STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Jonathan Lowell McClanahan, RN,
Petitioner Below, Petitioner

Vs.) No. 15-1014

West Virginia Board of Examiners for Registered Professional Nurses,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Jonathan McClanahan, R.N., by his counsel, Lisa L. Lilly, challenges the discipline affecting his nursing license imposed by the Board of Examiners for Registered Professional Nurses (the "Board"). Based upon Petitioner's use of marijuana detected by a pre-employment drug screen, the Board suspended Petitioner's license for one year. The Board stayed the suspension in lieu of a two-year period of probation, during which Petitioner was required to meet certain terms and conditions. On appeal, Petitioner argues that the Board's order should be vacated because, among other things, the Board did not act in a timely manner. The Board, by its counsel, Greg S. Foster, Assistant Attorney General, contends that following receipt of the hearing examiner's recommended order, it then timely issued its final order imposing discipline.

Upon consideration of the parties' briefs and arguments, the submitted record and pertinent authorities, for the reasons expressed below, we affirm the September 17, 2015 order of the Circuit Court of Kanawha County. Because this case presents no new or significant issue of law, we find this matter to be proper for disposition in a memorandum decision in accordance with Rule 21 of the West Virginia Rules of Appellate Procedure.

In November 2013, Petitioner was offered a position as a registered nurse at Raleigh General Hospital ("RGH"). The offer was conditioned on Petitioner passing a pre-employment drug screen. When the test returned positive for marijuana, RGH rescinded Petitioner's offer of employment and notified the Board, which initiated disciplinary proceedings against Petitioner. Following an investigation, the Board engaged a hearing examiner to conduct an evidentiary hearing, which was held on October 9, 2014. The evidence at the hearing revealed that both of Petitioner's urine samples (Samples A and B), which were submitted to two different laboratories, tested positive for marijuana.

Petitioner testified at the hearing and denied that he smoked marijuana. He contended that the results could have been false positives caused by several over-the-

counter medications he was taking at the time, which he identified for the Board. Dr. Douglas Aukerman, a licensed physician and certified medical review officer who appeared as an expert witness for the Board, testified and countered Petitioner's false-positive theory on the basis that (1) none of the medications that Petitioner had been taking contained THC, a compound found in marijuana; and (2) three separate mass spectrometry tests were independently positive for marijuana. Dr. Aukerman concluded that it was neither medically nor scientifically possible that the results were false positives. Petitioner did not offer expert testimony to contradict the testimony of Dr. Aukerman.

The hearing examiner subsequently issued his findings of fact, conclusions of law and recommended order to the Board on February 24, 2015. He found that Petitioner had used marijuana, an illegal substance, prior to his drug screen at RGH. Accordingly, the hearing examiner concluded that the Board met its burden of demonstrating that Petitioner was subject to discipline pursuant to West Virginia Code § 30-7-11(c), which states:

> The board shall have the power to deny, revoke or suspend any license to practice registered professional nursing issued or applied for in accordance with the provisions of this article, or to otherwise discipline a licensee or applicant upon proof that he or she . . . .
>
> (c) [i]s unfit or incompetent by reason of negligence, habits or other causes . . . .

W. Va. Code § 30-7-11(c) (2015).[1] The hearing examiner also concluded that Petitioner was subject to discipline pursuant to West Virginia Code § 30-7-11(f), which simultaneously allows the Board to discipline a licensee upon proof that he or she "[i]s guilty of conduct derogatory to the morals or standing of the profession of registered nursing." W. Va. Code § 30-7-11(f) (2015).

On March 30, 2015, the Board issued its Final Order and Final Order Addition[2] adopting the hearing examiner's decision in its entirety. The Board suspended

[1] Effective May 16, 2016, an amendment to this statute (West Virginia Code § 30-7-11) redesignated former (a) through (h) as (a)(1) through (a)(8) and made a stylistic change. For purposes of the instant appeal, we reference the statute as it existed at the time of the proceedings before the Board. We note that the substance of the statute at issue in this appeal was not affected by the 2016 amendment.

[2] The Final Order Addition set forth the terms and conditions of Petitioner's suspension and probationary period.

Petitioner's nursing license for one year but stayed the suspension contingent upon Petitioner successfully completing a two-year probationary period, during which Petitioner was required to comply with several terms and conditions. The Board also required that Petitioner pay a fine and administrative costs in the amount of $2,000.

