupuncture practitioner who is practicing in this State as of June 27, 2008, and has been doing so within the 12 months prior to June 27, 2008, shall be granted a license, provided they document the following:

(1) Completion of a course or evidence of passing an examination in clean needle technique; and

(2) The applicant demonstrates competence in performing acupuncture by meeting 1 of the following standards for education or training:

a. Graduation from a course of training of at least 1,800 hours in acupuncture, including 300 clinical hours, that is accredited by the ACAOM or found by the Council to be equivalent to a course approved by the ACAOM; or

b. Achievement of a diplomate in acupuncture from the NCCAOM or its equivalent organization, or achieve a passing score on an examination that is determined by the Board to be equivalent to the examination that is given by NCCAOM.

“Dr. Briggs’ acupuncture education was obtained through IAMA [International Academy of Medical Acupuncture] . . . [which] was not approved by ACAOM. Further, . . . the program [completed by Briggs] was not equivalent to a course approved by ACAOM.”¹¹ The Council had concerns regarding the courses Briggs completed because many of the courses were taken on-line, while ACAOM approval requires that all courses be conducted in a classroom.¹² The Council also noted that Briggs did not complete 1,800 hours of acupuncture education, as required by § 1799A(a)(2)a.¹³

Next, the Council examined Briggs’ application pursuant to 24 *Del. C.* § 1798, which sets forth the requirements for licensure. First, the Council found that Briggs could not satisfy § 1798(a)(1), because no evidence was presented which would indicate that Briggs received an “Achievement of a Diplomate in Oriental Medicine from the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM) or its equivalent as recognized by the Council and approved by the Board, or an organization that is recognized as equivalent to the NCCAOM by the Council and approved by the Board.”¹⁴ Next, the Council evaluated Briggs’ application under the waiver provision, § 1798, which allows the Council to waive the licensure requirements if certain criterion are met.¹⁵ The Council found that all the criterion necessary to grant

¹¹ Appendix at p. A-124.

¹² *Id.*

¹³ *Id.*

¹⁴ 24 *Del. C.* § 1798(a)(1).

¹⁵ 24 *Del. C.* § 1798(b) provides in pertinent part as follows:

b) Waiver of requirements. -- The Acupuncture Advisory Council, by the affirmative vote of 3 of its members and with the approval of the Board within a reasonable period of time from the vote, may waive any of the requirements of subsection (a) of this section if it finds all of the following by clear and convincing evidence:

(1) The applicant's education, training, qualifications and conduct have been sufficient to overcome the deficiency or deficiencies in meeting the requirements of this section;

Briggs a waiver were met except § 1798(b)(1). The Council found that Briggs' education did not overcome the deficiencies in his application because his training was not comparable to the training he would have received in a school of acupuncture.¹⁶ Because of the aforementioned deficiencies in Briggs' application, the Council recommended to the Board that Briggs' application be denied. The Board, in a three sentence Order, approved the Council's recommendation, and Briggs' acupuncture application was denied.¹⁷

PARTIES' CONTENTIONS

Briggs argues the Board violated the Administrative Procedure Act because the Board should have conducted a second hearing, after the hearing before the Council, where Briggs could have presented testimony regarding his license application.¹⁸ Briggs contends that there is no indication that the Board even examined the record before the Council, or even considered the record, before the Board made its decision regarding Briggs' application. Briggs submits that the Board's failure to consider the record or provide a rationale as to why it approved the Council's recommendation was an error of law and a violation of Briggs' right to due process.¹⁹ Briggs' argues the Board committed an error of law by utilizing the same educational requirement under the waiver

(2) The applicant is capable of practicing acupuncture in a competent and professional manner;

(3) The granting of the waiver will not endanger the public health, safety, or welfare; and

(4) For waiver of a felony conviction, more than 5 years have elapsed since the date of the conviction. At the time of the application the applicant may not be incarcerated, on work release, on probation, on parole or serving any part of a suspended sentence and must be in substantial compliance with all court orders pertaining to fines, restitution and community service;

¹⁶ Appendix at p. A-126.

¹⁷ See *id.* at p. A-127.

¹⁸ See Briggs' Opening Brief at 14.

