

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF PSYCHOLOGY

In the Matter of the Psychology License
Catherine P. Hoeckle, M.Eq., L.P.
License No. LP 1505

RECOMMENDED ORDER
ON MOTION FOR
SUMMARY DISPOSITION

The above-entitled matter is before the undersigned Administrative Law Judge on the motion of the Board of Psychology (the Board) for summary disposition.

Jacquelyn E. Albright, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, filed the Motion on behalf of the Board. Jerry Strauss, Attorney at Law, Commerce at the Crossings, 250 Second Avenue South, Suite 228, Minneapolis, Minnesota 55401-2169, represents the Licensee, Catherine P. Hoeckle, and filed a Memorandum in Opposition to the motion for summary disposition. The record closed on this motion on November 17, 1995, upon receipt of the Board's response to Licensee's Memorandum in Opposition.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Board shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Board. Exceptions to this Order, if any, shall be filed with Pauline Walker-Singleton, Executive Director of the Board of Psychology, 2700 University Avenue West, Suite 101, St. Paul, Minnesota 55144.

Based on the record in this matter, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDED ORDER

IT IS RECOMMENDED that the Board of Psychology's motion for summary disposition be GRANTED.

Dated this _____ day of December, 1995.

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

The Board has moved for summary disposition of this matter, asserting that no issues remain for hearing. The Board maintains that the conviction of Catherine Hoeckle on four counts of theft by false representation arising from Medical Assistance (MA) reimbursement claims is incontrovertible proof of the violations alleged in the Notice of and Order for Hearing. Licensee asserts that, since the facts underlying the conviction have not been presented, summary disposition is inappropriate. The doctrines of due process and fundamental fairness are cited by Licensee as requiring that a hearing be held.

Summary disposition is the administrative equivalent of summary judgment. Minn. Rule 1400.5500(K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn.R.Civ.P. 56.03 (1984). A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. Illinois Farmers Insurance Co. v. Tapemark Co., 273 N. W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W. 2d 804, 808 (Minn. App. 1984).

The Board, as the moving party, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist this motion for summary disposition, the nonmoving party, the Licensee, must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine

issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn.R.Civ.P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). The nonmoving party also has the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party. See Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Dollander v. Rochester State Hospital, 362 N.W.2d 386, 389 (Minn.App. 1985).

Based upon the pleadings and affidavits submitted in this matter, and construing the facts in the light most favorable to the Licensee, the underlying facts in this matter appear to be as follows:

In 1994, Licensee was charged with seven counts of theft by misrepresentation. The case came before Ramsey County District Court Judge Lawrence D. Cohen for a Rasmussen hearing immediately prior to the jury trial requested by Licensee. Licensee was present at this hearing and represented by counsel. After the Rasmussen hearing, the Licensee waived her right to a jury trial and agreed to the submission of the case to Judge Cohen for trial. The State amended the charge to allege four counts of theft by misrepresentation. The State and the Licensee stipulated that the State's case would be submitted to the Judge on the police report, the charge, and the testimony at the Rasmussen hearing. Licensee rested without introducing any evidence or calling any witnesses.

Judge Cohen found Licensee guilty on all four counts of theft by misrepresentation. Judge Cohen prepared written findings that the Licensee "intentionally prepared or filed one or more claims for reimbursement for medical care provided to recipients of the Medical Assistance Program in order to obtain the reimbursement checks." Board Exhibit A, at 2. Judge Cohen also found that "the Defendant [Licensee] knew or believed that the claim for reimbursement was false and Defendant acted with the intent to defraud. Id. The verdict of guilty was entered on July 26, 1995. Licensee was sentenced to ten years of probation, conditioned on Licensee serving 90 days home confinement, the usual conditions, and making restitution of \$75,104.46. Board Exhibit A. The time for appeal of Licensee's conviction has run.

The Board has cited as Licensee's violations of the statutes and rules affecting the licensure of persons by the Board the following:

1. violation of a statute or rule within the Board's jurisdiction in violation of Minn. Stat. § 148.941, subd. 2(1);
2. fraudulent, deceptive, or dishonest conduct relating to the practice of psychology that adversely affects the Licensee's fitness to practice

psychology in violation of Minn. Stat. § 148.941, subd. 2(2) and Minn. Rule 7200.5600;

3. unprofessional conduct that has a potential for causing public harm in violation of Minn. Stat. § 148.941, subd. 2(3) and Minn. Rule 7200.5700;
4. conviction of a felony, or any crime containing an element of dishonesty or fraud in violation of Minn. Stat. § 148.491, subd. 2(4);
5. violation of the Board's code of ethics in violation of Minn. Stat. § 148.941, subd. 2(9);
6. conviction in a court of competent jurisdiction of violating Minn. Stat. § 609.52, in violation of Minn. Stat. § 214.10, subd. 2.a.;
7. misrepresentation in billing to a third party of services provided to clients, in violation of Minn. Rule 7200.5200, subp. 3; and
8. violation of the law in which the facts giving rise to the violation involve the provision of psychological services in violation of Minn. Rule 7200.5500.

Amended Notice of and Order for Hearing, at 4.

To successfully resist a motion for summary disposition, the nonmoving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). General averments are not enough to meet the nonmoving party's burden under Minn.R.Civ.P. 56.05. Id.; Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.App. 1988).

Licensee has not disputed a single fact in this matter. Rather, Licensee has asserted that due process and fundamental fairness prohibit the imposition of summary disposition when a license is at issue. No cases have been cited in support of this proposition. The most recent case on summary disposition in a professional license revocation is Falgren v. Minnesota Board of Teaching, 529 N.W.2d 382 (Minn. App. 1995), review granted May 31, 1995.

In Falgren, the Court of Appeals held that an arbitration decision cannot be used for purposes of offensive collateral estoppel to preclude a licensee from obtaining a hearing on license revocation. Falgren, 529 N.W.2d at 382. The reasons given for not affording collateral estoppel effect to the arbitration decision are: 1) the effective lack of judicial review of an arbitrator's decision; and 2) the lack of a hearing on the issue. Id. The four-day hearing held before the arbitrator, with counsel, the right to call witnesses, and the right to cross-examine witnesses, was not a sufficient hearing to meet the due process right of the licensee, due to the lack of appellate review. Id.

By contrast, the guilty plea of a claimant for unemployment benefits in Nevins v. Christopher Street, Inc., 363 N.W.2d 891 (Minn.App. 1985), was sufficient to allow collateral estoppel. The Court of Appeals described the rationale for this result as follows:

But Nevins was convicted by a plea of guilty of just the same actions she is accused of committing before the Department of Economic Security. Nevins had an opportunity to fully litigate the facts and chose to enter a plea of guilty. The imposition of the presumption [statutorily denying eligibility for benefits based on the conviction] did not constitute a denial of due process.

The statute is obviously intended to eliminate a requirement for proof in the administrative forum of a fact already proved in a trial court in a criminal proceeding. The statute codifies the common law doctrine of collateral estoppel, a form of res judicata "whereby a former judgment is conclusive in a later suit between the same parties or their privies as to determinative issues finally decided in the former suit." Travelers Insurance Co. v. Thompson, 281 Minn. 547, 551, 163 N.W.2d 289, 292 (1968), appeal dismissed, 395 U.S. 161, 89 S.Ct. 1647, 23 L.Ed.2d 175 (1969).

Nevins, 363 N.W.2d at 893-94.

The Court of Appeals noted in Nevins that the claimant had knowledge of her pending unemployment claim and had "ample opportunity to contest the criminal charges." Nevins, 363 N.W.2d at 894.

In this matter, the Board has cited a violation of Minn. Stat. § 148.941, subd. 2(a) as a ground for taking adverse action against the Licensee. That statute states in pertinent part:

(a) The board may impose disciplinary action as described in paragraph (b) against an applicant or licensee whom the board, by a preponderance of the evidence, determines:

(1) has violated a statute, rule, or order that the board issued or is empowered to enforce;

(2) has engaged in fraudulent or deceptive conduct, whether or not the conduct relates to the practice of psychology, that adversely affects the person's ability or fitness to practice psychology.

(3) has engaged in unprofessional conduct or any other conduct that has the potential for harm to the public, including any departure from or failure to conform to the minimum standards of acceptable and prevailing practice without actual injury having to be established.

(4) has been convicted of or has pled guilty or nolo contendere to a felony or crime, an element of which is dishonesty or fraud, or has been shown to be engaged in acts or practices tending to show that the applicant or licensee is incompetent or engaged in conduct reflecting adversely on the applicant's or licensee's ability or fitness to engage in the practice of psychology.

* * *

(9) has violated the code of ethics adopted by the board.

Minn. Stat. §148.941, subd. 2 (1994).

