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Court of Appeals of Minnesota.

David A. SHAW, Relator,

v.

MINNESOTA BOARD OF TEACHING, Respondent.

No. Co-00-2173.

June 5, 2001.

Attorneys and Law Firms

William F. Garber, Education Minnesota, St. Paul, MN, for relator.

Mike Hatch, Attorney General, Bernard E. Johnson, Assistant Attorney General, St. Paul, MN, for respondent.

Considered and decided by RANDALL, Presiding J., SCHUMACHER and ANDERSON, JJ.

UNPUBLISHED OPINION

SCHUMACHER.

*1 Relator David A. Shaw petitioned this court for writ of certiorari after respondent Minnesota Board of Teaching (the board) suspended his teaching licenses for two years. The board determined that Shaw's act of exposing himself to another man in a public restroom constituted immoral conduct under Minn.Stat. § 122A.20 (2000). Shaw argues that (1) the board's decision was not supported by substantial evidence; (2) the board acted arbitrarily; and (3) the board made its decision based on unlawful procedure. We affirm.

FACTS

On November 24, 1998, Shaw attended an education conference at the Hyatt Hotel in downtown Minneapolis. Shaw's employer had excused him from his teaching duties to attend the conference. That afternoon, Shaw went to use

the public restroom. According to Shaw's testimony at the contested case hearing, he entered the middle stall of the restroom because the other two stalls were occupied. He noticed that the man to his right was tapping his foot. He then noticed that the man to his left was also tapping his foot. Shaw recognized the foot-tapping as a signal that gay men use to meet each other. He testified that the men on either side of him tapped again and that he tapped back.

Shaw looked under the partitions, made eye contact with both men, and the man on his left wiggled his finger at him underneath the stall and whispered, "Show it, show it, show it." Shaw then knelt on the floor and exposed his erect penis underneath the partition so the man in the other stall could see it and that after he got up, he asked the man, "Well, what do you think?" and the other man replied, "It's nice."

Officer Martin Werner testified that the Hyatt hired him during his off-duty hours to work undercover because of complaints of inappropriate sexual behavior in the men's restrooms. According to Werner's testimony, he was in the bathroom stall when Shaw entered the stall next to him. Shaw tapped his foot first, and Werner responded because he believed Shaw's tapping indicated that Shaw wanted to engage in sexual activity. Shaw then stuck his head underneath the partition and made eye contact with Werner. After that, Shaw exposed his erect penis underneath the partition.

After the men exited their respective stalls, the man Shaw had exposed himself to identified himself as Officer Werner. Werner issued Shaw a citation for indecent exposure, a misdemeanor. Pursuant to Minn.R.Crim.P. 27.05, Shaw entered into an agreement to suspend prosecution, and after complying with the terms of the agreement, the charge was eventually dismissed.

In spring 2000, the Minnesota Board of Teaching's disciplinary committee recommended suspension of Shaw's teaching licenses because he engaged in immoral conduct. After a preliminary hearing before an administrative law judge, the ALJ determined that Shaw's conduct was not immoral and recommended no disciplinary action by the board. On November 16, 2000, the board held a disciplinary hearing and considered the ALJ's recommendation. By a majority vote, the board determined that Shaw's conduct constituted immoral conduct and suspended his teaching licenses for two years. On December 19, 2000, Shaw filed

a writ of certiorari to this court for review of the board's decision.

DECISION

*2 Disciplinary hearings before the Minnesota Board of Teaching are contested cases governed by the Administrative Procedure Act. Minn.Stat. § 214.10, subd. 2 (2000). Accordingly, this court may reverse or modify the board's decision if the administrative findings, inferences, conclusions, or decisions are:

- (a) In violation of constitutional provisions; or
- (b) In excess of the statutory authority or jurisdiction of the agency; or
- (c) Made upon unlawful procedure; or
- (d) Affected by other error of law; or
- (e) Unsupported by substantial evidence in view of the entire record as submitted; or
- (f) Arbitrary or capricious.

Minn.Stat. § 14.69 (2000).

Shaw argues that the board (1) erroneously concluded that he engaged in immoral conduct because there was not substantial evidence to support the board's decision; (2) acted arbitrarily by making credibility determinations that contradicted the ALJ's determinations, rejecting the ALJ's findings, and suspending Shaw's licenses without any indication that the board members had fully reviewed the record; and (3) made its decision based on unlawful procedure because the number of affirmative votes by the board members was insufficient to carry the motion to suspend Shaw's teaching licenses.

