

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Frank Orlando Gray, :
Petitioner :
 :
v. :
 :
Bureau of Professional And :
Occupational Affairs, :
State Board of Medicine, : No. 1691 C.D. 2014
Respondent : Submitted: February 13, 2015

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: July 10, 2015

Frank Orlando Gray (Gray) challenges the order of the Bureau of Professional and Occupational Affairs, State Board of Medicine (Board) which denied Gray's request for reconsideration of the Board's order which adopted the hearing examiner's proposed adjudication and order and denied Gray's application for a Behavior Specialist License (License).

On or about September 13, 2012, Gray applied for his License. On the application, he answered "yes" to the question of "[h]ave you ever been convicted, found guilty or entered a plea of nolo contendere, or received probation without verdict or accelerated rehabilitative disposition (ARD) as to any felony or

misdemeanor” Application for a Behavior Specialist License, September 13, 2012, at 2.¹

By letter dated May 31, 2013, the Board informed Gray that it voted to provisionally deny his application for a license because his criminal record check revealed that he was convicted on February 25, 2008, of simple assault, recklessly endangering another person, and terroristic threats. The criminal record check also revealed that on March 21, 1977, Gray was convicted of “Burglary – Housebreaking and Burglary – Breaking and Entering in Winston-Salem, North Carolina.” Letter from Teresa Lazo, Counsel, State Board of Medicine, May 31, 2013, (Letter) at 1-2. The Board determined, “[y]our record of criminal convictions and failure to mention the older convictions in your statement to the Board raises questions regarding whether you have demonstrated the requisite good moral character for licensure. Accordingly, the Board voted to provisionally deny your license.” Letter at 2.

The Board conducted a hearing on September 9, 2013. Gray argued before the Board that Board Counsel, Teresa Lazo, erred when she used “a 40-year old juvenile misdemeanor adjudication to erroneously attack my character by alleging I lack the good moral character required for licensure.” Notes of Testimony, September 9, 2013, (N.T.) at 11. Gray asserted that only convictions that occurred within ten years prior to the application needed to be mentioned on the application or the accompanying explanatory letter. N.T. at 12. Gray further

¹ Because Gray’s Reproduced Record does not contain page numbers and does not contain the hearing transcript, this Court will not cite to the Reproduced Record.

asserted that under the applicable law his application for a license should not have been denied on the basis of a misdemeanor conviction that had no relationship to his job as a behavior specialist. N.T. at 13. Gray argued that his appeal should be granted because he was never convicted of any of the crimes enumerated in the Medical Practice Act of 1985² that disqualify an applicant for a license, the conviction in North Carolina was beyond the ten year time frame, he had successfully completed all academic coursework necessary for a license as well as the required clinical hours, and that he had worked as a behavior specialist for nearly fifteen years. N.T. at 16-18.

Gray attempted to enter into evidence five letters from individuals that attested to Gray's moral character. The Commonwealth's counsel, Joan J. Miller (Attorney Miller), objected to the letters on the basis of hearsay. The hearing examiner sustained the objections. N.T. at 22-27.

On cross-examination, Gray testified regarding the 1977 conviction:

In 1977, I was approximately 17 years of age. Myself [sic] and some playmates, cousins, were actually playing in the field in the woods. There was an old log cabin which appeared to not be occupied or owned. We ventured in a prankish way into the log cabin, playing. . . . It turned out that the log cabin was actually owned by someone that lived miles away, and filed a complaint for a misdemeanor trespassing. And that's essentially what happened.

N.T. at 36.

² Act of December 20, 1985, P.L. 457, *as amended*, 63 P.S. §§422.1-422.51a.

Also, on cross-examination, Gray testified regarding the 2008 convictions:

Those charges were the result of a mutual disagreement between an ex-girlfriend and I [sic] that ---. If that person were here, that person would actually admit that they [sic] felt that it was an accident, an incident that really got out of hand.

It was a situation where that person actually tried to withdraw the charges, but the prosecution would not allow the person to withdraw the charges. If they [sic] were here today, they would tell you that they indicated to the prosecutor that they fabricated the entire story and that those charges should have never ever gone to trial. As a matter of fact, it was a plea entered. The case actually never went to court.

N.T. at 38.

Gray admitted that he pled guilty to assault, terroristic threats, and recklessly endangering another person and was still on probation. N.T. at 38-39.