Judge Cohen's findings in the Licensee's criminal trial indicate that Licensee was convicted of a felony offense with an element of fraud. Those findings demonstrate every element of Minn. Stat. § 148.941, subd. 2(a)(4) required for taking adverse action against a license. Licensee has not raised any issue with the conviction. There are no genuine issues of material fact regarding the conviction. Thus, as a matter of law, the Board is entitled to take adverse action against the Licensee for violating Minn. Stat. § 148.941, subd. 2(a)(4).

Minn. Stat. § 214.10, requires the Board to initiate proceedings to suspend or revoke the license of any licensee "convicted in a court of competent jurisdiction of violating sections 609.23, 609.231, 609.465, 609.466, 609.52, or 626.557." The Complaint in the criminal trial cites Minn. Stat. § 609.52 as the statute violated in each count. Minn. Stat. § 214.10 creates a rebuttable presumption that a conviction for violating any of the listed statutes is a ground for suspension or revocation of a psychologist's license. The Board has introduced evidence of the Licensee's criminal conviction for violating Minn. Stat. § 609.52. The Licensee has raised no factual issue to suggest that a genuine issue of material fact exists tending to rebut the statutory presumption.

Minn. Stat. § 148.941, subd. 2(a)(1) authorizes adverse action against a license if the Licensee violates a statute, rule, or order of the Board. The specific rules cited by the Board as violations are Minn. Rule part 7200.5700, prohibiting unprofessional conduct; part 7200.5200, subpart 3, prohibiting misrepresentation to third parties billed for services to clients; and part 7200.5500, prohibiting violations of the law in which the facts supporting the violation involve the provision of psychological services. The findings of fact underlying the Licensee's conviction (or the conviction itself) support a prima facie showing of violations of rules 7200.5200, subpart 3; and 7200.5500. Minn. Rule 7200.5700 defines as unprofessional conduct any violations of rule constituting the code of ethics adopted by the Board (Minn. Rule 7200.4500-.5600). The violation of the rules cited above constitutes a prima facie violation of rule 7200.5700. Since no issues of fact were asserted by the Licensee regarding these asserted violations, the prima facie case is a sufficient basis for summary disposition.

Minn. Stat. § 148.941, subd. 2(a)(2) authorizes adverse action against a license where the licensee “has engaged in fraudulent or deceptive conduct ... that adversely affects the person’s ability or fitness to practice psychology.” There have been clear findings that fraudulent conduct was engaged in by the Licensee. There has been no evidence submitted that the conduct is in any way related to Licensee’s “ability or fitness to practice psychology.” There were no findings by Judge Cohen as to the standards in the practice of psychology. There is no element of the crime Licensee was convicted of that relates to the practice of psychology. The Board maintains that the conviction demonstrates per se that the Licensee is unfit. That conclusion is an inference against the Licensee. On a motion for summary disposition, inferences can only be taken in favor of the nonmoving party. Summary disposition cannot be granted on this basis.

Minn. Stat. § 148.941, subd. 2(a)(3) establishes unprofessional conduct or other conduct that may harm the public as grounds for adverse action against a license. On a prima facie basis, the unprofessional conduct standard is met by the rule violations discussed above. The public harm standard is also met here by the facts underlying the Licensee’s conviction. Fraudulent billing of a governmental agency is per se a harm to the public. Licensee has introduced no facts disputing the prima facie case established by the Board. Summary disposition is appropriate on this ground.

The Licensee’s conviction on four counts of Minn. Stat. § 609.52 meets the standard of Minn. Stat. § 148.941, subd. 2(a)(4). Fraud is an element of the offense. The remaining statutory basis for taking action is subdivision 2(a)(9), violation of the Board’s code of ethics. Those violations were discussed above. There were no issues of fact raised by Licensee on either of these issues. Summary disposition is appropriate on these grounds.

Licensee has not demonstrated that genuine issues of material fact remain for hearing in this matter. The Court of Appeals in Falgren did not intend to require administrative agencies to hold hearings without regard to any other proceedings that involve the licensee and the operative facts at issue in an adverse action against a license. The focus in Falgren was on the nature and limitations of an arbitration proceeding. There were no such limitations in the criminal trial of the Licensee. Licensee has chosen the course of her defense at that trial and has chosen not to appeal her conviction. The due process requirement that a licensee have a hearing has been met by the criminal trial. The outcome of the criminal trial is available to the Board in pursuing its adverse licensing action against Licensee. Since no genuine issues of fact have been raised, there is no purpose to going forward with a hearing on the issue of whether the Board may take adverse action against the Licensee. The Board’s Motion for Summary Disposition should, therefore, be GRANTED. The question of the appropriate discipline to impose will be determined by the Board.

S.M.M.