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OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 16-0146

DOMESTIC VIOLENCE SURVIVORS' SUPPORT GROUP, INC., d/b/a DOMESTIC VIOLENCE COUNSELING CENTER,

Petitioner Below, Petitioner,

v.

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

Respondent Below, Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITES ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

I. DVCC applied to OHFLAC to be certified as a behavioral health center. 2

II. OHFLAC conducted a pre-licensure survey and found that DVCC had no professionally licensed counselors. 2

III. OHFLAC interprets its legislative rules as requiring that all behavioral health center counselors be professionally licensed. 2

IV. OHFLAC denied DVCC's application to be licensed as a behavioral health center because DVCC has no professionally licensed counselors 3

V. DVCC administratively challenged OHFLAC's decision to deny DVCC's application for licensure as a behavioral health center 4

SUMMARY OF ARGUMENT 5

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 6

STANDARD OF REVIEW 6

ARGUMENT 7

I. The Circuit Court properly deferred to OHFLAC's interpretation of the Licensure Rule, which requires that all professional staff at a behavioral health center be licensed. 7

II. Petitioner's procedural due process rights were not violated in this case 11

CONCLUSION 13

TABLE OF AUTHORITES

Cases

Allen v. State Human Rights Comm'n,
174 W. Va. 139, 324 S.E.2d 99 (1984) 12

Cookman Realty Group, Inc. v. Taylor,
211 W. Va. 407, 415, 566 S.E.2d 294, 302 (2002) (Starcher, J., concurring) 8

Martin v. Occupational Safety & Health Review Comm'n,
499 U.S.144, 151 (1991) 8

Miller v. Moredock,
229 W. Va. 66, 726 S.E.2d 34 (2011) 11

State ex rel. Bowen v. Flowers,
155 W. Va. 389, 184 S.E.2d 611 (1971) 12

Wheeling-Pittsburgh Steel Corp. v. Rowing,
205 W. Va. 286, 517 S.E.2d 763 (1999) 7

Statutes

W. Va. Code § 27-17-3 2
W. Va. Code § 27-9-1 2
W. Va. Code § 29A-5-1, *et seq.* 6
W. Va. Code § 30-31-11(a)(4) 7

Rule

Rev. R.A.P. 21 6

Regulations

W. Va. Code St. R. § 64-11-5.5.g 3, 7
W. Va. Code St. R. § 64-11-7.1 9
W. Va. Code St. R. § 64-11-7.2 8
W. Va. Code St. R. § 64-11-7.3 9
W. Va. Code St. R. § 64-11-7.3.e.3 9
W. Va. Code St. R. § 64-11-7.6 10
W. Va. Code St. R. § 64-11-1 *et seq.* 1

INTRODUCTION

This administrative appeal centers on the application by the Domestic Violence Counseling Center ("DVCC") to become a licensed behavioral health center and provide counseling and therapy services to domestic violence victims without having any licensed counselors on its staff.[1] Respondent Office of Health Facility Licensure and Certification ("OHFLAC")—the agency responsible for certifying behavioral health centers in West Virginia—interprets its legislative rules as requiring professional staff and counselors at behavioral health centers to be professionally licensed.[2] DVCC concedes that its professional staff is not licensed, so OHFLAC denied DVCC's application. DVCC disagrees with OHFLAC's interpretation of its rules, however, arguing that its staff need not be licensed because counselors at nonprofit organizations are exempted from licensure requirements by the Board of Examiners of Counseling under Chapter 30 of the West Virginia Code.

After hearing OHFLAC's reasons for its interpretation of its regulations, both an administrative law judge and the Circuit Court of Kanawha County affirmed OHFLAC's interpretation of its regulation. DVCC now appeals to this Court for relief. As explained below, however, OHFLAC's interpretation of its own licensing regulation is reasonable and entitled to deference, and the Circuit Court's decision must be affirmed.

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[1] A behavioral health center is a licensed entity that provides behavioral health services, as defined by state regulation. *See* W. Va. Code St. R. § 64-11-1 *et seq*. OHFLAC is the agency charged with regulating licensed behavioral health centers.

