

STATE OF MICHIGAN
COURT OF APPEALS

In re GARY EARL LEITERMAN LPN RN.

DEPARTMENT OF COMMUNITY HEALTH
and BOARD OF NURSING,

UNPUBLISHED
September 13, 2005

Petitioners-Appellees,

v

No. 254033
Department of Consumer and
Industry Services
LC No. 2002-000640

GARY EARL LEITERMAN,

Respondent-Appellant.

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Respondent Gary Earl Leiterman appeals as of right from the final order of the Michigan Board of Nursing Disciplinary Subcommittee (BNDS) placing him on two-years' probation for his violation of MCL 333.16221(c)(iv).¹ We vacate and remand for further proceedings.

I. Facts and Procedural Background

Respondent is a registered nurse. In 1999, he suffered a painful episode of kidney stones and, thereafter, became addicted to prescription pain medication. He began forging prescriptions from his treating physician and was eventually arrested in 2001 while attempting to shoplift prescription pain medication from the pharmacy. After his arrest, respondent informed his employer of his addiction and was referred to a drug treatment program monitored by the Michigan Health Professional Recovery Corporation (MHPRC). In January of 2002, he pled guilty in circuit court to fraudulently obtaining controlled substances in violation of MCL

¹ MCL 333.16221(c)(iv) provides, in relevant part, that the BNDS may sanction a licensee for “[o]btaining, possessing, or attempting to obtain or possess a controlled substance as defined in section 7105 without lawful authority; or selling, prescribing, giving away, or administering drugs for other than lawful diagnostic or therapeutic purposes.”

333.16221(c)(iv). His employer, Borgess Medical Center, forced him to retire from his nursing position. A few months later, he discontinued his treatment with the MHPRC program, as it was not covered by his insurance policy. His withdrawal from this program led to the summary suspension of his nursing license.² However, respondent subsequently successfully completed the court-ordered drug treatment program. Thereafter, the circuit court dismissed respondent's conviction without prejudice on March 28, 2003.

Respondent thereafter sought the reinstatement of his nursing license. A hearing was held before an administrative law judge (ALJ). The ALJ found that the court-ordered treatment program was functionally equivalent to the MHPRC-monitored program and that respondent had overcome his addiction. Rather than fully reinstating his license as recommended by the ALJ, the BNDS placed respondent on probation for two years.

II. Summary Suspension of Nursing License

Respondent first argues that the BNDS abused its discretion by summarily suspending his license after he pleaded guilty to fraudulently obtaining controlled substances. He contends that this decision was arbitrary and capricious, given his involvement in the court-ordered drug treatment program. However, “[a]n issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief.”³ As the BNDS dissolved respondent's summary suspension in August of 2002, we decline to review the challenged error.⁴

III. Final Order

Respondent also challenges the final order of the BNDS. He contends that the BNDS abused its discretion by requiring his treatment to be monitored by the MHPRC as a term of his probation. He also contends that the BNDS abused its discretion in ordering that the reduction of his probationary period would only occur if he returned to work on a full-time basis.⁵ When conducting a direct review of an administrative decision, we must determine whether the agency's action “was authorized by law and if the decision was supported by competent,

² The summary order suspending respondent's license was dissolved, but the BNDS adjourned respondent's case until he completed his court-ordered drug treatment program.

³ *Michigan Nat'l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997).

⁴ *City of Jackson v Thompson-McNully Co*, 239 Mich App 482, 493; 608 NW2d 531 (2000).

⁵ Respondent contends that the BNDS is forcing him to return to work when he had no intention of ending his retirement.

material, and substantial record evidence.”⁶ “Substantial evidence is evidence that reasonable persons would accept as sufficient proof to support a decision.”⁷

In its final order, the BNDS accepted the ALJ’s findings of fact and conclusions of law.⁸ Although the ALJ recommended in his proposal that further treatment or supervision was unnecessary, given respondent’s successful completion of the court-ordered treatment program and evidence of his recovery, the BNDS ordered respondent to enter into a monitoring agreement with the MHPRC. Respondent admitted that he illegally obtained controlled substances with forged prescriptions. MCL 333.16226(1) authorizes a disciplinary subcommittee to impose sanctions, including probation, for violations of MCL 333.16221. However, the BNDS failed to comply with the requirements of 1999 AC, R 338.1630(5), which provides in relevant part that:

A disciplinary subcommittee . . . in its final order, may adopt, modify, or reject, in whole or in part, the opinion or proposal for decision of the administrative law judge. If the disciplinary subcommittee . . . modifies or rejects the opinion or proposal for decision, the reasons for that action *shall* be stated in the final order.⁹

“The term ‘shall’ denotes a mandatory rather than a discretionary course of action.”¹⁰ The BNDS failed to state any reason for rejecting the ALJ’s proposal and did not provide any facts supporting its decision. Therefore, we are unable to review its decision.¹¹ Accordingly, we must vacate the final order of the BNDS. We remand to allow the BNDS an opportunity to articulate the reasons and supporting evidence for its determination, contrary to the proposal of the ALJ, that respondent’s license should only be reinstated if he agrees to continued monitoring by the MHPRC.

⁶ *Motycka v Gen Motors Corp*, 257 Mich App 578, 580-581; 669 NW2d 292 (2003), citing Const 1963, art 6, § 28.

⁷ *Id.* at 581.

⁸ See 1999 AC, R 338.1630(4), which provides in relevant part:

After reviewing the findings of fact and conclusions of law, the disciplinary subcommittee . . . may make revisions. In making revisions, the disciplinary subcommittee . . . shall specifically identify those portions of the findings of fact or conclusions of law, or both, that it is modifying or rejecting and identify evidence from the record that supports its revisions.

⁹ 1999 AC, R 338.1630(5) (emphasis added). See also *Butcher v Dep’t of Natural Resources*, 158 Mich App 704, 707; 405 NW2d 149 (1987) (“An agency’s findings of fact must provide a precise statement of the evidence which supports its ruling and the conclusions of law in order to facilitate appellate review.”).

¹⁰ *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2003).

¹¹ See *Viculin v Dep’t of Civil Service*, 386 Mich 375, 404-405; 192 NW2d 449 (1971).

Although we have determined that the BNDS improperly imposed probation without articulating its reasons for doing so, we note that defendant's contention that he is being forced to return to work is without merit. The final order does not force respondent to return to work; it merely provides an opportunity for respondent to reduce his probationary period if he does so.

Vacated and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly

Court of Appeals, State of Michigan

ORDER

In Re Gary Earl Leiterman, LPN RN

Docket No. 254033

LC No. 2002-000640

Jessica R. Cooper
Presiding Judge

Richard A. Bandstra

Kirsten Frank Kelly
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

As more fully stated in the accompanying opinion, on remand the Board of Nursing Disciplinary Subcommittee (BNDS) shall articulate the reasons for its rejection of the administrative law judge's proposal for decision consistent with 1999 AC R 1630(5).

Proceedings on remand in this matter shall commence and be completed within 28 days of the Clerk's certification of this order. Within seven days after entry of the BNDS's final order, appellant shall file with this Court copies of all orders entered on remand.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

SEP 13 2005

Date

Sandra Schultz Mengel
Chief Clerk