On November 21, 2013, the hearing examiner issued a Proposed Adjudication and Order and denied Gray's application. The hearing examiner concluded that Gray failed to establish that he was of good moral character. As a result he failed to demonstrate the requisite qualifications or standards for licensure. The hearing examiner determined that there was little value in considering the 1977 conviction in North Carolina because Gray was a juvenile when it occurred and it occurred so long ago. However, with regard to the 2008 convictions, the hearing examiner found that they were of much greater concern because they were more recent and because Gray "minimized his part in them and

presented them inaccurately.” Proposed Adjudication and Order, November 21, 2013, (Proposed Adjudication) at 14.

The hearing examiner reasoned:

One reason his 2006 conviction is of greater concern lies in the fact that Applicant’s [Gray] description of what occurred in the Philadelphia criminal matter is inconsistent with the charges to which Applicant [Gray] pled guilty. He stated that there was a mutual verbal altercation between him and his ex-girlfriend, and that she told an officer she had actually been slapped. . . . The Applicant [Gray] was charged with nine different offenses in that matter and ultimately pled guilty to three: simple assault, a second degree misdemeanor in violation of the Crimes Code at section 2701(a); recklessly endangering another person, a second degree misdemeanor in violation of the Crimes Code at section 2705; and making terroristic threats, a first degree misdemeanor in violation of the Crimes Code at section 2706(a)(1). . . .

By pleading guilty to these three offenses, Applicant [Gray] admitted the elements of the offenses in question.

. . .
. . . .

In stating that the ex-girlfriend asserted that Applicant [Gray] had slapped her, Applicant [Gray] clearly minimized what happened, as evidenced by the very charges to which he pled guilty. By pleading guilty to simple assault, Applicant [Gray] admitted that he attempted to cause or intentionally, knowingly or recklessly caused bodily injury to his ex-girlfriend or attempted by physical menace to put her in fear of imminent serious bodily injury. . . . By pleading guilty to recklessly endangering another person, he admitted that he placed his ex-girlfriend in danger of death or serious bodily injury. . . . By pleading guilty to terroristic threats, Application [sic] [Gray] admitted that he committed a crime of violence with the intent to terrorize his ex-

girlfriend. These are far more serious actions than a slap . . . which makes it difficult to believe that Applicant's [Gray] ex-girlfriend complained merely that he had slapped her. (Citations and footnote omitted.)

Proposed Adjudication at 15-17.

The hearing examiner determined that Gray's statement that his ex-girlfriend later recanted her statement to the police was unsupported hearsay. The hearing examiner did not credit Gray's statements that his record was expunged. The hearing examiner determined that the "offenses to which Applicant [Gray] pled guilty in 2006 are inconsistent with the definition of good moral character because they all involve a reprehensible state of mind." Proposed Adjudication at 19. The hearing examiner determined that Gray failed to establish he had been rehabilitated and now possessed the moral character that entitled him to a license. Proposed Adjudication at 20.

With regard to the letters of character reference, the hearing examiner sustained the hearsay objections of the Commonwealth because the writers of the letters were not present to be cross-examined. Proposed Adjudication at 21.

On November 26, 2013, the Board gave notice of its intent to review the report of the hearing examiner.

By letter dated November 29, 2013, Gray requested that the Board review the Proposed Adjudication. Gray asserted that his convictions in 2008 were not evidence of a lack of good moral character. He argued that the hearing

examiner's use of the 2008 convictions for evidence of a lack of good moral character constituted racism and discrimination against African-Americans.

On June 27, 2014, the Board issued a final memorandum order that adopted the hearing examiner's proposed adjudication and order. The Board agreed with the hearing officer that the letters in support of Gray's character were properly excluded as hearsay. The Board also agreed with the hearing examiner that the 2008 convictions were relevant to the determination of whether Gray possessed the good moral character needed for a license. The Board determined that Gray failed to establish any racial basis for the hearing examiner's decision. The Board determined that the hearing examiner did not abuse her discretion by disregarding proof of Gray's rehabilitation and the passage of time since the convictions.

On or about June 30, 2014, Gray applied for reconsideration. By order dated July 25, 2014, the Board denied the application for reconsideration.

