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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-467

No. COA20-584

Filed 7 September 2021

Gaston County, No. 19 CVS 535

ROBERT MCCARTER, JR., LPC, Petitioner-Appellee,

v.

NORTH CAROLINA BOARD OF LICENSED PROFESSIONAL COUNSELORS,
Respondent-Appellant.

Appeal by Respondent from an order entered 28 October 2019 by Judge Daniel A. Kuehnert in Gaston County Superior Court. Heard in the Court of Appeals 26 May 2021.

Davis & Hamrick, L.L.P., by Ann C. Rowe and Jason L. Walters, for Petitioner-Appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Alesia M. Balshakova, for Respondent-Appellant.

INMAN, Judge.

¶ 1

Respondent-Appellant North Carolina Board of Licensed Professional Counselors (the “Board”) appeals from the superior court’s order reversing the Board’s decision to revoke the professional counseling license of Petitioner-Appellee Robert McCarter, Jr. (“Petitioner”). After careful review, we reverse the superior

court's order and remand with instructions reinstate the decision of the Board.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The record below tends to show the following:

¶ 3 For a two-year period beginning in September 2008, Petitioner, a licensed mental health counselor, treated a woman, Ms. S.,¹ for intimacy issues and a distrust of men. Petitioner employed an “eclectic” treatment style consisting of largely neurolinguistic programming and cognitive behavioral therapy (“CBT”).

¶ 4 In 2017, Ms. S. told her employer-provided insurer, Optum, that Petitioner had sexually assaulted her in one of their sessions. The following January, Ms. S. called Petitioner and left a voicemail stating she would be delivering a letter to Petitioner's wife detailing the sexual assault allegations unless he donated \$10,000 to her church in support of its anti-sex-trafficking ministry. Petitioner never responded to the message, and Ms. S. delivered the letter to Petitioner's wife. Ms. S. then filed a complaint with the Board about the alleged assault.

¶ 5 Petitioner denied the sexual assault allegations and submitted to the Board additional documentation about his training and treatment of Ms. S. The Board's licensed private investigator, Randy Yardley, reviewed the materials submitted by the parties and interviewed Ms. S. and Petitioner.

¹ We refer to the complainant by her last initial to protect her privacy.

¶ 6 On 18 October 2018, the Board held a lengthy closed-door hearing on Ms. S.'s charges pursuant to the North Carolina Administrative Procedure Act ("APA"). Ms. S., Mr. Yardley, and Petitioner testified at the hearing.

¶ 7 Ms. S. testified as follows: She began growing leery of Petitioner when he started complementing her on her looks and sitting closer and closer to her during their sessions. In their final session, Petitioner locked Ms. S. in a room with him, propositioned her with sex acts, and groped her as she attempted to leave. Ms. S. left and never saw Petitioner for treatment again. Ms. S. waited to report Petitioner because she was worried about hurting his family and subjecting her own son to bullying at school.

¶ 8 Asked to explain her decision to seek a \$10,000 donation to her church from Petitioner in exchange for not reporting the allegations to the Board, Ms. S. testified that she felt compelled to report the assault due to the rise of the #MeToo movement and "was looking for something good to come out of something evil."

¶ 9 Mr. Yardley testified that Petitioner never prepared a treatment plan for Ms. S. Petitioner's treatment notes seemed atypically unstructured for clinical therapy and more anecdotal than objective.

¶ 10 Mr. Yardley also testified that during an interview with him, Petitioner mentioned a therapy session in which Ms. S. told him she thought he wanted her to fellate him.

¶ 11 Petitioner admitted that he did not conduct a termination interview with Ms. S., nor did he attempt to schedule one. He denied inappropriately touching Ms. S. at any point. He conceded he never completed a treatment or counseling plan. He also admitted that he told Mr. Yardley about Ms. S.'s fellatio comment.