1. Statutory interpretation is a question of law, which this court reviews de novo review. *Doe v. Minnesota State Bd. of Med. Exam'rs*, 435 N.W.2d 45, 48 (Minn.1989). Further, determining the meaning of words in a statute presents a legal question, which is also subject to de novo review. *St. Otto's Home v. Minnesota Dep't Human Servs.*, 437 N.W.2d 35, 39-40 (Minn.1989).

A teacher's license may be suspended for immoral conduct. Minn.Stat. § 122A.20, subd. 1 (2000). Immoral conduct is also grounds for immediate discharge of a continuing-

contract teacher. Minn.Stat. § 122A.40, subd. 13(a) (2000). But, neither statute specifically defines immoral conduct. Further, although the Minnesota Supreme Court recognized that the phrase "immoral conduct" is nebulous and noted that immoral conduct in a particular community may not be labeled as such in another, no caselaw specifically defines the phrase. *Falgren v. State, Bd. of Teaching*, 545 N.W.2d 901, 908 (Minn.1996). Thus, this court should construe "immoral" according to its common and approved usage and the rules of grammar. Minn.Stat. § 645.08(1) (2000). This court must apply its plain meaning if the phrase, so construed, is not ambiguous; in other words, it is not susceptible to more than one meaning. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn.1995).

Although not precedential, the Missouri Court of Appeals resolved a similar issue regarding the definition of immoral conduct. As with Minnesota, Missouri's statutes allow the Missouri Board of Teaching to suspend a teacher's license or discharge a continuing-contract teacher for immoral conduct without specifically defining the phrase. In resolving the issue, the court relied on a continuing-contract teacher-discharge case that stated:

*3 According to *Webster's New Universal Unabridged Dictionary* (2d ed.1983), the term 'immoral' means 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially not in conformity with the accepted standards of proper sexual behavior; unchaste; lewd; licentious; obscene.' Each of these definitive terms shares a common element of wrongful intent or conscious disregard of established mores such that the act itself bespeaks or permits a presumption of knowledge of its wrongful character.

Howard v. Missouri State Bd. of Educ., 913 S.W.2d 887, 891 (Mo. Ct.App.1995) (quoting *Youngman v. Doerhoff*, 890 S.W.2d 330, 341 (Mo.Ct.App.1994)). This language is similar to language employed in a recent recommendation by an ALJ in determining whether a teacher's actions constituted immoral conduct. *In re the Proposed Revocation/Suspension of Teaching Licenses of Alttonn*, 1998 WL 879168, at 9 (Minn.Off.Admin.Hrgs. Oct. 20, 1998). The ALJ applied the "ordinary" meaning of the term immoral, which it defined as "corrupt, indecent, depraved or dissolute, or [was] conduct which offends the morals of the community in which it occurred." *Id.*

Because we accept this “ordinary” definition of immoral conduct, we must determine if the substantial evidence supports the board's conclusion that Shaw committed immoral conduct.

The Minnesota Supreme Court has stated that substantial evidence is

- 1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2) more than a scintilla of evidence; 3) more than ‘some evidence’; 4) more than ‘any evidence’; and 5) evidence considered in its entirety.

Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 825 (Minn.1977) (quotation omitted).

Shaw first argues that there was not substantial evidence for the board to find Werner's version of the incident more credible than Shaw's. Where there is a choice between conflicting evidence, the agency's conclusion “must stand unless manifestly and clearly contrary to the evidence.” *Nelson v. Lutheran Mutual Life Ins. Co.*, 311 Minn. 527, 529, 249 N.W.2d 445, 447 (1976).

The only difference between the two versions of the events was the question of who initiated the contact. But, the board did not rely on this difference in making its determination. Instead, the board relied on undisputed facts: 1) Shaw was at the Hyatt to attend an educational conference, 2) Shaw intentionally exposed his penis to another man, 3) the exposure took place in a public restroom on a school day, 4) the restroom was accessible to the general public, including children, and 5) it was typical for the Hyatt to have groups of students there for school-related events.

Because the board did not rely on who initiated contact, the error, if any, the board made in its credibility determination is de minimis. See *Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn.App.1985) (refusing to remand for de minimis error).

*4 Second, Shaw queries, “[o]n a broader level one must question why it would be harmful for a male child to witness a man with an erection in the men's bathroom.” Shaw reasons that when “a child enters a public restroom it is certainly

possible that [he] could view a [man's] penis either erect or flaccid.” Shaw argues that there might not be any harm for a child to see a man's erect penis while standing next to him at an urinal, because it might help the child to understand that an erect penis is part of a man's biological process. But this hypothetical situation is very different from the facts of the instant case.

