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SJC-13732

RUSSELL V. PACEWICZ vs. BOARD OF REGISTRATION OF MASSAGE THERAPY.

January 9, 2026.

Massage. License. Administrative Law, Evidence, Record, Substantial evidence. Evidence, Administrative proceeding.

The petitioner, Russell V. Pacewicz, appeals from a judgment of the county court upholding a final decision and order of the Board of Registration of Massage Therapy (board), which revoked his license to practice as a massage therapist (massage therapist's license) due to gross misconduct in violation of G. L. c. 112, § 61 (1), as well as other statutory and regulatory violations. That misconduct fell into two categories: first, Pacewicz's admitted failure to make certain disclosures on his license renewal applications, and second, a disputed claim that he sexually assaulted a client (complainant). We affirm the revocation of Pacewicz's massage therapist's license.

Facts. We summarize the facts as found by the hearing officer in his tentative decision, which was later adopted without modification as the final decision of the board.

Pacewicz received his massage therapist's license on or about October 31, 2014. At that time, Pacewicz also held a license to practice as a licensed practical nurse (nursing license). In 2016, Pacewicz admitted to misconduct related to narcotics and falsifying witness signatures, and he voluntarily surrendered his nursing license. Pacewicz did not inform the board of that disciplinary action. Thereafter, each time Pacewicz renewed his massage therapist's license, he asserted to

the board that he had reported all discipline taken against any professional license issued to him. Pacewicz admits this misconduct.

The hearing officer also found that, on or about June 25, 2017, while providing massage therapy services to the complainant, Pacewicz "engaged in inappropriate touching and/or sexually suggestive conduct" by touching the complainant's genitalia without his consent. On that day, Pacewicz was employed at Massage Envy in Medford. The complainant arrived there for a massage appointment, the only one he would have at that location. In a massage room, the complainant disrobed to his briefs, and a male massage therapist began to give the complainant a massage. Shortly after starting the massage, the massage therapist intentionally touched the complainant's genitalia over and under his briefs. The complainant told him to stop. The massage therapist did so and asked, "Are we all good?" before leaving the room.

The complainant could not identify the person who assaulted him. The hearing officer found that the assailant was Pacewicz based on two documents stating that he was the person who performed the complainant's massage on the day in question. Those documents were an e-mail message sent to the complainant's counsel in civil litigation (exhibit no. 8) and a document titled "Client Buying History" produced in the same litigation (exhibit no. 12). We discuss these documents in more detail below. Pacewicz disputes both the admissibility of these documents and the sufficiency of the evidence that he was the perpetrator.¹

Procedural background. After the complainant reported to the board that Pacewicz had sexually assaulted him, the board issued an order temporarily suspending Pacewicz's massage therapist's license, a notice of hearing, and an order to show cause, alleging that Pacewicz committed gross misconduct in violation of G. L. c. 112, § 61 (1), and violated other statutes and regulations governing the profession of massage therapy. A hearing officer conducted an adjudicatory hearing, at which the complainant, Pacewicz, and an investigator testified and at which several documents were admitted as exhibits. In particular, exhibit nos. 8 and 12 were admitted over Pacewicz's objection. On April 28, 2023, the hearing officer issued the

¹ Pacewicz does not, however, suggest that revocation of a massage therapist's license is an unduly harsh sanction for sexual misconduct if it is proved.

tentative decision summarized above, finding that Pacewicz had committed the charged misconduct.

Thereafter, Pacewicz filed a request to reopen the record in order to submit additional documents. The hearing officer denied that request on the ground that it did not meet the standard set forth in 801 Code Mass. Regs. § 1.01(7)(k) (2020). The hearing officer determined that none of the documents was "new evidence" within the meaning of that regulation, that is, "newly discovered evidence which by due diligence could not have been discovered at the time of the hearing by the Party seeking to offer it." Id. In addition, the request was not made "prior to a decision being rendered," as the regulation requires. Id.

While that request was pending, Pacewicz filed a statement of objections to the tentative decision. He contended that the tentative decision improperly disregarded evidence favorable to him, namely, evidence showing his good character and the complainant's inability to identify him. He also reiterated his objections to the admission of exhibit nos. 8 and 12. To some extent, his objections relied on the additional documents proffered with his request to reopen the record. In its final decision, the board rejected all of Pacewicz's objections and declined to consider the additional documents. The board adopted the findings and rulings of the tentative decision in their entirety. Accordingly, the board ordered that Pacewicz's license be revoked.

Pacewicz thereafter filed a petition for review in the county court pursuant to G. L. c. 112, § 64. After a hearing, a single justice affirmed the final decision. Pacewicz now appeals.

Discussion. Under G. L. c. 112, § 64, this court, "upon petition of a person whose certificate, registration, license or authority has been suspended, revoked or cancelled, may enter a decree revising or reversing the decision of the board, in accordance with the standards for review provided in" G. L. c. 30A, § 14 (7). "Section 14 (7), in turn, instructs us to set aside or modify the decision only if the substantial rights of a party may have been prejudiced because the agency decision is '(1) in violation of constitutional provisions; (2) in excess of the board's authority; (3) based on an error of law; (4) unsupported by substantial evidence; or (5) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law'" (citation omitted). Welter v. Board of Registration in Med., 490 Mass. 718, 723-724 (2022), cert.

denied, 143 S. Ct. 2561 (2023). Although this is an appeal from the decision of the single justice, we review the board's decision directly. Franchini v. Board of Registration in Podiatry, 490 Mass. 1015, 1017 (2022). As the party challenging the board's decision, Pacewicz "bears 'a heavy burden,' for we 'give due weight to the [board's] expertise, as required by § 14 (7)." Welter, supra at 724, quoting Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 263-264 (2001). Pacewicz has not carried his heavy burden.

