

STATE OF MICHIGAN
COURT OF APPEALS

DAVID L. BUDDE,

Petitioner-Appellee / Cross-
Appellant,

V

MICHIGAN DEPARTMENT OF CONSUMER &
INDUSTRY SERVICES,

Respondent-Appellant / Cross-
Appellee.

UNPUBLISHED
September 14, 2001

No. 221251
Wayne Circuit Court
LC No. 99-905867-AA

Before: Saad, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

The Michigan Department of Consumer & Industry Services (“Department”) appeals as of right from the circuit court’s order reversing a licensing action taken by the Board of Examiners of Social Workers (“Board”). David Budde cross-appeals from the circuit court’s order. We reverse the circuit court and reinstate the decision and penalty imposed by the Board.

I. Factual and Procedural Background

In July 1997, the Department filed a formal complaint against Budde, a state certified social worker, alleging several violations of the Occupational Code.¹ The complaint arose from Budde’s relationship with one of his female patients, Marlene Hallstrom. Between 1987 and 1989, Budde served as Hallstrom’s therapist. Hallstrom’s last counseling session with Budde occurred either in August or September 1989.² Hallstrom claimed that she and Budde began a sexual relationship during the last two treatment sessions. Budde denied such conduct. However, on November 10, 1989, less than ninety days after the end of therapy sessions, Hallstrom visited Budde at his home and the two had sexual intercourse. Over six years later, in

¹ MCL 339.101 *et seq.*

² Budde testified that the last counseling session occurred in August 1989. Hallstrom testified that she attended one last counseling session on September 16, 1989. None of Hallstrom’s treatment records were available at the time of the administrative hearing.

May 1996, Hallstrom filed a complaint with the Department.³ That complaint alleged that Budde had engaged in sexual activities with her during therapy sessions and after the end of treatment, in violation of the standards of conduct governing state certified social workers.

The Department investigated Hallstrom's accusations and elected to file a formal complaint against Budde under the Occupational Code. The case was tried before an administrative hearing examiner. Both Budde and the Department presented expert testimony regarding the standards of professional conduct in the field of social work. Much of that testimony concerned the propriety of a social worker's sexual relationship with a current or former patient. After the close of proofs, the hearing examiner issued a lengthy written report. In that report, he found insufficient evidence to support Hallstrom's claim that she and Budde engaged in sexual activities during therapy sessions. However, the report concluded that Budde's sexual relationship with Hallstrom in November 1989, less than ninety days after the end of therapy sessions, constituted gross negligence and professional incompetence. MCL 339.604(e), (g).

The hearing examiner did not recommend a specific sanction for Budde's conduct. However, he did recommend that Budde's certification not be suspended or revoked. The Board of Examiners of Social Workers then reviewed the matter and issued a final order revoking Budde's state certification and imposing a \$5,000 fine. Budde appealed the agency decision to circuit court. The court reversed the Board's decision, based on its determination that Budde's conduct had not caused Hallstrom actual harm. The court also held that sexual contact with a patient, in and of itself, was insufficient to support the revocation of a social worker's license. Both Budde and the Department appeal from the circuit court's decision.

II. Proof of Actual Harm

The Department first contends that the circuit court erred as a matter of law when it reviewed the agency's decision for proof of actual harm to Hallstrom, the complaining witness. When reviewing a lower court's review of agency action, this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). We conclude that the circuit court applied incorrect legal principles when it reversed the Board's decision based on lack of actual harm to the complaining witness.

The hearing examiner concluded that Budde violated two provisions of the Occupational Code, committing "an act of gross negligence in practicing an occupation" and committing "an act which demonstrates incompetence." MCL 339.604(e), (g). The circuit court reversed the Board's decision based on a finding that Hallstrom did not suffer actual harm.⁴ On appeal, the

³ Hallstrom conceived a child as a result of the November encounter. In early 1990, upon discovering the pregnancy, Budde married Hallstrom. In September 1995, Hallstrom filed for divorce. Hallstrom filed her complaint with the Department in the midst of a bitter custody battle over the couple's son.

⁴ Budde argues that the circuit court's decision did not require proof of actual harm. Instead, Budde argues that the circuit court overturned the agency decision for lack of competent, (continued...)