Gray contends that he was denied the license in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, that the Board discriminated against him when it deviated from the "grandfather clause" opportunity to obtain a massage therapist's license when it denied him the License, that the hearing examiner erred or misapplied administrative legal procedures when she orally accepted the Commonwealth's recommendation to issue a probationary behavior specialist license to Gray and then denied the request

for a license, and that the Board discriminated against Gray when it did not admit the written character reference letters.³

Initially, Gray contends that he was denied his license in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Although Gray labels the first section of his argument as “Whether Petitioner, Frank Orlando Gray, was denied the Behavior Specialist License in Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution,” Gray’s Brief at 11, and devotes fourteen pages of his brief to this section, he did not address the alleged denial of due process in that section. However, in a subsequent section of his brief, Gray does argue that his due process rights were violated when the Board did not issue him a license even though he met the “checklist” of qualifications for a license.

While Gray apparently did satisfy many of the requirements for licensure, Section 635.2(g)(2)(i) of the Insurance Company Law of 1921⁴, 40 P.S. §764h(g)(2)(i), specifically requires that an applicant for a behavior specialist license must demonstrate to the satisfaction of the Board that he or she “[i]s of good moral character.” The hearing officer found that Gray was not of good moral character based on his convictions and his description of the events which downplayed the convictions. The Board adopted the proposed conclusions. Gray

³ This Court’s review of the denial of an application for reconsideration is limited to determining whether the Board abused its discretion. Georgia-Pacific Corporation v. Unemployment Compensation Board of Review, 630 A.2d 948 (Pa. Cmwlth. 1993).

⁴ Act of May 17, 1921, P.L. 682, *as amended*. This Section was added by the Act of July 9, 1988, P.L. 885.

appears to argue that he established that he was of good moral character. However, a review of the record indicates that the findings of the hearing examiner as adopted by the Board regarding Gray's moral character were supported by substantial evidence. This Court is unable to discern exactly what type of due process violation allegedly occurred and finds no error was committed by the hearing examiner or the Board.

Gray next contends that the hearing examiner erred when she accepted the Commonwealth's recommendation to issue Gray a probationary behavior specialist license only to recommend the denial of the license in the Proposed Adjudication. A review of the record provides no support for Gray's contention. Attorney Miller asked Gray if he would be willing to accept a probationary license for as long as Gray remained on probation for the 2008 convictions. N.T. at 49. However, in her closing argument, Attorney Miller stated that "the Commonwealth has no recommendation." N.T. at 52. Gray has not accurately represented what took place based on the record before this Court.

Gray next contends that the Board discriminated against him when it deviated from the "grandfather clause" utilized to issue a license as a massage therapist.

Section 5(b) of the Massage Therapy Law (Massage Law),⁵ 63 P.S. §627.5(b), provides a means for existing massage practitioners to obtain a license

⁵ Act of October 9, 2008, P.L. 1438, *as amended*.

if they were in the business of providing massage therapy prior to the passage of the Massage Law so long as they met certain requirements.

However, the Insurance Company Law of 1921 which provides for the licensure of behavior specialists offers no such provision. The Board does not have the authority under the Insurance Company Law of 1921 to issue licenses on such a basis. Gray appears to argue that if a practitioner of one licensed occupation may receive a license under a so-called grandfather clause that all licensed practitioners should have that option. In contrast, the General Assembly determined that the procedure for obtaining a license for a massage therapist was different than that of a behavior specialist as set forth in Insurance Company Law of 1921. The Board lacks the authority to deviate from the statutory mandate of the General Assembly.

Gray next contends that the Board erred when it adopted the hearing examiner's decision to sustain the Commonwealth's objections to the letters in support of Gray's moral character. Gray argues that the letters were admissible and are not hearsay based on Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). While it is true in Schware that Rudolph Schware, a candidate for admission to the New Mexico Bar, submitted letters in support of his candidacy, it does not appear that there were any objections lodged in opposition. Furthermore, the United States Supreme Court did not address the issue.

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the

truth of the matter asserted.” Pa.R.E. 801(c). A “statement” is defined in the Pa.R.E. as “(1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion.” Pa.R.E. 801(a).

Here, Gray attempted to introduce the letters in an attempt to establish that he possessed the requisite moral character for licensure. The letters were introduced to prove he was of good moral character. The authors of the letters were not present at the hearing. As a result, the Commonwealth could not cross-examine them. The Commonwealth objected on the basis of hearsay. The hearing examiner did not commit an error of law when she sustained the objection.

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

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ORDER

AND NOW, this 10th day of July, 2015, the order of the Bureau of Professional and Occupational Affairs, State Board of Medicine in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge