

16-0146

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Domestic Violence Counseling Center

Petitioner,

v.

Civil Action No. 14-AA-40  
Judge Jennifer Bailey

WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES/  
OFFICE OF HEALTH FACILITY  
LICENSURE AND CERTIFICATION,

Respondent.

ORDER

This matter is before this Court for judicial review pursuant to West Virginia Code §29A-5-4, the Administrative Procedures Act and the West Virginia Rules of Procedure of Administrative Appeals. The Petitioner, the Domestic Violence Counseling Center appeals the Administrative Final Order dated April 3, 2014, ordering the Center to conform with W.Va. Code St. R. § 64-11-5.5.g. The Court has reviewed the record and the arguments of the parties, and for the reasons set forth below, concludes that the Petitioner's appeal be DENIED, and the Administrative Final Order dated April 3, 2014, is AFFIRMED.

FINDINGS OF FACT

1. On November 16, 2012, the Domestic Violence Counseling Center ("Center") submitted an application to the Office of Health Facility Licensure and Certification ("OHFLAC") to become a licensed behavioral health center.
2. A behavioral health center is a licensed entity that provides behavioral health services as defined by W.Va. Code St. R §64-11-1 *et seq.*

3. Upon receipt of the Center's application to become a behavioral health center, an OHFLAC surveyor, James Cooper, conducted an initial survey of the Center and completed a report on November 16, 2012.

4. A survey of a facility seeking license includes review of policies and procedures, personnel files, and other information provided by the facility to determine whether or not the applicant meets the requirements of a behavioral health license. If there are deficiencies, the applicant receives a statement of deficiencies and a request for a plan to correct the deficiencies.

5. By letter dated November 26, 2012, OHFLAC Behavioral Health Program Manager Dr. Rose Lowther-Berman advised the Center of its deficiencies and requested a plan of correction.

6. The Center and OHFLAC worked for several months to address OHFLAC's concerns, through several Plans of Correction and Directed Plans of Correction.

7. The parties were unable to agree on OHFLAC's position that W.Va. Code St. R §64-11-5.5g requires all counselors and professional personnel to be licensed. The rule in issue provides: "[A]ll professional staff and consultants of the Center shall be in compliance with applicable State professional licensure requirements." W.Va. Code St. R §64-11-5.5g.

8. The Center, seeks to have its director, who is not licensed, to serve as a counselor. The Center, a nonprofit organization, asserts that as a nonprofit, it is exempt from licensure by the West Virginia Board of Examiners in Counseling. *See* W.Va. Code § 30-31-11(a)(4).

9. The Center requested OHFLAC reconsider its position on the licensure; however by letter dated April 24, 2013, Jolynn Marra, Director of OHFLAC, denied the Center's request:

"OHFLAC recognizes that the West Virginia Board of Examiners in Counseling, under its rules and regulations, exempts 'professional counselors or marriage and family therapists, whether as volunteers or for compensation or other personal gain, in any

public or private nonprofit corporation, organization, associations or charities.’ W.Va. Code 30-31-11(a)(4). Although the Board of Examiners in Counseling may exempt non-profit counselors from their regulations, OHFLAC interprets its regulation as requiring licensure for all professional staff at a behavior health center.”

10. At the Hearing, Dr. Lowther-Berman testified regarding the statement of deficiencies as it relates to professional licensure, reporting that a review of the policy and procedure manual provided by the Center revealed no licensed staff was employed.

11. As of November 12, 2012, no licensed staff was employed by the Center and the Center Director was the only staff member providing counseling services at the Center.

12. W.Va. Code St. R §64-11-5.5g requires professional staff to be in compliance with applicable state and professional licensure requirements.

13. Dr. Lowther-Berman made findings that behavioral health centers have numerous mandates that can only be accomplished by licensed personnel including the completion of the intake documentation, development of treatment plans, initial assessments and evaluations.

14. After evaluation and assessments are completed, licensed staff is to determine what treatment is needed. Behavioral health centers are required to write diagnoses in standard language that are based upon accepted professional standards of examination.

15. Treatment plans must address behavior management specific to a consumer’s needs, include specific goals to improve or maintain the mental health and optimal adaptive functioning of the individual, be based on assessments, include measureable objectives related to the goals, and have an expected achievement date and outcomes from discharge. A treatment plan provides for the review of drug dosages and explains the rationale for changes or continuation of psychotropic drug regimens. Treatment plans must be developed and reviewed

by an interdisciplinary team at least every ninety days. All behavior intervention plans must be based upon functional analysis of the behavior.

16. Behavior health centers are required to have discharge planning following the treatment plan, and a written discharge summary. Additionally, behavioral health centers are required to provide a description of services, including outside services, directed primarily toward achievement of expected outcomes, and the frequency the services are provided.

17. Dr. Lowther-Berman made findings that the Petitioner could be employed by the Center as its executive director; however, the Center would need licensed staff to provide counseling and other professional services.

18. Furthermore, the application could not be accepted because the Center did not have a job description that includes an education component for personnel providing counseling/therapy and case management in its staff personnel files. Among the personnel files that did not have an educational component in the job description was the position of Executive Director and Mental Health Therapist/Counselor.

### **CONCLUSIONS OF LAW**

19. Hearings before DHHR were held in accordance with the State Administrative Procedures Act (APA). W.Va. Code St. R. § 64-1-1. According to the APA, when the Circuit Court reviews decisions of the administrative agency, “[t]he court may affirm the order or decision of the agency or remand the case for further proceeding. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or orders are:

- a. In violation of constitutional or statutory provisions; or
- b. In excess of the statutory authority or jurisdiction of the agency; or
- c. Made upon unlawful procedures; or
- d. Affected by other error of law; or
- e. Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- f. Arbitrary or capricious or characterized by abuse and discretion or clearly unwarranted exercise of discretion.” (W.Va. Code 29A-5-4(g)).