On or about May 4, 2015, Petitioner appealed the Board's order to the Kanawha County Circuit Court and identified various assignments of error. Based on the record developed before the hearing examiner, the circuit court ruled that the Board's decision was supported by a rational basis and substantial evidence and affirmed the Board's Final Order. Petitioner now appeals to this Court.[3]

Regarding the review of administrative orders, we have held:

> [o]n appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code § 29A–5–4(a) and reviews questions of law presented de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.

Syl. Pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996). That statute provides the following standard for review:

> [t]he [circuit] court may affirm the order or decision of the agency or remand the case for further proceedings. It 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, decision 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.

[3] Petitioner previously petitioned this Court for a writ of prohibition in which he asserted the argument regarding whether the Board's entry of its Final Order was timely. By order entered June 9, 2015, we refused the petition.

W. Va. Code § 29A-5-4(g) (1998).

Petitioner's brief alleges ten assignments of error. However, we focus our attention in this case on Petitioner's tenth assignment of error regarding the timeliness of the Board's final order.[4] Petitioner alleges that in entering its final order on March 30, 2015, the Board violated the applicable procedural rule:

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[4] By Order dated September 14, 2016, this Court ruled that "this matter will be submitted to the Court on oral argument on Assignment of Error No. 10 only (designated as Assignment of Error "J" in Petitioner's Amended Appeal Brief.) The Court deems Assignments of Error Nos. 1 through 9 to be without merit." Consistent with Rule 5(h) of the West Virginia Rules of Appellate Procedure, this Court fully considered all of the issues presented in the Petitioner's brief, including those that were not deemed appropriate for oral argument pursuant to the Court's order. Finding those issues to be without merit, we summarily dispose of them for the following reasons, addressing them according to subject matter to the extent that some of the assignments of error are closely related.

(1) Rules and Regulations Violations/Criminality

First, Petitioner argues that there was no evidence as to the criminality of marijuana use or that Petitioner knowingly ingested marijuana. Therefore, Petitioner contends, the conclusion that his "use" was "unlawful" is erroneous. He asserts that there was no basis to conclude that a positive screen was "conduct derogatory to the morals of standing of the profession of registered nursing." However, West Virginia Code of State Rules § 19-3-14 expressly provides that a licensee who uses an illicit drug is guilty of professional misconduct under West Virginia Code § 30-7-11(f). Thus, because marijuana is an illicit drug in West Virginia and the Board proved by a preponderance of the evidence that Petitioner tested positive for marijuana, we find this assignment of error to be without merit and affirm the circuit court's ruling finding that Petitioner was guilty of misconduct in violation of West Virginia Code § 30-7-11(f).

Petitioner also alleges that the Board failed to prove by a preponderance of the evidence that Petitioner was "unfit or incompetent by reason of negligence, habits or other causes" to practice nursing under West Virginia Code § 30-7-11(c) by virtue of a single positive drug screen. As noted above, proof of a violation of West Virginia Code § 30-7-11(f) was sufficient to impose discipline on Petitioner's license. Therefore, this assignment of error is moot and also lacks merit.

(2) Failure to Produce the Shrewsbury Report

Petitioner also asserts that prior the hearing, the Board failed to produce a report prepared by a substance abuse counselor, Binicki Shrewsbury, in which she concluded

that Petitioner had no need for alcohol or drug treatment. He contends that this evaluation was conducted at the Board's direction and is exculpatory because it reinforces Petitioner's contention that he did not smoke marijuana and is not addicted. The circuit court found this assignment of error to be meritless because Ms. Binicki's conclusions were irrelevant, as the standards do not require a finding of substance abuse treatment in order for the Board to conclude that a positive drug screen is "derogatory to the morals" of the profession under West Virginia Code § 30-7-11(f). We agree.

(3) Chain of Custody

Petitioner contends that there was no evidence presented regarding the chain of custody for the samples that went to Aegis and Quest Laboratories. However, we conclude that this challenge to chain of custody has been waived because no objections on this issue were placed on the record before the hearing examiner. Furthermore, we note that the circuit court properly concluded the evidence established that proper chain of custody was utilized at all times. There is no evidence that Petitioner's urine sample was contaminated or tampered with. Dr. Aukerman was permitted to testify that, because they are certified laboratories, they followed protocol and that the samples tested positive. Jessica Troche, a phlebotomist at RGH laboratory, testified at the hearing and established, in detail, the chain of custody for the specimen cup from the closet, to the taking of sample, to the mailing to Aegis. Further, Petitioner verified upon signing the "Forensic Drug Testing Custody and Control Form" that the specimen was unadulterated. Even in this appeal, Petitioner does not identify any specific evidence suggesting the samples were tampered with or somehow contaminated. Petitioner's allegations rest entirely on speculation and no legitimate basis exists to conclude that the hearing examiner abused his discretion by admitting the evidence. Accordingly, we find this assignment of error to be without merit.