Here, Shaw acknowledges that he exposed his erect penis to try to meet another man. He was not standing at an urinal performing a bodily function. Instead, he intentionally exposed himself underneath the partition of a public restroom stall because he thought “that was probably going to be the basis as to whether or not [the man in the other stall wanted] to meet [him].” Unlike his hypothetical, Shaw was not performing a function one normally witnesses in a public restroom.

Third, Shaw argues that his actions are a common occurrence in the gay community and are therefore not immoral. Based on our accepted definition of immorality, this argument is misplaced. An act is immoral if it is contrary to the community's socially acceptable mores. Shaw points out that it is difficult for gay men to meet each other in this society. But the fact remains that, rather than pursuing other options to meet the man who tapped his foot in the stall next to him, Shaw chose to expose his erect penis. Without passing judgment on Shaw's lifestyle, we conclude his act of exposing his penis in a *public* restroom, whether he is homosexual or heterosexual, does not comport with society's acceptable mores.

Fourth, Shaw argues that the undisputed facts do not constitute immoral conduct. In making this argument, Shaw contends that a recent board decision involving alleged immoral conduct by a teacher should control. *In re Denial of the Application for Teaching Licensure of C.M.*, OAH Docket No. 11-1302-9178-2 (Minn.Bd. of Teaching Mar. 17, 1995). In that case, C.M. was charged with disorderly conduct for having sex with another man in a public restroom. C.M. met the requirements of an agreement to suspend prosecution, so the conviction was expunged from his record. *Id.* at 2-3. When C.M. applied for a teaching license, he disclosed the event. *Id.* at 3. The board denied his application, explaining that the indecent exposure incident was immoral conduct. *Id.* at 4.

After a hearing, the board found that C.M. had “not engaged in conduct [constituting immoral conduct] that justifies his denial of his license application.” *Id.* at 7. But, the conduct

occurred two years before C.M. applied for his license. *Id.* at 2-3. Although it is unclear if this fact influenced the board's decision, the board did find that, at the time of the incident, C.M. had not yet decided to become a teacher and "was not as aware or familiar with ethics for teachers as he is at the present time." *Id.* at 3. Unlike C.M., Shaw was already licensed as a teacher at the time of the incident, and he is bound by the ethical standards teachers must uphold. Shaw's reliance on C.M. is misplaced.

*5 The board argues that this case is factually similar to another recent board decision involving suspension of a teacher's license because of immoral conduct. *In re Suspension of Teaching Licenses of Ebnet*, OAH Docket No. 15-2301-12384-2 (Minn.Bd. of Teaching Sept. 17, 1999). In that case, the board concluded that the teacher engaged in immoral conduct by exposing his penis to an undercover police officer under a stall in a public restroom in a Minneapolis department store on a weekday afternoon. *Id.* at 2 (adopting ALJ's findings of fact and conclusions of law stated in ALJ's recommendation). Shaw argues that the case is distinguishable because Ebnet "defaulted, leaving the hearing officer no option but to recommend the requests of the [board]." But Ebnet's non-appearance only resulted in the ALJ accepting the allegations as true, and the board still had the authority to reject the ALJ's recommendation. See *Beaty v. Minnesota Bd. of Teaching*, 354 N.W.2d 466, 472 (Minn.App.1984) (concluding that agency may reject hearing examiner's findings if agency specifies its reasons for its action). On the given set of facts in *Ebnet*, which Shaw concedes are "almost identical to the instant case," the board determined that Ebnet's behavior constituted immoral conduct. In its memorandum attached to the order, the board reasoned that Ebnet used poor judgment by engaging in this conduct in a public place that was easily accessible to children.

In this case, like the teacher in *Ebnet*, Shaw willingly exposed his erect penis to another man underneath a bathroom stall in a public restroom. Also like the teacher in *Ebnet*, Shaw's actions took place on a weekday in the afternoon. Further, as in *Ebnet*, no one else besides the arresting officer witnessed the event, but the board still determined that the conduct was immoral.

Shaw testified that he thought the man in the stall next to him wanted to meet him. He further testified that his behavior was the normal way gay men meet each other and that he was lonely due to lack of companionship. Werner testified that the

public restrooms in the Hyatt are a very common place for gay men to meet. Shaw chose to expose his penis in a public restroom in order to attract the attention of the man in the stall next to him. Shaw's psychologist opined several times on the record that Shaw's conduct was a sexual act. Given these facts, the record demonstrates substantial evidence to support the board's determination that Shaw engaged in immoral conduct.

Finally, Shaw argues that his immoral act must be related to his fitness to teach in order to sustain the board's decision. Although Shaw cites Nebraska caselaw, Shaw did not cite any precedential Minnesota caselaw on point, and none could be found. In *Nicholson v. Independent Sch. Dist. No. 363*, No. C0-91-1404, 1992 WL 48113, at *2 (Minn.App. Mar. 17, 1992), review denied (Minn. May 15, 1992), an unpublished opinion involving an appeal from the board's decision to terminate a teacher's contract, this court concluded that the governing statute did not require a specific finding that a teacher is unfit to teach in order to terminate a teacher for immoral conduct. Although *Nicholson* has no precedential value, this court's reasoning in *Nicholson* is persuasive. There was no language in the governing statute in *Nicholson* that required a finding that a teacher was unfit to teach before terminating a teacher's contract for immoral conduct.

*6 Similarly, there is no language in Minn.Stat. § 122A.20 that requires a finding that a teacher is unfit to teach before disciplining a teacher for immoral conduct. Courts cannot add to a statute "what the legislature purposely omits or inadvertently overlooks." *Ullom v. Independent Sch. Dist. No. 112*, 515 N.W.2d 615, 617 (Minn.App.1994) (citation and quotation omitted). Thus, Shaw's argument that the law requires a nexus between the alleged immoral conduct and a teacher's fitness to teach lacks merit.

2. An agency's decision is arbitrary or capricious when "the determination represents the agency's will and not its judgment, or when the decision is without evidence to support its conclusion." *Beaty*, 354 N.W.2d at 471.

Shaw argues that the board acted arbitrarily by reaching its decision without any indication on the record that its members had read the record from the preliminary ALJ hearing.

Over a month before the board's review of the ALJ's recommendation, the attorney general's office sent a memo to the board advising its members that they needed to review the complete record before making a final decision on the matter. Further, the record demonstrates that over 50 pages of

the disciplinary hearing transcripts involved a summary of the facts and arguments presented at the preliminary ALJ hearing. Shaw points out that “no board member was asked and no board member indicated that they read the record.”

Shaw seems to be arguing that the board members are required to indicate on the record that they reviewed the documents from the preliminary ALJ hearing, but Shaw cites no authority for this proposition, and none could be found. Further, Shaw did not point to any specific facts that indicate the board *did not* review the preliminary record, and a review of the record does not reveal any facts to substantiate Shaw's assertion. The record's silence on this issue does not lead to the conclusion that the board members did not review the preliminary record.

Shaw also asserts that one of the board members changing her mind at the disciplinary hearing further evidences his argument that the board did not adequately review the record. But, this member was part of the two-person disciplinary committee that initially recommended disciplinary action. The record demonstrates that she changed her mind about the *appropriate disciplinary action for Shaw's conduct*, not whether Shaw's action constituted immoral conduct. The member told the board:

*I do see the conduct as immoral. As a professional, I have a huge problem with what happened and how it reflects on my profession. I do believe there should be some consequence to it. * * * I'm not sure two years' suspension is the appropriate [consequence].*

(Emphasis added.) It is unclear how a board member changing her mind about appropriate disciplinary action is evidence that the board did not adequately review the record.

Because the record does not indicate that the board *did not* review the preliminary record, there is no evidence that the board acted arbitrarily in making its final decision.

*7 Finally, Shaw argues that the board acted arbitrarily by rejecting the ALJ's findings and the ALJ's determination that Shaw's testimony was more credible than Werner's without providing a reason on the record.

An agency may reject the ALJ's findings, but when it does so, it must explain its reasons for doing so on the record. *Beaty*, 354 N.W.2d at 472. “Failure to do so evidences the agency's desire to exercise its will and not its judgment.” *Id.* An agency's credibility determination, even if contrary to an ALJ's determination, is not arbitrary if the agency has

adequately explained its reasons for disagreeing with the ALJ. *Brinks, Inc. v. Minnesota Pub. Utils. Comm'n*, 355 N.W.2d 446, 452 (Minn.App.1984).