Department argues that actual harm to a patient is irrelevant to whether a social worker has violated MCL 339.604(e) or (g). According to the Department's argument, this case is analogous to a violation of the Motor Vehicle Code. As the argument goes, a driver who runs a stop sign may receive a ticket irrespective of whether he injured another driver or a pedestrian. Running a stop sign is not prohibited because that conduct always results in actual harm to others. Rather, the conduct is prohibited because it creates a risk of harm to others. We believe that the Department's analogy is fitting. The Occupational Code prohibits a social worker from committing acts of gross negligence and incompetence. It does not limit that prohibition to grossly negligent or incompetent acts that result in actual harm to a patient.

We conclude that a certified social worker may violate MCL 339.604(e) and (g) without causing actual harm to a patient. The hearing examiner and the Board considered whether Budde exposed his patient to a risk of psychological harm, in violation of the standard of care commonly known and discussed in the profession. Actual harm to a patient might be a relevant factor in weighing an appropriate penalty for a violation of the Occupational Code. However, actual harm is not required to support a finding that a social worker has violated MCL 339.604(e) and (g). Accordingly, the circuit court erred as a matter of law when it reviewed the agency's decision for proof of actual harm to the complaining witness.

III. Witness Credibility

The Department next contends that the circuit court erroneously weighed Hallstrom's credibility and erroneously overturned the agency's decision on that ground when Hallstrom's testimony did not actually influence the agency's decision. We agree.

We believe it is beyond dispute that the circuit court, sitting as an appellate court reviewing an agency decision, should not have passed on the credibility of a witness who testified before the agency. Further, the circuit court should not have reversed the agency decision based on a witness' apparent lack of credibility.⁵ "It is not a reviewing court's function

(...continued)

material and substantial evidence supporting the conclusion that sexual contact with a patient is per se incompetent or grossly negligent. We conclude that the circuit court did not reverse the Board's decision based on the grounds urged by Budde. Rather, the court held that the record lacked sufficient evidence of actual harm and that sexual contact with a patient, in and of itself, was not a sufficient reason to support the penalty imposed by the Board in this case.

⁵ We reject Budde's reliance on *People v Ridgeway*, 74 Mich App 306, 317 n 7; 253 NW2d 743 (1977), for the proposition that an appellate court may assess the credibility of a witness whose testimony is "palpably suspect." *Ridgeway* is distinguishable from the present case because that decision involved a criminal prosecution, not an administrative agency's licensing action. Further, the *Ridgeway* Court clearly believed that it was physically impossible for the police testimony to be true. *Id.* In the present case, the circuit court was not concerned with the physical possibility of the events described by Hallstrom. Finally, Budde does not explain why Hallstrom's credibility should be deemed "palpably suspect." He merely points to the factual discrepancies between his testimony and Hallstrom's testimony. Employing Budde's logic, his own testimony should also be deemed "palpably suspect" because it differed from Hallstrom's testimony.

to resolve conflicts in the evidence or to pass on the credibility of witnesses.” *Arndt v Dept of Licensing and Regulation*, 147 Mich App 97, 101; 383 NW2d 136 (1985).

Even assuming that Hallstrom was not a credible witness,⁶ the Department argues that the circuit court erred in reversing on that basis because the hearing examiner did not base his decision on Hallstrom’s testimony. Budde counters that argument by highlighting several “significant discrepancies” between his testimony and Hallstrom’s testimony: (1) whether Hallstrom and Budde engaged in sexual activities during treatment sessions, (2) the duration of the proposed no-contact period, (3) the date on which therapy sessions ended, and (4) whether Hallstrom was intoxicated on the night that she and Budde had sex. Budde argues that these discrepancies undercut the validity of the hearing examiner’s decision. Budde also argues that, without Hallstrom’s testimony, the record fails to support a conclusion that Budde acted with incompetence and gross negligence.

Our review of the record reveals that the hearing examiner resolved all of these factual disputes in Budde’s favor. Further, the hearing examiner did not rely on Hallstrom’s testimony, but relied on Budde’s admissions and the expert witness testimony. Budde admitted that he established a six-month no-contact period for Hallstrom, based on the advice of his supervisor. He also admitted having sexual intercourse with Hallstrom before the six-month period expired. The Department’s expert witness testified that a social worker’s sexual relationship with either a current or a former patient violated professional standards. This evidence was sufficient to support the hearing examiner’s conclusion that Budde acted with gross negligence and professional incompetence. Therefore, the circuit court committed error requiring reversal when it overturned the agency’s decision based on the credibility of a witness whose testimony did not influence the agency’s decision in the first place.