(4) Constitutional Issues/Invasion of Privacy

Petitioner argues that his counsel failed to protect his interests adequately during the hearing. However, this assignment of error lacks merit because Petitioner does not have a constitutional or other right to effective assistance of counsel in an administrative proceeding. The Constitution of West Virginia mandates that a defendant in a criminal proceeding receive competent and effective assistance of counsel. W. Va. Const. art. 3, § 14. West Virginia does not provide the same guarantee for a respondent in an administrative proceeding. Petitioner's only remedy for such alleged inadequacy would be against his attorney by way of pursuing a legal malpractice claim. Accordingly, we affirm the circuit court's ruling on this issue.

Additionally, Petitioner's assertion that random drug testing is an unconstitutional invasion of his privacy is procedurally improper and legally erroneous. This issue was not

> Any final order entered by the Board following a hearing conducted pursuant to these rules shall be made pursuant to the provisions of W. Va. Code §§ 29A-5-3 and 30-1-8(d). Such orders shall be entered within forty-five (45) days following the submission of all documents and materials necessary for the proper disposition of the case, including transcripts, and shall contain findings of fact and conclusions of law.

W. Va. C.S.R. § 19-5-10.1.[5] While Petitioner did not allege this issue as an assignment of error in his appeal to the circuit court below, and thus, the circuit court did not address this issue in its order, we observe that Petitioner briefly noted his concerns with the Board's delay in his memorandum of law below. To the extent that Petitioner now presents this issue on appeal to this Court, both parties have thoroughly briefed the issue, and because this issue presents potential due process considerations that are capable of repetition in the future but may perhaps continue to evade our review, we wish to address the merits of Petitioner's argument.

Petitioner contends that all the documents and materials necessary for the proper disposition of the case following the hearing on October 9, 2014 were within the custody and control of the Board by November 24, 2014, including the proposed findings of fact and conclusions of law from both parties. Nonetheless, Petitioner claims the Board waited 166 days (until March 30, 2015) to issue its Final Order and thus did not comply with the forty-five-day deadline set forth in the rule. He further alleges that the Board's

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raised before the circuit court. Accordingly, it has been waived. Regardless, the Board is permitted to order a licensee to submit to random drug testing as a condition of probation as a public safety measure. There is a safety interest in ensuring that nurses are not positive for illicit substances. An employee's right to privacy yields when an employer has a good faith suspicion of an employee's drug usage or when an employee's job involves public safety or the safety of others. See Syl. Pt. 2, *Twigg v. Hercules Corp.*, 185 W.Va. 155, 406 S.E.2d 52 (1990) (Drug testing will not be found to violate public policy grounded in the potential intrusion of a person's right to privacy where it is conducted by an employer based upon reasonable good faith objective suspicion of an employee's drug usage or while an employee's job responsibility involves public safety or the safety of others). Accordingly, we conclude that this assignment of error lacks merit.

[5] Effective November 21, 2016, this rule (W.Va. C.S.R. § 19-5-10.1) was renumbered as § 19-5-11.1. For purposes of the instant appeal, we reference the regulation as numbered at the time of the proceedings before the Board. We note that the substance of this rule was not affected by the renumbering.

conduct is representative of a pattern and course of action that creates a hardship for the licensee, the intent of which is seemingly to force nurses against whom complaints have been lodged to sign a consent order disposing of the complaint "voluntarily," thus, effectively depriving them of their due process rights, including an opportunity to be promptly heard and defend the allegations against them.

The Board maintains that it did not have all the documents and materials necessary to properly dispose of the case until it received the hearing examiner's recommended order on February 24, 2015. The Board contends that following receipt of the hearing examiner's recommended order, it then timely issued its Final Order on March 30, 2015. The Board asserts that it is permitted to engage a hearing examiner to preside over contested case hearings:

> The Board may appoint a hearing examiner who shall be empowered to subpoena witnesses and documents, administer oaths and affirmations, examine witnesses under oath, rule on evidentiary matters, hold conferences for the settlement or simplification of issues by consent of the parties, cause to be prepared a record of the hearing so that the Board is able to discharge its functions and otherwise conduct hearings as provided in section 3.10 of this rule.