¶ 12 Petitioner testified that he completed several master's degree courses that included instruction on CBT, and that although his education did not make him competent in CBT, his "reading, talking to others, going over different strategies, [and] going to workshops" gave him competency in the technique. Petitioner admitted that his professional resume incorrectly and misleadingly stated he majored in counseling as an undergraduate when he had, in fact, graduated without a designated major.

¶ 13 The Board issued its final decision revoking Petitioner's license on 17 January 2019. The findings in the final decision consist largely of recitations of testimony. The Board also found that "Ms. S.'s testimony regarding [Petitioner]'s conduct [was] credible" and that "[Petitioner]'s denials of Ms. S's complaint and his explanations in his testimony [were] not . . . credible."

¶ 14 The final decision also included conclusions of law that Petitioner had violated various provisions of N.C. Gen. Stat. § 90-340(a) (2019) and the American Counseling Association Code of Ethics (the "ACA Code") by (1) sexually assaulting Ms. S., (2) employing CBT to treat her when he was not competent to do so, and (3) failing to

develop a counseling plan for Ms. S. The Board determined that the first two violations provided independent grounds to revoke Petitioner's license, while the third warranted disciplinary action.

¶ 15 Petitioner timely filed a petition for judicial review. The petition provided the following grounds for review:

8. The Petitioner makes the following exceptions to the Final Decision in that the evidence does not substantially support the findings, inferences, conclusions, or decision of the Agency:

a. That the complainant failed multiple times to identify the correct year of the alleged incident;

b. That there is no independent and timely corroborating witness to the alleged incident in or around the time that the alleged incident occurred;

c. That the complainant stated that she went to see another licensed professional counselor immediately after the alleged incident but the complainant failed to identify the counselor and the Agency failed to identify the counselor or obtain any records;

d. That the complainant attempted to extort the Petitioner almost eight years after the alleged incident;

e. That the complainant only filed her complaint with the Agency after the Petitioner refused to concede to the complainant's extortion attempt;

f. That the Agency failed to recognize the Petitioner's professional training, education and experience in determining his professional competencies;

g. That there were numerous other inconsistencies in the testimony of the complainant and the Agency's witnesses at the hearing.

9. Further, the Petitioner takes exception to the Final Decision in that that findings, inferences, conclusions, or decisions of the Agency were arbitrary, capricious and an abuse of discretion.

¶ 16 The Board moved to dismiss Petitioner's appeal on the ground that it was not sufficiently explicit under the APA's judicial review statute, N.C. Gen. Stat. § 150B-46 (2019), to perfect an appeal to superior court. The parties then briefed the petition for judicial review on the merits. After a telephonic court conference, Petitioner submitted supplemental briefing, arguing for the first time that the Board's decision lacked proper findings of fact and was barred by the doctrines of laches and unclean hands. The Board moved to strike this supplemental brief. Following a hearing, the superior court entered an order denying the Board's motions and reversing the Board's final decision. In its order, the superior court stated it applied the whole record test and concluded (1) there was no substantial evidence to support any findings that Petitioner was unqualified to perform CBT; and (2) the doctrines of laches and unclean hands barred discipline on any ground. The Board timely appealed.

II. ANALYSIS

¶ 17 The Board presents three arguments on appeal: (1) the petition for judicial

review should have been dismissed by the superior court because it failed to satisfy the specificity requirements of N.C. Gen. Stat. § 150B-46; (2) the superior court erred in failing to strike Petitioner's supplemental brief; and (3) the superior court employed an improper standard in reviewing the Board's final decision. We agree that the superior court erred in failing to dismiss the petition for judicial review. We reverse the superior court's order and decline to address the parties' additional arguments, as our other holding is dispositive.

1. Standard of Review

¶ 18 Whether a petition for judicial review from an agency decision complies with the APA's procedural requirements is purely a question of law subject to *de novo* review. *Butler v. Scotland Cty. Bd. of Educ.*, 257 N.C. App. 570, 571, 811 S.E.2d 185, 187 (2018). Judicial review statutes are to be reviewed liberally to preserve the right to review where possible. *James v. Bd. of Educ.*, 15 N.C. App. 531, 533, 190 S.E.2d 224, 226 (1972).

