

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN L. WALLACE,
Appellant,
vs.
NEVADA STATE BOARD OF
PSYCHOLOGICAL EXAMINERS,
Respondent.

No. 49083

FILED

SEP 28 2010

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

This is an appeal from district court orders denying a petition for judicial review in a professional licensing matter. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

After a complaint was made against appellant Dr. John L. Wallace on June 27, 1997, respondent Nevada State Board of Psychological Examiners held a disciplinary hearing on four separate days in July and August of 1997. At the conclusion of the hearing, the Board issued an order that suspended Dr. Wallace's license to practice psychology for one year and stated that Dr. Wallace's license to practice psychology could only be reinstated if he complied with certain terms (the Board's Order). The Board's Order was later amended (the Board's Amended Order) on October 14, 1997, to state that Dr. Wallace's license was suspended pending the completion of the terms set out by the Board.

Four months following the issuance of the Board's Amended Order, the Board held another hearing and added another term that Dr. Wallace was required to complete before his license would be reinstated. Dr. Wallace attended this hearing and was further informed of this additional term by written letter.

On July 29, 1998, Dr. Wallace filed a lawsuit against the Board in federal court. The federal district court dismissed Dr. Wallace's suit against the Board and Dr. Wallace appealed this decision to the

United States Court of Appeals for the Ninth Circuit. The parties were accepted into the Ninth Circuit's mediation program and began mediation. The parties reached an agreement that the Board would hold another hearing on the matter.

The Board held the agreed-upon hearing some three years later on August 28, 2004. Dr. Wallace requested a continuance of that hearing, which the Board denied because he had been duly noticed of the hearing a month before. Dr. Wallace was not present at this initial hearing, and to allow him an opportunity to present evidence of his compliance with the Board's order's, the Board continued its final decision until its December 2004 meeting.

At the second hearing, which was held on December 4, 2004, with Dr. Wallace present, the Board revoked Dr. Wallace's license to practice psychology for failure to comply with the terms for reinstatement previously set out by the Board in the Board's Amended Order. Dr. Wallace filed a petition for judicial review of the Board's revocation of his license in the district court. The district court: (1) dismissed Dr. Wallace's petition for judicial review of the Board's Order as untimely, (2) affirmed the Board's decision to revoke Dr. Wallace's license, and (3) found that the letter sent to Dr. Wallace confirming the additional term of the Board's Amended Order qualified as a written order of the board.¹

On appeal, Dr. Wallace argues that the district court erred in: (1) condoning numerous violations of his right to due process committed by the Board, and (2) dismissing his petition for judicial review as untimely.

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

Standard of review

This court reviews an administrative decision in the same manner as the district court. We, like the district court, decide purely legal questions de novo. In reviewing questions of fact, however, both this court and the district court are prohibited from substituting their judgment for that of the agency. Therefore, on factual issues, this court is limited to determining whether there is substantial evidence in the record to support the agency's decision. Substantial evidence is evidence that a reasonable mind might accept as adequate to support the [Board's] conclusion. The reviewing court is confined to the record before the agency.

Garcia v. Scolari's Food & Drug, 125 Nev. ___, ___, 200 P.3d 514, 519-20 (2009) (citations omitted).

“NRS 233B.135 [(1), (2)] provides that judicial review of a final agency decision must be confined to the record and the burden of proof is on the party challenging the agency decision.” Clements v. Airport Authority, 111 Nev. 717, 721 n.1, 896 P.2d 458, 460 n.1 (1995). An agency or board's decision and its determination of factual issues should be upheld unless the decision is in violation of law, clearly erroneous, arbitrary or capricious, or characterized by an abuse of discretion. NRS 233B.135(3). On all questions of fact the reviewing court is limited to determining whether there is substantial evidence in the record to support the Board's final decision. Clements, 111 Nev. at 722, 896 P.2d at 461. If there is substantial evidence supporting the Board's decision, a reviewing court may not reverse that decision, even if the reviewing court might

have weighed the facts differently or reached a different conclusion. Knapp v. State, Dep't of Prisons, 111 Nev. 420, 425, 892 P.2d 575, 578 (1995).

Dr. Wallace's due process rights

Dr. Wallace argues that his due process rights were violated by: (1) the Board adding a term to be completed by Dr. Wallace before his license could be reinstated, (2) the Board allowing one of its members with a possible conflict of interest to sit at Dr. Wallace's 2004 disciplinary hearing, (3) Deputy Attorney General Edward Reed (DAG Reed) acting as administrative prosecutor, (4) the Board's deliberations being tainted by the Board's counsel coaching it on how to rule, and (5) the Board exceeding its authority in revoking his license.