W.Va. C.S.R. § 19-5-6.1. The Board further asserts that it cannot issue a Final Order until it receives the hearing examiner's recommended decision according to the procedural rule, which requires that "[t]he hearing examiner shall prepare recommended findings of fact and conclusions of law for submission to the Board. The Board may adopt, modify or reject such findings of fact and conclusions of law." W.Va. C.S.R. § 19-5-6.3. The Board additionally asserts that the hearing examiner is appointed for the benefit of the licensee to remove any appearance of bias or unfairness and to promote due process, and it would be an abuse of its discretion if it issued a Final Order without first receiving and considering the hearing examiner's recommended order. Thus, according to the Board, it stands to reason that the hearing examiner's recommended order is necessary for the proper disposition of the case.

We conclude that the applicable timeframes for entry of the Board's Final Order were met in this particular case. Pursuant to West Virginia Code of State Rules § 19-5-3.10.10(j)[6], "[t]he hearing may be conducted by one or more Board members or by a hearing examiner appointed by the Board." As noted above the hearing examiner is

[6] Effective November 21, 2016, this rule (W.Va. C.S.R. § 19-5-3.10(j)) was renumbered as § 19-5-3.10.10. For purposes of the instant appeal, we reference the regulation as numbered at the time of the proceedings before the Board. We note that the substance of this rule was not affected by the renumbering.

expressly empowered by § 19-5-6.1 to hold evidentiary hearings and engage in various fact-finding functions in order to assist the Board in resolving contested cases, the hearing examiner's power is limited: "[h]earing examiners appointed by the Board are *not authorized or empowered to grant, suspend, revoke or otherwise discipline any license*." W.Va. C.S.R. 19-5-6.2 (emphasis added). Additionally, while the hearing examiner is required to prepare recommended findings of fact and conclusions of law for submission to the Board under West Virginia Code of State Rules § 19-5-6.3, the rule expressly provides that "*the Board may adopt, modify or reject* [the hearing examiner's] findings of fact or conclusions of law." (emphasis added).

Thus, although a hearing examiner may be appointed the Board for certain expressly limited purposes, the Board itself retains the sole power to enter a Final Order in these disciplinary matters. West Virginia Code of State Rules § 19-5-6 does not contain a timeframe requirement for the hearing examiner's submission of its recommended decision to the Board. Rather, the rule simply requires that the Board's final orders "shall be entered within forty-five days following the submission of all documents and materials necessary for the proper disposition of the case, including transcripts . . . ." W.Va. C.S.R. § 19-5-10.1. Upon review of this rule, we conclude that the recommended order of the hearing examiner, as the designated fact-finder, was necessary for the Board to dispose of the case. Accordingly, we find that the Board did not have all the documents and materials necessary to dispose properly of the case until it received the hearing examiner's recommended order on February 24, 2015. Once the Board received the hearing examiner's recommended order, it issued its Final Order on March 30, 2015, within the forty-five day timeframe required by § 19-5-10.1.

Although we conclude that, in the absence of a specific timeframe regulation governing the hearing examiner's actions, no error meriting reversal of the circuit court's order exists, we note our concern with the extensive amount of time it took the hearing examiner to submit findings of fact, conclusions of law and a recommended order to the Board in this case. The absence of a specific time requirement for the hearing examiner to submit his/her recommended order to the Board should not serve as an excuse for unnecessary delay in moving these contested cases to resolution in a timely fashion. As the Board is well aware, we have previously expressed our concerns with delays in resolving these cases and the effect that such delays have on the livelihood of the nurses working in our State.

In *State ex rel. Fillinger v. Rhodes*, 230 W.Va. 560, 741 S.E.2d 118 (2013), this Court strictly applied the statutory and other applicable time requirements against this Board. In syllabus point 2, we held:

> In adjudicating a contested case concerning the revocation or suspension of a nurse's license to practice registered professional nursing, the West Virginia Board of Examiners

> for Registered Professional Nurses must follow the procedural requirements set forth in Chapter 30 of the West Virginia Code as well as the contested case hearing procedure set forth in Title 19, Series 5, of the West Virginia Code of State Rules.