Pacewicz maintains that the hearing officer improperly considered exhibit nos. 8 and 12 and that without these exhibits, the board's decision is not supported by substantial evidence. As noted above, these exhibits were essential to the determination that Pacewicz was the one who assaulted the complainant. Pacewicz argues primarily that both exhibits were hearsay not subject to any exception. By statute, however, "agencies need not observe the rules of evidence observed by courts." G. L. c. 30A, § 11 (2). Rather, "[e]vidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." Id. Moreover, in an administrative proceeding, "[s]ubstantial evidence may be based on hearsay alone if that hearsay has 'indicia of reliability'" (citation omitted). Covell v. Department of Social Servs., 439 Mass. 766, 786 (2003).

Under these principles, the hearing officer properly admitted and considered both exhibits. As noted above, these documents came into the complainant's possession in the course of civil litigation. The complainant commenced that action in 2020 against the franchisor of the Massage Envy chain of massage establishments, the local franchisee operating the Medford location, and "Richard Roe," the then-unknown individual who assaulted him. In that litigation, the defense produced the "Client Buying History," that is, exhibit no. 12, which indicated that Pacewicz provided massage therapy services to the complainant on the date in question. There was adequate evidence before the hearing officer that exhibit no. 12 was a genuine record maintained by the franchisor.² In fact, in his own testimony, Pacewicz acknowledged that there was a record

² We need not determine whether the showing before the hearing officer would have rendered exhibit no. 12 admissible as a "business record" in ordinary civil litigation. The hearing officer was not obligated to apply the rules of evidence that apply in court. G. L. c. 30A, § 11 (2).

showing that he provided a massage to the complainant. Exhibit no. 12 is also corroborated by other evidence before the hearing officer. It shows, consistent with the complainant's testimony, that he visited the Medford location on June 25, 2017, for a massage, that this was the only date on which he did so, and that he received a massage from a male massage therapist on that date. It is also corroborated by Pacewicz's own testimony that he was working at the Medford location on that date. We have no trouble concluding that exhibit no. 12 is "the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs," G. L. c. 30A, § 11 (2), and that it bears indicia of reliability. The hearing officer properly admitted it.

Turning to exhibit no. 8, this was an e-mail message from defense counsel in the civil case to the complainant's counsel. In that message, defense counsel provided a waiver of service on behalf of "Richard Roe" and, apparently to facilitate an amendment to the complaint, identified "Richard Roe" as Pacewicz. Plainly, the civil litigation was a serious matter, and defense counsel had a duty to be truthful with opposing counsel. Exhibit no. 8 thus also bore indicia of reliability, and the hearing officer properly admitted it.

Furthermore, exhibit nos. 8 and 12 provided substantial evidence that it was Pacewicz who performed the massage and thus committed the assault on the complainant. "With regard to whether a decision is supported by substantial evidence, our review is limited: 'While we must consider the entire record, and must take into account whatever in the record detracts from the weight of the agency's opinion . . . as long as there is substantial evidence to support the findings of the agency, we will not substitute our view of the facts.'" Duggan v. Board of Registration in Nursing, 456 Mass. 666, 673-674 (2010), quoting Kippenberger v. Board of Registration in Veterinary Med., 448 Mass. 1035, 1036 (2007). "'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1 (6). To be sure, there was countervailing evidence in the record: Pacewicz himself denied any sexual misconduct, noted the absence of any other such complaints against him, and provided character reference letters. However, "it is for the agency, not the reviewing court, to weigh credibility of witnesses and resolve factual disputes involving contradictory testimony." Cobble v. Commissioner of the Dep't of Social Servs., 430 Mass. 385, 393 n.8 (1999).

Finally, we discern no error in the denial of Pacewicz's request to reopen the record. That request was untimely, having been made after the tentative decision was rendered. See 801 Code Mass. Regs. § 1.01(7)(k). Also, as the hearing officer ruled, each piece of evidence that Pacewicz sought to add to the record was either a document that was available to him at the time of the hearing or an affidavit of a person whom Pacewicz could have called to testify. None of it was "newly discovered evidence which by due diligence could not have been discovered at the time of the hearing." Id. We are unpersuaded by Pacewicz's claim that the tentative decision unexpectedly shifted the burden of proof to him, necessitating a late rebuttal. The tentative decision squarely placed the burden on the prosecution to produce reliable evidence and, ultimately, to prove that Pacewicz committed the charged misconduct. Pacewicz had a full and fair opportunity to rebut the prosecution's case at the hearing.

In sum, the board's decision was supported by substantial evidence. The board did not err or abuse its considerable discretion by revoking Pacewicz's massage therapist's license.³

Judgment affirmed.

The case was submitted on briefs.

Robert P. Powers & Thomas C. Donovan for the petitioner.

John R. Hitt, Assistant Attorney General, for the respondent.

³ In view of our decision, we need not consider Pacewicz's further argument that, standing alone, his admitted failure to disclose the surrender of his nursing license would not warrant revocation.