¶ 19 We review a superior court's order resolving a petition for judicial review under the APA "for errors of law." *Shackleford-Moten v. Lenoir Cty. Dep't of Soc. Servs.*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002) (citation omitted). This review involves: "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Hardee v. N.C. Bd. of Chiropractic Exam'rs*, 164 N.C. App. 628, 633, 596 S.E.2d 324, 328 (2004)

(internal quotation marks and citations omitted). If the superior court improperly conducted its review below, it is not always necessary to remand the matter back down to the superior court for rehearing, as this Court may resolve the appeal by applying the proper standards “raised by the petitioner before the superior court and properly assigned as error and argued on appeal to this Court.” *Shackelford-Moten*, 155 N.C. App. at 572, 573 S.E.2d at 770.

2. The Petition Fails to Comply with the APA

¶ 20 The petition in this case did not assert any errors of law. It alleged only that “the evidence does not substantially support the findings, inferences, conclusions, or decision of the Agency” and that “the findings, conclusions, or decisions of the Agency were arbitrary, capricious and an abuse of discretion.” The petition fails to comply with N.C. Gen. Stat. § 150B-46, as it neither challenges specific findings or conclusions as unsupported nor identifies any particular conduct or determination as arbitrary or capricious. *Gray v. Orange Cty. Health Dep’t*, 119 N.C. App. 62, 72, 457 S.E.2d 892, 899 (1995).²

² The lack of specificity in the petition for judicial review is brought into focus when comparing the petition to the briefs filed by Petitioner with both the superior court and this Court. For example, the petition contains a blanket allegation that the Board’s findings, conclusions, and decision were arbitrary and capricious, but his briefs argue that only the findings, conclusions, and decisions concerning the alleged sexual harassment were arbitrary and capricious; he levies no such claim at the Board’s findings, conclusions, and determinations concerning his competency to practice CBT or his failure to complete a counseling plan for Ms. S.

¶ 21 The petition for judicial review did not challenge a single finding of fact or conclusion of law made by the Board. The petition instead questioned Ms. S.'s conflicting testimony, her motive for bringing the complaint against Petitioner, the absence of directly corroborative evidence, and the Board's decision not to credit Petitioner's testimony before concluding that "there were numerous other inconsistencies in the testimony of the complainant and the Agency's witnesses at the hearing." In sum, the petition only took issue with the Board's "unchallenged superiority to act as finders of fact." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 662, 599 S.E.2d 888, 896 (2004) (citations and quotation marks omitted). *See also State ex rel. Util. Comm'n v. Duke Power Co.*, 305 N.C. 1, 21, 287 S.E.2d 786, 798 (1982) ("[I]t is for the administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence if any." (citations omitted)).

¶ 22 Petitioner's failure to identify specific findings or conclusions as unsupported—as well as his failure to identify how the Board acted arbitrarily or capriciously—compels us to hold that the petition falls short of the specificity required by N.C. Gen. Stat. § 150B-46 under our caselaw. *Gray*, 119 N.C. App. at 72, 457 S.E.2d at 899. *See also Vann v. N.C. State Bar*, 79 N.C. App. 173, 174, 339 S.E.2d 97, 98 (1986). Because Petitioner failed to perfect his appeal to invoke the superior court's jurisdiction, we

reverse the superior court's order and remand with instructions to reinstate the Board's decision. *Gray*, 119 N.C. App. at 76, 457 S.E.2d at 902. *See also Dare Cty. v. N.C. Dep't of Ins.*, 207 N.C. App. 600, 610-11, 701 S.E.2d 368, 375-76 (2010) (holding that compliance with the APA's judicial review statutes is necessary to obtain jurisdiction in the superior court).

¶ 23 Petitioner contends he was unable to challenge discrete findings of fact in his petition because the Board's order consisted primarily of recitations of testimony and did not contain proper findings of fact. *See, e.g., Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 806, 323 S.E.2d 368, 369 (1984) ("Recitations of the testimony of each witness do not constitute findings of fact by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented."). But Petitioner did not assert this ground for reversal, modification, or remand in his petition for judicial review.³ *See* N.C.