Id. In so holding, we concluded that the Board's failure to resolve the complaint within the applicable time requirements necessitated dismissal of the complaint. We noted that with respect to the time requirements contained in the statute, " [t]his Court has no reason to conclude that the Legislature meant less than what it said in W. Va. Code, 30–1–5(c) [2005], about those requirements[.]" *Id*. at 567, 741 S.E.2d at 125.

In his concurring opinion in *Fillinger*, now Chief Justice Loughry specifically urged the Board to take measures to ensure its inaction was not repeated. He stated:

> [i]t is the responsibility of the Board to act diligently and promptly in reviewing, investigating, and conducting disciplinary hearings on complaints brought before it not only to guarantee that nurses will be held accountable for proven misconduct, but most importantly, to ensure the safety of patients and the public. Such expeditious action by the Board also assures hardworking, diligent, and caring nurses that they are working alongside other nurses who are competent and fit to hold a nursing license in this State. This results in protecting the public while also preserving the integrity of the nursing profession.

Id. at 568, 741 S.E.2d at 126 (Loughry, J., concurring).

Subsequently, in *State ex rel. Miles v. W.Va. Board of Professional Nurses*, 236 W.Va. 100, 777 S.E.2d 669 (2015), this Court again dealt with a similar issue where the petitioner, a registered nurse, asserted that the Board's failure to resolve the complaint against her within one year from the date of an interim status report, pursuant to West Virginia Code § 30–1–5(c), divested it of jurisdiction to proceed on the complaint. We found that the Board failed to comply with the statutory mandates of West Virginia Code § 30–1–5(c) and therefore, further action on the complaint against Petitioner's license was in excess of its jurisdiction. *Id.* at 106, 777 S.E.2d at 675. In so holding, we discussed the legislative history of the amendments to this section of the West Virginia Code and our decision in *Fillinger* and once again admonished the Board for its delay. We concluded:

> the Board in this instance has exceeded its jurisdiction by failing, almost entirely, to comply with the statute governing

> its procedural handling of complaints. Not only did the Board fail to comply with the statute, but it failed, inexplicably, to take heed of this Court's holding in Fillinger which was directed explicitly to this Board. The Board's refusal to strictly comply with the very straightforward requirements in the statute seems to evidence a blatant disregard for both the Legislature's and this Court's explicit instructions on how these matters should be handled, at worst, or a pattern of lackadaisical pursuit of complaints by this Board, at best. Either way, we are dismayed to note that in addition to divesting it of jurisdiction, the Board's actions in this case present the seldom-seen "persistent disregard for either procedural or substantive law" likewise warranting a writ of prohibition. Syl. Pt. 4, in part, *Hoover*, 199 W.Va. 12, 483 S.E.2d 12.

Id. Echoing Chief Justice Loughry's concerns in *Fillinger* regarding the impact that such delays have on nursing professionals, we stated:

> Clearly, the Legislature has determined that professionals are entitled to resolution of the cloud over their license within a specific time frame. More critically, the Legislature has determined that the public should not be interminably exposed to professionals who potentially present a risk of harm to their patients, clients or the public at large.

Id.

Because, despite this Court's prior admonishments, we are again presented with yet another case involving delays by the Board, we take this opportunity to call specific attention to the fact that it is not only the responsibility of the Board itself, but also its appointed hearing examiner, to act diligently and promptly in conducting evidentiary hearings on complaints brought before the Board. Hearing examiners must consider the evidence adduced at the hearing and the credibility of the witnesses and ultimately provide the Board with recommended findings of fact and conclusions of law promptly in order to assure that the nursing professionals in this State have any clouds placed upon their licenses resolved in a timely manner, as intended by the statutory requirements set forth in West Virginia Code § 30-1-5(c). In order for the Board to ensure that the cases before it involving appointed hearing examiners are resolved in an expeditious fashion, we encourage the Board to consider amending its regulations to place a specified timeframe requirement upon its hearing examiners for submission of recommended findings of fact and conclusions of law to the Board.

Having noted our concerns, for the reasons stated above, we cannot find that the Board's actions in this particular case merit grounds for reversal. We do, however, hope that the Board, and its appointed hearing examiners, will dutifully note these concerns and that a specific timeframe requirement for the submission of recommended findings of fact and conclusions of law to the Board will be implemented in future cases. Accordingly, we affirm the September 17, 2015 order of the circuit court.

Affirmed.

ISSUED: April 10, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Elizabeth D. Walker