IV. MCR 7.105(M)

The Department next contends that the circuit court failed to comply with the requirements of MCR 7.105(M) when it reversed the Board’s decision. The Department argues that the circuit court failed to separately state which factual findings were not supported by competent, material and substantial evidence on the whole record. We disagree.

This Court reviews de novo the interpretation and application of court rules. *Grzesick v Cepela*, 237 Mich App 554, 559; 603 NW2d 809 (1999). MCR 7.105 governs appeals from administrative agency decisions in contested cases. Subsection M of that rule governs the form of the circuit court’s decision:

On completing review the court shall enter a written order. The court may affirm, reverse, remand, or modify the decision of the agency and may grant the petitioner or the respondent further relief as appropriate based on the record, findings, and conclusions. When the court finds that the decision or order of an agency is not supported by competent, material, and substantial evidence on the

⁶ During closing arguments at the administrative hearing, the state conceded that Hallstrom was not very credible, given her motivation for filing the complaint against Budde.

whole record, *the court shall separately state which finding or findings of the agency are so affected.* [Emphasis added.]

In the present case, the hearing examiner's report was very detailed and replete with references to the record, while the circuit court's oral decision was very brief and focused on only one factual issue. However, MCR 7.105(M) does not require the circuit court to issue a written opinion containing voluminous footnotes. The court rule simply requires the circuit court to "separately state which finding or findings of the agency" were unsupported by the requisite evidence. In this case, the circuit court addressed only one factual issue: actual harm to the complaining witness. The court made a factual finding that the complaining witness was not believable and that the record contained insufficient evidence to support a finding of actual harm.⁷ Although the circuit court's decision was legally erroneous, it did not violate MCR 7.105(M) for lack of specificity.

V. Substantial Evidence Test

The Department next contends that the circuit court misapplied the substantial evidence test when it overturned the agency's decision. When reviewing an administrative agency's decision, the circuit court should affirm as long as the hearing examiner's findings are supported by competent, material and substantial evidence, even if the circuit court "might have reached a different result had it been making the initial decision." *Arndt, supra* at 101. On appeal, we review whether the circuit court misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. *Boyd, supra* at 234.

Substantial evidence is that evidence which a reasoning mind would accept as sufficient to support a conclusion. It consists of more than a scintilla of evidence but may be substantially less than a preponderance of the evidence. [*Arndt, supra* at 101.]

We conclude that the circuit court impermissibly substituted its own judgment for that of the agency. The record developed at the administrative hearing contained sufficient evidence to support the hearing examiner's conclusions and the Board's final order.

A. Professional Standards

The Department first argues that the record supports the hearing officer's conclusions regarding Budde's violation of professional standards. Budde counters with an argument that, in 1989, there was no statute, court rule, case law, administrative rule, ethical code, or any other written rule or document prohibiting a sexual relationship between a social worker and a former client. Budde did present evidence that the National Association of Social Workers ("NASW") code of ethics in effect in 1989 did not specifically prohibit a social worker from having a sexual

⁷ As the Department correctly notes, the hearing examiner never made a factual finding that the complaining witness suffered actual harm. In fact, the hearing examiner ruled that the issue of actual harm was irrelevant. The findings of fact contained in his report address the potential risk of harm, not the occurrence of actual harm. The circuit court therefore based its decision on an erroneous premise.

relationship with a former patient.⁸ Budde also presented evidence that the NASW amended its code of ethics after 1989, adding a specific prohibition against a social worker having sexual relationships with former patients. From this evidence, Budde draws the conclusion that 1989 standards of conduct did not prohibit his behavior.

However, Budde's own expert testified that the standard of conduct in the industry had not changed between 1989 and the time of the agency hearing. Lisa Silverman testified that the NASW simply updated the ethics code to make it more specific. She also testified that all of the professional literature existing in 1989 warned against a therapist having a sexual relationship with a client, even a former one. Similarly, the Department's expert testified that there were "volumes" of professional literature stating that such conduct created an ethical problem. Based on this expert testimony, the hearing examiner had ample grounds to conclude that the 1989 standard of conduct prohibited a therapist from having sexual relations with either current or former patients.