³ Petitioner's contention on appeal to this Court that the Board's order lacks sufficient findings to support its conclusions of law presents an alleged error of law subject to *de novo* review. *See, e.g., Brooks v. Ansco & Assocs.*, 114 N.C. App. 711, 717, 443 S.E.2d 89, 92 (1994) ("An error of law, as that term is used in N.C. Gen. Stat. § 150B-51(b)(4), exists if a conclusion of law entered by the administrative agency is not supported by the findings of fact entered by the agency or if the conclusion of law does not support the decision of the agency."); *see also N.C. Bd. of Architecture v. Lee*, 264 N.C. 602, 608, 142 S.E.2d 643, 647 (1965) (recognizing that challenges to specific evidence are distinct from "error[s] of law [that] appear[] on the face of the record proper," which include "whether the facts found by the judge are sufficient to support the judgment, and whether the judgment is regular in form"). Petitioner acknowledges that his petition for judicial review did not raise any errors of law subject to the *de novo* standard.

Gen. Stat. § 150B-51(b) and (c) (providing that a reviewing court may remand the contested case for further proceedings after “determin[ing] whether the petitioner is entitled to the *relief sought in the petition*” (emphasis added)).

¶ 24 Unlike his brief on appeal to this Court and his briefs submitted to the superior court, Petitioner’s petition for judicial review failed to identify any conclusions of law reached by the Board that he believed were arbitrary and capricious or unsupported by adequate evidence and proper findings. *See, e.g., Ellis v. N.C. Crime Victims Comp. Comm’n*, 111 N.C. App. 157, 162, 432 S.E.2d 160, 163-64 (1993) (applying the “whole record” test to discern “whether the evidence supports the conclusions of law” and “if there is substantial evidence in the record to support the administrative tribunal’s findings and conclusions”).⁴ Because the APA imposes pleading requirements on a petition for review to confer jurisdiction upon the superior court, Petitioner’s efforts in briefing could not cure this jurisdictional defect. *See Dare Cty.*, 207 N.C. App. at 610, 701 S.E.2d at 375 (“The appeal must conform to the statute granting the right [to judicial review] and regulating the procedure. The statutory requirements are mandatory and not directory. They are conditions precedent to

⁴ Petitioner’s brief to the superior court, unlike his petition for judicial review, identified specific conclusions of law that he believed were unsupported based on the entire record. Petitioner’s supplemental brief to the superior court, which for the first time argued the Board’s findings of fact were improper, identified specific findings he contended were inadequate to support the Board’s determination based on the whole record of evidence.

obtaining a review by the courts and must be observed. Noncompliance therewith requires dismissal.” (cleaned up) (quoting *In re Emp. Sec. Comm’n*, 234 N.C. 651, 653, 68 S.E.2d 311, 312 (1951))).

III. CONCLUSION

¶ 25 For the foregoing reasons, we reverse the superior court’s order and remand with instructions to reinstate the Board’s final decision.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Judge WOOD concurs.

Judge DIETZ concurs in the judgment by separate opinion

Report per Rule 30(e).

DIETZ, Judge, concurring.

¶ 26 I concur in the judgment. Although the better practice is to include reference to specific findings of fact and conclusions of law in a petition for judicial review, I believe the petition in this case raises specific exceptions sufficient to confer jurisdiction on the superior court, particularly with respect to McCarter's failure to demonstrate competence in cognitive behavioral therapy.

¶ 27 But I acknowledge that our case law consistently has taken a strict view of this pleading requirement and described it as a jurisdictional one. In any event, under the narrow standard of review applicable to these administrative appeals, if this Court reached the merits, I would conclude that the agency's findings are supported by substantial evidence and that the agency's resulting decision is not arbitrary or capricious. I thus concur in the majority's judgment to remand with instructions to reinstate the agency's final decision.