Paragraph six of the ALJ's findings of fact adopted Shaw's version of the restroom incident. The board's findings detailed Shaw's version and Werner's version of the incident. Although Shaw contends that this equates to contradictory findings because both versions cannot be true, a more accurate description would be that the board simply wanted the findings to reflect both witnesses' testimony.

Paragraph 12 of the ALJ's findings of fact outlined Shaw's exemplary employment record. The board's findings replaced some of the language of this paragraph to more accurately reflect that the facts surrounding Shaw's employment record were solely the product of Shaw's testimony. The board also added a paragraph to reflect the fact that Shaw did not inform his school district administration about the incident until almost a year after it occurred.

The board rejected the ALJ's conclusion that the board had not proven by a preponderance of the evidence that Shaw's conduct constituted immoral conduct. Instead, the board concluded that Shaw's conduct did constitute immoral conduct, which justified a two-year suspension of his licenses, and it concluded that his teaching records and depression were not mitigating factors.

Although Shaw relies on *Beste v. Independent Sch. Dist. No. 697*, 398 N.W.2d 58 (Minn.App.1996), to argue that the board acted arbitrarily, the facts in *Beste* are not sufficiently analogous to the instant case. In *Beste*, there was no explanation whatsoever for the school board's decision not to adopt the hearing examiner's recommendations. *Id.* at 63. This court concluded that, even though the changes to the recommendations were minor, an explanation should have accompanied the board's decision. *Id.*

Here, the memorandum accompanying the board's order does provide an explanation for its decision to reject the ALJ's findings, its credibility determination, and its conclusion. In its memorandum attached to its order, the board noted:

After a complete review of the record, the Board finds the testimony of Officer Martin Werner more credible than the testimony of [Shaw]. [Shaw]

testified that he did not intend to have sexual interaction in the restroom but simply wanted to meet someone. That is not credible.

*8 The board further noted that it believed "that deliberately and intentionally exposing an erect penis to a stranger in a public restroom is clearly immoral conduct." The board reasoned that because children sometimes use the restroom where the incident occurred, the

incident, the fact that it occurred on a school day while attending an educational conference, and the fact that students frequent the hotel all lead to the conclusion that [Shaw] engaged in immoral conduct.

Accordingly, the board acted based on its judgment rather than its will and did not arbitrarily reject the ALJ's recommendation.

3. The Minnesota Board of Teaching is comprised of 11 members. The parties agree that ten members were present at Shaw's disciplinary hearing. Although Minnesota statutes do not provide guidance, both parties agree that a simple majority is needed in disciplinary matters. Further, in its brief, the board states that the chair only casts a vote to break a tie, which Shaw does not refute. Of the ten members present, two abstained from voting on all matters because they were members of the disciplinary committee that initially recommended that the board take action against Shaw. See Minn.Stat. § 214.10, subd. 2 (stating board members consulted during investigation may not vote on matters pertaining to case).

Shaw argues that a majority vote of the eight remaining board members, or five affirmative votes, was required in order to approve the proposed disciplinary action against him. On the motion of whether to suspend Shaw's teaching licenses based on immoral conduct, the eight eligible voting members voted in the following manner: four members voting in favor of the action, three voted against, and one abstained. Shaw contends

that the abstaining vote should not count toward the majority, so the motion to suspend his licenses should not have carried.

In Minnesota, the issue of how to count an abstaining vote seems to depend on the reason for the abstention. When an abstention is due to legal disqualification, the majority of the remaining voting members is required. See *In re 1989 Street Improvement Program*, 483 N.W.2d 508, 511 (Minn.App.1992) (holding that, where statute required four-fifths vote of five-member town board to adopt resolution but two members abstained from voting because of legal disqualification, affirmative vote of remaining three members satisfied statutory voting requirement). An opinion from the Minnesota Attorney General's Office provides guidance for how to treat abstentions that are not the result of legal disqualification:

[I]f quorum is present, the affirmative vote of a majority of those actually voting on the matter is sufficient to carry the issue. Abstentions may be considered to be acquiescence in the vote of the majority and are counted, therefore, with the votes of the majority.

Op. Att'y Gen. 161-a-20 (June 3, 1987).

Based on this reasoning, Shaw is correct that a majority vote of the eight remaining board members was necessary to carry the motion. But contrary to Shaw's argument, the remaining abstention should be counted toward the majority votes. Unlike the members of the disciplinary committee, the record does not indicate that the third abstention was due to a legal disqualification. Accordingly, based on the four affirmative votes and the abstention, the board had enough votes to carry the motion to suspend Shaw's teaching licenses.

*9 Affirmed.

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