Budde also argues that the hearing officer erroneously determined that Hallstrom was one of Budde's "current" patients in November 1989, when the sexual relationship occurred. Budde argues that there is no written definition of when a current patient becomes a former patient. Budde's argument ignores the linchpin of the hearing examiner's decision: the six-month "cooling-off" period. The hearing examiner held:

Before therapy sessions terminated, presumably while in a more scientific frame of mind, Mr. Budde and his supervisor worked out a six-month cooling-off period. The six months was to give the patient enough time to find another romantic interest and forget about him. . . . Mr. Budde's imposition of a cooling-off period implies that a significant facet of the therapeutic relationship continued while the period ran. The decision to abandon the cooling-off period was, therefore, a professional act, affecting a patient who was, in that sense, still in a professional relationship with him. For our purposes, [Hallstrom] was a current patient. . . . Mr. Budde violated professional standards by starting a sexual relationship with a client who was, for practical purposes, still current.

If Budde's professional duties to Hallstrom ended with their last counseling session, then a six-month waiting period to begin a sexual relationship would have been unnecessary. This waiting period was created by Budde after consultation with his supervisor. Budde testified that he conveyed this six-month requirement to Hallstrom during counseling sessions, when she was undoubtedly still a current patient. He admitted that he violated the six-month period and that doing so was a mistake in personal and professional judgment. We conclude that adequate evidence existed in the record to support the hearing examiner's decision that Hallstrom could be considered as one of Budde's "current" patients for the purpose of this case.

⁸ Michigan has never adopted the NASW code of ethics to govern state certified social workers. The NASW is a private, voluntary organization that is not affiliated with the state licensing authority.

Given the above testimony, we conclude that the record supported the hearing officer's decision that Budde was governed by professional duties when he began a sexual relationship with Hallstrom in November 1989.

B. Risk of Harm

The Department next argues that the record supports the hearing officer's conclusions regarding the risk of psychological harm that is created when a therapist begins a sexual relationship with a current or former patient. The record contained extensive expert testimony regarding that issue. Both expert witnesses agreed that the standard of care in the field of social work involved an evaluation of the risk of harm to the patient. Both experts agreed that a patient's sexual relationship with a therapist exposed the patient to a risk of harm. Both experts agreed that the risk of harm would increase if the therapy relationship had been long and involved, such as Hallstrom's therapy relationship with Budde. The hearing examiner's decision that Budde's conduct created a risk of harm to one of his patients was clearly supported by expert testimony.

We conclude that the hearing examiner's decision was adequately supported by the record. The sole issue discussed by the circuit court was actual harm to the complaining witness. The court did not discuss the issues of legal duty, ethical standards in the profession, or the continuing patient relationship. The circuit court committed clear error requiring reversal when it held that the agency's decision was not supported by competent, material and substantial evidence on the whole record.

VI. Statute of Limitations and Laches

On cross-appeal, Budde contends that the formal complaint filed by the Department was barred by the statute of limitations and the equitable doctrine of laches. We disagree.

As an initial matter, we conclude that Budde has waived review of his claim that the Department's formal complaint was barred by the statute of limitations. During the administrative hearing, Budde's attorney repeatedly stated that did not possess a valid statute of limitations argument.⁹ "One who waives his rights . . . may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). Budde may not argue the statute of limitations issue on appeal because he waived the issue in the trial court.

⁹ On the second day of testimony, Budde's attorney stated: "If God forbid we had a statute of limitations, we wouldn't be sitting here." On the third day of testimony, he stated: "If there were a statute of limitation, I don't know whether the general statute of limitation applies to administrative matters, I don't think it does but it's unclear. There surely is no case law that I could find." Finally, during closing arguments, he stated: "God, I wish there was a study [statute] of limitations but I have not been able to find any."

Budde next argues that the equitable doctrine of laches bars the Department's formal complaint.¹⁰ In the case of *In re Contempt of United Stationers Supply Co.*, 239 Mich App 496, 503-504; 608 NW2d 105 (2000), this Court explained the doctrine of laches:

Laches is an affirmative defense that depends principally on the requisite of intervening circumstances that would render inequitable any grant of relief to the dilatory plaintiff. The doctrine is concerned with unreasonable delay, and the defendant must prove a lack of due diligence on the part of the plaintiff that resulted in some prejudice to the defendant. [Citations omitted.]

The doctrine of laches applies where the passage of time combined with a change in condition would make it inequitable to enforce a claim against another party. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 96-97; 572 NW2d 246 (1997). The defendant must prove a lack of due diligence on the part of the plaintiff resulting in some prejudice to the defendant. *Id.* at 97. We review for clear error a trial court's application of the doctrine of laches. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998).

It is undisputed that the Department filed the formal complaint more than seven years after Budde's alleged misconduct. Budde argues that the long passage of time, combined with the resultant change in circumstances, made it inequitable for the Department to proceed against him on these charges. We conclude that Budde has failed to prove a lack of due diligence by the Department in bringing these professional misconduct charges. Although Hallstrom failed to promptly report Budde's professional misconduct, we can find no evidence in the record that the Department was anything but expeditious in its handling of this matter, once it received Hallstrom's complaint. We therefore conclude that any delay caused by Hallstrom is not attributable to the Department.

Budde also argues that he was prejudiced by the delay because: (1) Budde and Hallstrom's memories were adversely affected by the passage of time, (2) treatment records were destroyed, and (3) Lana Kocher became unavailable as a witness. We conclude that Budde has failed to prove that he suffered prejudice.

First, our review of the record reveals that Budde was able to clearly recall and testify concerning the pertinent facts of this case. He recalled the conversation with his supervisor about the "cooling-off" period and insisted that he established a six-month period, rather than the three-month period indicated by Hallstrom. He recalled the events of November 10-11, 1989, and admitted having sexual relations with Hallstrom that night. Budde's alleged memory impairment did not affect the outcome of this case.

Second, we conclude that the destruction of Hallstrom's treatment records did not prejudice Budde's defense. Budde argues that these records might have established a final treatment date in August 1989, rather than September 1989. He also argues that the records might have confirmed Hallstrom's testimony about a three-month "cooling-off" period, instead of his own recollection of a six-month period. Budde argues that if these two facts had been

¹⁰ For the purpose of this case, we will assume, without deciding, that the doctrine of laches can apply against the state in a disciplinary proceeding brought under the Occupational Code.

established, Hallstrom would have been considered a former patient rather than a current patient. We reject Budde's argument. At the administrative hearing, Budde expressed no difficulty in remembering the length of the "cooling-off" period. He insisted below that it was a six-month, not a three-month period. Budde provides no reason why this Court should accept Hallstrom's testimony about a three-month period, while simultaneously rejecting the remainder of her testimony as untrustworthy. The missing records would not have changed the fact that Budde decided to have sexual relations with Hallstrom in November 1989, less than ninety days after the end of treatment. Budde received professional discipline because of that decision.

Finally, Budde has failed to prove prejudice because Lana Kocher was unavailable to testify as a witness at the administrative hearing. Budde does not explain what efforts were made to locate Kocher and there is no indication why she was unavailable to testify. Although Kocher could have testified about Budde's conduct during treatment sessions, Budde was not disciplined for any of the misconduct allegedly occurring during that period. Kocher would not have been able to testify about Budde's conduct on the night of November 10-11, 1989. Therefore, we conclude that her testimony would not have affected the outcome of this case.

Because the delay in prosecuting this licensing action cannot be fairly attributable to the Department and because Budde has failed to demonstrate prejudice, the doctrine of laches does not bar this disciplinary proceeding.

VII. Constitutional Claims

Budde next contends that the prosecution of the Department's formal complaint violated his constitutional rights to marry and procreate. Further, Budde contends that portions of the Occupational Code are unconstitutional due to vagueness. These constitutional claims present questions of law that we review *de novo*. *Cardinal Mooney High School v MHSAA*, 437 Mich 75, 80; 467 NW2d 21 (1991).

First, we reject Budde's argument that this licensing action violated his constitutional rights to marry and procreate. Budde did not intend to marry or procreate with Hallstrom when he committed the charged conduct. Further, Budde was not disciplined because he married Hallstrom or because he had a child with her. He was disciplined because he decided to have sexual relations with a patient less than ninety days after their last counseling session. The record contains ample testimony that a social worker's decision to have sexual relations with either a current or former patient violates standards of professional conduct. We conclude that Budde's constitutional rights were not implicated by this disciplinary action.

Budde next argues that the Occupational Code is void for vagueness. The hearing examiner found that Budde violated two provisions of the Occupational Code, MCL 339.604(e) and (g). Section 604(e) prohibits "an act of gross negligence in practicing an occupation." Section 604(g) prohibits "an act which demonstrates incompetence." The code does not define the term "gross negligence," but it does define "incompetence" to mean "a departure from, or a failure to conform to, minimal standards of acceptable practice for the occupation." MCL 339.104(8).

Budde argues that he had no idea that starting a sexual relationship with a patient less than ninety days after the end of treatment could be construed as a violation of the above code

provisions. However, two expert witnesses testified at the administrative hearing regarding the “minimal standards of acceptable practice for the occupation.” Both experts agreed that the professional literature identified this conduct as an ethical violation. Cloud testified that there were “volumes” of professional literature stating that therapists should never have sexual relations with their patients, either current or former. Silverman also testified that all the professional literature stated that having sex with former patients was not a good idea. The expert testimony supports a finding that Budde violated well-known standards of conduct in the field of social work.

Furthermore, the hearing examiner based his decision on Budde’s failure to observe his own six-month “cooling-off” period. The hearing examiner did not adopt a sweeping standard that a therapist may never have sexual relations with a former patient. He did not reach a broad conclusion that Budde should have known about professional standards but failed to follow them. The hearing examiner held that Budde was incompetent and grossly negligent because he failed to follow *his own treatment plan* for this patient. We conclude that the Occupational Code is not unconstitutionally vague as applied in this case. According to the expert witnesses, the standard of care was well known in the field of social work. Additionally, Budde knew about the six-month period and chose to violate his own professional judgment.

VIII. Abuse of Discretion

Budde next contends that the Board abused its discretion by revoking his social worker’s certification and imposing a \$5,000 fine. Although we would not have imposed these penalties had we handled this case at the administrative level, we cannot find that the agency abused its discretion.

The Occupational Code specifically describes the penalties that may be imposed for a social worker’s code violations. MCL 339.602 provides:

A person, school or institution which violates a section of this act or a rule or order promulgated or issued under this act shall be assessed 1 or more of the following penalties:

- (a) Placement of a limitation on a license or certificate of registration for an occupation regulated under articles 8 to 25.
- (b) Suspension of a license or certificate of registration.
- (c) Denial of a license, certificate of registration, or renewal of a license or certificate of registration.
- (d) Revocation of a license or certificate of registration.
- (e) A civil fine to be paid to the department, not to exceed \$10,000.00.
- (f) Censure.
- (g) Probation.

(h) A requirement that restitution be made.

The hearing examiner did not recommend a specific sanction for Budde's conduct. Yet, he did recommend that Budde's certificate not be suspended or revoked, based on the passage of time since the events in question and the remote likelihood that Budde would repeat the conduct at issue here. However, the hearing examiner's recommendation was just that, a recommendation. *Arndt, supra* at 104. The Legislature vested the Board of Examiners of Social Workers with complete authority over the penalty to be imposed for a social worker's violation of the Occupational Code. *Id.*; MCL 339.309; MCL 339.514(1). Therefore, the Board was not required to follow the hearing examiner's recommendation.

Although the penalty imposed by the Board was not the maximum penalty authorized by statute, it came close.¹¹ We can envision worse violations of professional standards than the violations committed by Budde, and we would not have imposed these sanctions had we been making the initial decision. However, it is not our role to impose the decision we would have made. We are limited to reviewing the Board's decision for an abuse of discretion, and we cannot find an abuse of discretion based on the facts of this case.

Given our resolution of the above issues, we need not address Budde's argument that the trial court erred in failing to award him costs and expenses incurred in his defense against the Department's formal complaint.

Reversed. The decision and penalty imposed by the Board is reinstated.

/s/ Henry William Saad

/s/ Michael R. Smolenski

¹¹ The Board chose to assess a civil fine of \$5,000, rather than the maximum allowable fine of \$10,000.