

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS DIXON,

Petitioner-Appellee,

v

PUBLIC SCHOOL EMPLOYEES RETIREMENT
BOARD,

Respondent-Appellant.

UNPUBLISHED
November 5, 2013

No. 309001
Ingham Circuit Court
LC No. 11-000751-AA

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Respondent appeals by leave granted from the circuit court's order reversing respondent's decision to deny petitioner's request for disability retirement benefits. We reverse the circuit court and reinstate respondent's decision denying benefits.

Petitioner worked as a high school math teacher with Flint Community Public Schools for twenty-two years. On March 8, 2007, a student pushed petitioner from behind, injuring his back. Petitioner underwent surgery and physical therapy, but asserts that he still suffers from debilitating back pain and post traumatic stress disorder. Petitioner applied for disability retirement benefits on October 1, 2008. Petitioner was physically examined by two doctors and given a psychological examination; all three doctors concluded that petitioner was not permanently disabled. Consequently, respondent's independent medical advisor (IMA) concluded that petitioner was not permanently disabled. Respondent then denied petitioner's request for active duty disability retirement benefits. Petitioner requested an administrative hearing pursuant to Mich Admin Code, R 38.1386 and R 38.1387.

At a prehearing conference, petitioner asked the administrative law judge for permission to depose two of his treating physicians. The presiding officer denied the request, citing Mich Admin Code, R 38.1382(1), which requires a petitioner to obtain respondent's written approval before taking depositions. Petitioner then asked respondent for such permission, but withdrew the request before respondent had an opportunity to answer. Petitioner subsequently deposed the two physicians in conjunction with his separate, but contemporaneous, workers' compensation case. Petitioner notified respondent about the depositions, but respondent chose not to attend. Petitioner then requested that respondent submit the deposition transcripts to the IMAs for review. Respondent denied petitioner's request, citing the failure to obtain approval under Rule

38.1382(1). Petitioner made his request to the presiding officer, who likewise denied it, citing Rule 38.1382(1). Petitioner then filed a motion for reconsideration with the presiding officer, again requesting that the depositions be submitted to the IMAs.

Before the presiding officer had the opportunity to rule on the motion for reconsideration, the parties held a full administrative hearing on petitioner's request for disability benefits. There, one of the deposed physicians testified as a witness, but the other was unavailable. Petitioner requested that the presiding officer admit the unavailable doctor's deposition transcript into the administrative record. The presiding officer, having not yet ruled on the motion for reconsideration, took the request under advisement and reserved his ruling on the issue. The presiding officer promised to advise the parties if the deposition was admitted.

The presiding officer issued an order denying petitioner's motion for reconsideration. The presiding officer addressed petitioner's oral motion as follows:

On October 26, 2010, [petitioner] submitted a Motion for Reconsideration of Petitioner's Request to Submit Documents to Medical Advisors and on November 1, 2010 [respondent] submitted a Response in Opposition to Motion for Reconsideration. Because November 2, 2010 was a State holiday, the [presiding officer] did not have an opportunity to consider [petitioner's] Motion for Reconsideration prior to the hearing, which commenced on November 3, 2012 at 9:00 a.m. As such, [petitioner's] Motion was taken under advisement.

The presiding officer issued a proposal for decision denying petitioner's request for disability retirement benefits. Petitioner filed exceptions and again requested that respondent submit his deposition transcripts to the IMAs for review. Respondent again reiterated that petitioner failed to obtain its approval before taking the depositions, and recommended adoption of the proposal for decision. The respondent issued a final decision which adopted the proposal for decision and thus denied petitioner's request for disability benefits.

Petitioner appealed to the circuit court under MCL 24.301, *et seq.*, which reversed the decision on the grounds that the presiding officer failed to rule on petitioner's oral motion at the administrative hearing to admit the deposition transcripts and erred in denying petitioner's earlier request that those transcripts be submitted to the IMAs.

A circuit court's review of an administrative decision is limited to determining whether the decision below "was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Bandeen v Pub Sch Employees Retirement Bd*, 282 Mich App 509, 514; 766 NW2d 10 (2009). Our review of the circuit court's decision inquires into "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." *Mantei v Michigan Pub Sch Employees Retirement Sys*, 256 Mich App 64, 71; 663 NW2d 486 (2003). This standard is indistinguishable from the clear error test, which asks whether there is a definite and firm conviction that the lower court has made a mistake." *Id.* at 72. We review legal conclusions de novo. *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605; 683 NW2d 759 (2004).

First, respondent argues that the presiding officer did not commit a substantial and material error of law by failing to rule on petitioner's oral motion to admit the deposition transcripts into the administrative record, so the circuit court erred in holding otherwise. We agree.

The circuit court did not identify any statute or rule that respondent violated. Under Mich Admin Code, R 38.1377(2), the presiding officer must "issue orders that are necessary for the fair and efficient determination of the issues presented." However, the presiding officer actually addressed petitioner's oral motion in its order, and it is clear from the context of the hearing and the opinion that the presiding officer intended to address the oral motion. We cannot determine that the presiding officer clearly failed to issue a necessary order. Rule 38.1377(2) does not require the presiding officer to explicitly issue specific orders on all motions. We conclude that the circuit court erred in holding that the presiding officer committed a substantial and material error of law. The presiding officer's conclusion that petitioner's failure to obtain approval before taking the depositions would be dispositive of and fatal to both motions in any event. We are satisfied that presiding officer intended to address both of petitioner's motions in its opinion on petitioner's motion for reconsideration.

Next, respondent argues that circuit court erred in concluding that the presiding officer erroneously refused petitioner's request to submit the deposition transcripts to the IMAs. We agree.

We review administrative rules de novo in the same manner as we review issues of statutory interpretation. *City of Romulus v Michigan Dep't of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003). Consequently, if the language used in a rule is clear and unambiguous, we presume the agency that promulgated the rule intended the meaning so plainly expressed, and no further construction is required or permitted. See *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). Where any ambiguity exists, we generally defer to an agency's interpretation of its own rules unless the agency's interpretation is "clearly wrong." *City of Romulus*, 260 Mich App at 65-66.

The circuit court concluded that Mich Admin Code, R 38.1382(1), which disallows discovery in connection with contested case hearings of this sort "except depositions may be taken upon written approval of the board where it is established that it is impractical or impossible to otherwise obtain the evidence," did not apply to the depositions at issue because petitioner took them in conjunction with his workers' compensation case. Parties to administrative proceedings are not entitled to discovery as a matter of constitutional right. *In re Del Rio*, 400 Mich 665, 687 n 7; 256 NW2d 727 (1977). Administrative agencies may "adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings." MCL 24.274(1).

Rule 38.1382(1) unambiguously requires a party to obtain permission before taking a deposition as a prerequisite to that deposition's consideration. Clearly, the rule does not preclude petitioner from taking depositions in connection with other proceedings; at the same time, the rule provides no exception for situations in which a deposition was otherwise properly taken elsewhere. Holding otherwise would allow a party to circumvent the restrictions of Rule 38.1382(1) simply by devising some separate basis for taking depositions. Accordingly,

approval of the Retirement Board is required before any deposition, regardless of how it came into existence, can be made part of the record in a retirement proceeding of this sort.

The circuit court is reversed, and the decision of the Public School Employees' Retirement Board is reinstated. No taxable costs pursuant to MCR 7.219, a question of public policy being involved.

/s/ Joel P. Hoekstra

/s/ Amy Ronayne Krause

/s/ Mark T. Boonstra