The additional term added by the Board

At a meeting of the Board on February 7, 1998, the Board decided to allow Dr. Wallace to practice on a probationary basis. The Board agreed that Dr. Wallace could practice, but that his practice would be limited to assessments of male patients and not include ongoing psychotherapy. The Board stipulated that for Dr. Wallace's probationary practice to continue he was to undergo weekly supervision with a practice monitor appointed by the Board and that he had to tape his assessments until such time as the practice monitor determined that the taping was no longer needed. The Board also stated that Dr. Wallace was to take a board-approved, formal sexual harassment class within one year. These terms were set out in the Board's Amended Order.

On June 22, 1998, Dr. Wallace received a letter (1998 Letter) from the Board that included an additional term, not included in the Board's Amended Order that had to be met in order for him to have his

license reinstated. The 1998 Letter added the requirement that Dr. Wallace was to seek therapy from a licensed female psychologist.

Dr. Wallace argues that the district court erred in finding that the 1998 Letter was an order of the Board giving Dr. Wallace fair notice of the additional term. However, the Board contends that because Dr. Wallace never made this argument to the Board at the 2004 disciplinary hearing, he waived his right to argue this point as he treated the 1998 Letter as an official order of the Board. We agree with the Board.

“This court will not consider issues raised for the first time on appeal.” State v. Wade, 105 Nev. 206, 209, n.3, 772 P.2d 1291, 1293, n.3 (1989); see also Merica v. State, 87 Nev. 457, 462, 488 P.2d 1161, 1164 (1971). Thus, we conclude that we must refrain from considering this issue because Dr. Wallace did not make this argument in the district court or at the December 2004 disciplinary hearing of the Board. As such, he is impermissibly raising this issue for the first time on appeal.² Thus, we affirm the order of the district court on this issue.

The member of the Board with a possible conflict of interest

Dr. Wallace argues that his due process rights were violated by the Board allowing one of its members, Dr. Graybar, to serve during Dr. Wallace’s disciplinary hearing in December 2004. Dr. Wallace contends that because Dr. Graybar was a named defendant in the federal lawsuit, Dr. Graybar could not act fair and impartial during Dr. Wallace’s disciplinary hearing. We disagree.

² However, we note that even if we were to take notice of this issue, Dr. Wallace’s failure to raise this complaint in the proceedings below, constituted a waiver of his rights. See Mahban v. MGM Grand Hotels, 100 Nev. 593, 596, 691 P.2d 421, 423 (1984) (stating that a waiver of one’s rights can be implied by that person’s conduct).

Under NRS 641.040(4) “[b]oard members must not have any conflicts of interest or the appearance of such conflicts in the performance of their duties as members of the Board.” This court adopted, from the United States Supreme Court, the requirement that the party contesting the impartiality of an administrative agent must satisfy a heavy burden. City Plan Dev. v. State, Labor Comm’r, 121 Nev. 419, 429, 117 P.3d 182, 189 (2005); Withrow v. Larkin, 421 U.S. 35, 47 (1975). Further, this court has held that “[a] presumption of honesty and integrity cloaks those who serve as adjudicators. That presumption may be overcome, however, by showing that the adjudicators have a conflict of interest, such as a financial stake in the outcome of the case.” Gilman v. State, Bd. of Vet. Med. Exam’rs, 120 Nev. 263, 269, 89 P.3d 1000, 1004 (2004).

We conclude that Dr. Wallace has failed to show his due process rights were violated by Dr. Graybar participating in his disciplinary hearing. Specifically, Dr. Wallace has not satisfied the heavy burden to show that Dr. Graybar could not be impartial, as nothing in the record indicated that Dr. Graybar had a conflict of interest that negated his presumption of integrity. Further, Dr. Graybar specifically stated at the December 2004 hearing that he wished that he and Dr. Wallace had been able to work together closer in order for Dr. Wallace to have complied with the Board’s Amended Order. As such, we affirm the order of the district court on this issue.

DAG Reed acting as administrative prosecutor

Dr. Wallace argues that his due process rights were violated by DAG Reed serving as counsel or prosecutor for the Board at the December 2004 disciplinary hearing. Dr. Wallace contends that DAG Reed could not serve as counsel or prosecutor for the Board because he had a conflict of interest in that his father was the presiding judge in the

federal lawsuit. The Board contends that Dr. Wallace has not provided this court with sufficient information or evidence regarding the alleged conflict of interest of DAG Reed that would have precluded him from acting properly in his duties as required by the Nevada Rules of Professional Conduct. We agree with the Board.

If an appellant fails to provide this court with sufficient citations to authority to support its contentions, that argument cannot prevail. See Smith v. Timm, 96 Nev. 197, 201-02, 606 P.2d 530, 532 (1980) (stating that the court was unable to find error because the appellant had failed to provide adequate legal authority).

We conclude that Dr. Wallace's argument must fail because he has provided this court with no authority to support his position that his due process rights were violated by DAG Reed prosecuting his case to the Board. Dr. Wallace's argument on this issue consists of a one-sentence, conclusory statement. Further, Dr. Wallace provides no argument as to why DAG Reed would have needed to recuse himself as prosecutor for the Board, but only states that he had a conflict of interest. Without more explanation of what the conflict of interest was that would have prevented DAG Reed from fulfilling his duties as prosecutor for the Board in an appropriate way, Dr. Wallace has failed to show that DAG Reed should have recused himself from participation in the December 2004 disciplinary hearing because he failed to explain how he was prejudiced by the alleged conflict of interest. As such, we affirm the order of the district court on this subject.

The Board's deliberations at Dr. Wallace's 2004 disciplinary hearing

Dr. Wallace argues that the Board, in its capacity as finder of fact, was improperly influenced by its counsel, Senior Deputy Attorney General Dianna Hegedius (SDAG Hegedius). Wallace contends that SDAG Hegedius coached the Board as to what evidence to consider and how to rule on the disposition of Dr. Wallace's license.

We disagree because we conclude that the record supports the Board's position that SDAG Hegedius did not tell the Board what decision to make, but simply directed the Board members on what documents they should look at when conducting their deliberations. While there does seem to be some disparity as to exactly what was initially said to the Board by SDAG Hegedius in this regard, SDAG Hegedius did correctly direct the Board to look at all the evidence presented at the hearing when making its decision. Specifically SDAG Hegedius stated to the Board that "you need to discuss your witnesses. You need to address each of the issues, your witnesses, whether they were credible, what evidence was presented, whether it's credible." As such, we conclude that Dr. Wallace has failed to show that SDAG Hegedius's conduct was improper or tainted the Board's deliberations at Dr. Wallace's 2004 disciplinary hearing.

The Board's authority to revoke Dr. Wallace's license

Dr. Wallace argues that the Board exceeded its authority in its imposition of discipline against him. Dr. Wallace contends that the Board acted improperly in effectively suspending his license for seven years because the statute that gives the Board authority to act only allows for suspension of a license for a one-year period.³ We disagree.

³ NRS 641.240(1)(c) states that "[i]f the Board, a panel of its members or a hearing officer appointed by the Board finds a person guilty

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“[W]aiver is the intentional relinquishment of a known right. A waiver may be implied from conduct which evidences an intention to waive a right, or by conduct which is inconsistent with any other intention than to waive the right.” Mahban v. MGM Grand Hotels, 100 Nev. 593, 596, 691 P.2d 421, 423 (1984) (citations omitted). Further, a person cannot sit on his perceived rights by not exercising them at the time and come back years later and claim that he was denied his rights. See Hutchinson v. Kenney, 27 F.2d 254, 256 (4th Cir. 1928);

We conclude that Dr. Wallace waived his right to complain about the actions taken against him by the Board as he waited seven years to assert his rights. Specifically, Dr. Wallace sat by and made no complaint to the Board or any other entity concerning the continuing suspension of his license for seven years and only complains now because the Board decided to revoke his license for noncompliance. Additionally, Dr. Wallace was the party that requested the Board change the language in the Original Order that suspended his license for only a one-year period, to a suspension until the terms and conditions laid out by the Board were completed. Since the evidence presented at the disciplinary hearing in December 2004 showed that Dr. Wallace did not comply with all the terms placed on him by the Board, Dr. Wallace has failed to show that his due process rights were violated. As such, we conclude that Dr. Wallace has waived his right to complain about the Board’s actions, and we affirm the order of the district court on this issue.

... continued

in a disciplinary proceeding, it may: . . . (c) [s]uspend the license for a period of not more than 1 year.”

Dr. Wallace's petition for judicial review


Dr. Wallace argues that the district court erred in dismissing his petition for judicial review as untimely. The Board contends that, since Dr. Wallace cites no authority for his argument, he cannot prevail on his argument. We agree with the Board.

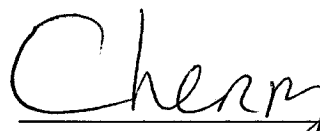
Under NRAP 28(a)(8)(A), the argument contained in an appellant's brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." If an appellant fails to provide this court with sufficient citations to authority to support its contentions, that argument cannot prevail. See Smith v. Timm, 96 Nev. 197, 201-02, 606 P.2d 530, 532 (1980) (stating that the court was unable to find error because the appellant had failed to provide adequate legal authority).

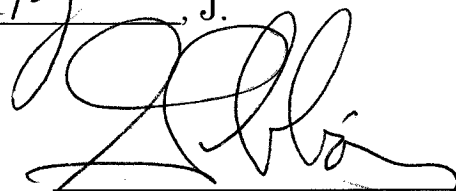
We conclude that Dr. Wallace's argument must fail because he has provided this court with no legal authority to support his position. The three sentences Dr. Wallace provides in this section of argument contain nothing more than generalized conclusions. As such, we conclude that we must affirm the order of the district court on this issue.

In light of the foregoing discussion, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Cherry


_____, J.
Gibbons

cc: Hon. Leon Aberasturi, District Judge
Carolyn Worrell, Settlement Judge
Mirch Law Office
Attorney General/Carson City
Lyon County Clerk