20. In Walker v. W.Va. Ethics Comm’n, 201 W.Va. 108, 492 S.E.2d 167 (1997), the West Virginia Supreme Court of Appeals stated that evidentiary findings made at an administrative hearing should not be reversed unless clearly wrong. The Court also stated that a reviewing court must evaluate the records of an agency’s proceedings to determine whether there is evidence on the record as a whole to support the agency’s decision. The evaluation is conducted pursuant to the administrative body’s findings of fact, regardless of whether the Court would have reached the same conclusion on the same set of facts. Furthermore, the task of the Circuit Court is to determine whether the (agency) decision was based on consideration of the relevant factors and whether there was a clear error of judgment. In addition, an appellate court may not reverse a lower tribunal’s conclusion under the clearly erroneous standard if the conclusion is plausible when viewing the evidence in its entirety.

21. A plainly wrong standard of review is a deferential one which presumes the administrative tribunal’s actions are valid as long as the decision is supported by substantial evidence. Conley v. Workers’ Compensation Div., 199 W.Va. 196, 483 S.E.2d 542 (1997), Lambert v. Workers’ Compensation Div., 211 W.Va. 436, 566 S.E.2d 573 (2002). Furthermore, credibility determinations by the Administrative Law Judge are to be accorded deference. Freeman v. Fayette County Bd. of Ed., 215 W.Va. 272, 599 S.E.2d 695 (2004).

22. A behavioral health center is a licensed entity that provides behavioral health services as defined by W.Va. Code St. R §64-11-1 *et seq.*

23. Under the Behavioral Health Centers Licensure rule, “[a]ll professional staff and consultants of the Center shall be in compliance with applicable State professional licensure requirements.” W.Va. Code St. R §64-11-5.5g.

24. Licensed staff is required because under the legislative rules, behavioral health centers have numerous mandates that can only be accomplished by licensed personnel. These mandates include assessing and diagnosing consumers; drafting and revising treatment plans; recommending treatments; working with outside professionals in an interdisciplinary team; planning for after consumer discharge; use of functional analysis of behavior to create behavior intervention plans; and providing an environment that is free from conditions that promote maladaptive behavior.

25. OHFLAC did not err in denying the Center a behavioral health center license because the Center does not employ any licensed counselors or other licensed professionals.

26. DHHR Cabinet Secretary Bowling’s Final Administrative Order dated April 3, 2014, is not in violation of the law, clearly wrong, nor arbitrary and capricious. The ALJ carefully considered witness testimony and evidence and correctly determined that W.Va. Code St. R. § 64-11-5.5g requires counselors and professional personnel to be professionally licensed.

27. The ALJ properly found that although the Board of Examiners in Counseling exempts nonprofit counselors from its regulations, OHFLAC’s behavioral health center regulations require licensure for counselors and all other professional staff.

28. The ALJ properly found that OHFLAC did not err in denying the Center a behavioral health center license because the Center does not employ any licensed counselors or other licensed professionals.

29. Additionally, under W.Va Code St. R. § 64-1-12, “Every final order entered by the hearing examiner or administrative law judge, following a hearing conducted pursuant to these rules, shall be made pursuant to the provisions of W.Va. Code §29A-5-3. Such orders shall be entered within forty-five (45) days following the submission of all documents and materials necessary for the proper disposition of the case, including transcripts and proposed findings of fact and conclusions of law.”

30. The Supreme Court of Appeals of West Virginia has stated that “to trigger application of the ‘plain error’ doctrine, there must be 1) an error; 2) that is plain; 3) that affects substantial rights; and 4) seriously affects the fairness, integrity or public reputation of the judicial proceedings.” Syl. Pt. 4, Voelker v. Fredrick Business Properties Co., 195 W.Va 246, 465 S.E. 2d 246 (1995).

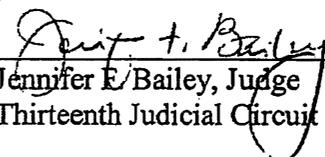
31. The ruling delay did not affect the substantial rights of the Center nor seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Both ALJ Keener and Secretary Bowling agreed that the Center needs licensed professionals in order to be licensed as a behavioral health center. Secretary Bowling’s Final Order denying licensure was a proper interpretation of the law and shall not be reversed solely because the decision was issued untimely.

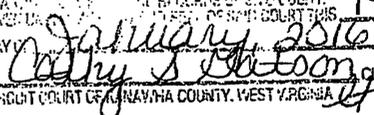
**DECISION**

Accordingly, for the reasons set for in this Order, the Court **AFFIRMS** the decision of the ALJ and finds that although the Board of Examiners in Counseling exempts nonprofit counselors from its regulations, OHFLAC's behavioral health center regulations require licensure for counselors and all other professional staff. Furthermore, Secretary Bowling's Final Order denying licensure was a proper interpretation of the law and shall not be reversed solely because the decision was issued untimely.

The Court **ORDERS** that this administrative appeal is hereby **DISMISSED** and **STRICKEN** from the active docket of this Court. The Clerk is **DIRECTED** to mail a certified copy of this Order to all counsel of record herein.

ENTERED this 14<sup>th</sup> day of January 2016.

  
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Jennifer E. Bailey, Judge  
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA  
COUNTY OF MARYSHAW  
I, CATHY S. BAILEY, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE AND CORRECT COPY OF SAID COURT  
ORDER AS ENTERED IN THE RECORDS OF SAID COURT THIS 19  
DAY OF January, 2016.  
  
CATHY S. DALTON, CLERK  
CIRCUIT COURT OF MARYSHAW COUNTY, WEST VIRGINIA