¹⁹ See *id.* at 15-18.

provision²⁰ as the educational requirements under 24 *Del. C.* § 1798(a)(1). Finally, Briggs argues the Board’s decision is not supported by substantial evidence.²¹

The Board responds, arguing that its decision is supported by substantial evidence and free from legal error.

STANDARD OF REVIEW

On appeal, this Court determines whether the Board’s decision is supported by substantial evidence and is free from legal error.²² Substantial evidence is such relevant evidence that a reasonable mind would accept as adequate to support a conclusion.²³ This Court does not act as the trier of fact, nor does it have authority to weigh the evidence, decide issues of credibility, or make factual conclusions.²⁴ In reviewing the record for substantial evidence, the Court must consider the record in the light most favorable to the party prevailing below.²⁵ The Court’s review of conclusions of law is *de novo*.²⁶ Absent an error of law, the Board’s decision will not be disturbed where there is substantial evidence to support its conclusions.²⁷

DISCUSSION

“Reversal is not always required because the Board fails to make its findings in expansive terms. If appropriate, reviewing courts can look at subordinate facts underlying the Board’s conclusions when those facts can be determined, by implication,

²⁰ 24 *Del. C.* § 1798(b).

²¹ Briggs’ Opening Brief at 20.

²² *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. Super. 1964); *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. Super. 1960).

²³ *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. Super. 1994).

²⁴ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. Super. 1965).

²⁵ *Benson v. Phoenix Steele*, 1992 WL 354033, at *2 (Del Super. Nov. 6, 1992).

²⁶ *Reese v. Home Budget Center*, 619 A.2d 907 (Del. Super. 1992).

²⁷ *Dellachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

from the ultimate conclusion.”²⁸ However, “when the Court cannot determine, from the ultimate findings and the record, whether the [Board] proceeded upon a correct theory of law, or whether its findings are based upon competent evidence,” further findings are needed and remand is required.²⁹

In this case, the Board, without any reasoning or rationale whatsoever, approved the Council’s recommendation.³⁰ Additionally, at the January 4, 2011 Board Meeting, the meeting where the Board considered Briggs’ application, the Board minutes appear to show that the Board did nothing more than “rubber stamp” the Council’s recommendation.³¹ The decision to grant an acupuncture license is with the Board.³² “The Board shall approve or reject [licensure] recommendations within a reasonable time period.”³³ Pursuant to the Medical Procedure Act, “[a] person against whom a decision of the Board has been rendered may appeal the decision to the Superior Court”³⁴ When the Board does not supply a basis for approving or rejecting the Council’s recommendation, the Court cannot conduct an adequate appellate review of the Board’s decision.³⁵ The Court is unable to determine from the Board’s decision whether it “proceeded upon a correct theory of law, or whether its findings are based upon competent evidence.”³⁶

²⁸ *Haveg Industries, Inc. v. Humphrey*, 456 A.2d 1220, 1222 (Del. 1983).

²⁹ *Board of Public Ed. in Wilmington v. Rimlinger*, 232 A.2d 98, 101 (Del. 1967); *See Lindsay v. Chrysler Corp.*, 1994 WL 750345, at *4 (Del. Super. Dec. 7, 1994).

³⁰ *See* Appendix at p. A-127.

³¹ *See id.* at p. A-117.

³² 24 *Del. C.* § 1798 (a): All applicants must meet the following requirements for licensure by *the Board*. (emphasis added).

³³ 24 *Del. C.* § 1796 (d).

³⁴ 24 *Del. C.* § 1736. Appeal procedures.

³⁵ Engaging in a hypothetical, imagine if, in this case, the Board, with no basis or rationale, rejected the Council’s recommendation to grant Briggs’ application. How could this Court conduct a meaningful review of the Board’s decision without some basis upon which the Board approved or rejected the Council’s recommendation?

³⁶ *Board of Public Ed. in Wilmington*, 232 A.2d at 101.

CONCLUSION

For the forgoing reasons, the Court **REMANDS** this matter to the Board and requests a rationale for approving the Council's recommendation denying Briggs' application.

IT IS SO ORDERED.

Jan R. Jurden, Judge