[2] OHFLAC is a division within the Office of the Inspector General, which falls under the umbrella of the Department of Health and Human Resources (the "Department").

STATEMENT OF THE CASE

I. DVCC applied to OHFLAC to be licensed as a behavioral health center.

Petitioner DVCC is a 501(c)(3) nonprofit corporation established "to provide long-term, intensive, outpatient mental health counseling for victims of domestic violence related to trauma, regardless of the ability to pay for the services." (App. 197.) In 2012, DVCC sought "to offer intensive outpatient behavioral health counseling services" to domestic violence victims. (*Id.*) Accordingly on March 13, 2012, DVCC applied to OHFLAC to become a licensed behavioral health center.[3]

II. OHFLAC conducted a pre-licensure survey and found that DVCC had no professionally licensed counselors.

In November 2012, an OHFLAC behavioral health surveyor visited the facility to determine whether OHFLAC could license DVCC as a behavioral health center. (App. 74-75). OHFLAC identified several deficiencies during this visit, a list of which were sent to DVCC on November 26, 2012. (App. 1-9.) DVCC and OHFLAC then worked to address those deficiencies through Plans of Correction and Directed Plans of Correction. (App. 51, 75-76.) DVCC and OHFLAC were able to resolve each deficiency save one: DVCC had no licensed counselors. (App. 66-67.)

III. OHFLAC interprets its legislative rules as requiring that all behavioral health center counselors be professionally licensed.

The regulations pertaining to the licensure of behavioral health centers requires that "all professional staff and consultants of the Center shall be in compliance with applicable State

[3] Licensure from OHFLAC is mandated by state law, which states that no "hospital, center or institution . . . designed to contribute to the care and treatment of the mentally ill . . . or prevention of such disorders, may be established, maintained or operated . . . unless a license therefor is first obtained from the Secretary of the Department of Health and Human Resources." W. Va. Code § 27-9-1; *see also* W. Va. Code § 27-17-3 (regulating group residential facilities).

professional licensure requirements." W. Va. Code St. R. § 64-11-5.5.g (the "Licensure Rule"). OHFLAC interprets the Licensure Rule to require that all professional staff and consultants of a behavioral health center must be licensed in West Virginia. As such, OHFLAC determined that DVCC does not satisfy the Licensure Rule because DVCC admittedly has no staff professionally licensed to provide counseling and therapy services in West Virginia.

DVCC disagreed with this interpretation. It insisted that because it is a nonprofit organization, its non-licensed director can oversee and provide counseling and therapy services at DVCC. (App. 66-67.)[4] DVCC's argument was based on reading the Licensure Rule in conjunction with a statutory provision within the requirements for professional licensed counselors. That statutory provision states that "[t]he official duties of persons serving as professional counselors or marriage and family therapists, whether as volunteers or for compensation or other personal gain, in any public or private nonprofit corporations, organizations, associations or charities" are exempt from the statute's licensure requirements. W. Va. Code § 30-31-11(a)(4). In other words, DVCC argued that because it was a nonprofit organization, its counselors could provide counseling and therapy services under this Code provision without having any professional licensure, and it thus complies with the Licensure Rule.

IV. OHFLAC denied DVCC's application to be licensed as a behavioral health center because DVCC has no professionally licensed counselors.

On April 24, 2013, OHFLAC rejected DVCC's interpretation and affirmed its position that professional staff be licensed as professional counselors or therapists before DVCC could be licensed as a behavioral health center. (A.R. 69; A.R. 77). Notwithstanding the licensure

[4] The director's educational background includes a master of science degree in community health education from West Virginia University. (App. 160.)

exemption offered by § 30-31-11(a)(4), OHFLAC explained that it "interprets its regulation as requiring licensure for all professional staff at a behavior health center." (App. 69.)

V. DVCC administratively challenged OHFLAC's decision to deny DVCC's application for licensure as a behavioral health center.

DVCC challenged OHFLAC's interpretation of the Licensure Rule and requested an administrative hearing. The hearing was held August 28, 2013, before an administrative law judge ("ALJ"). During this hearing, OHFLAC presented the testimony of Rose Lowther-Berman, Ph.D., who was then the program manager for the Behavioral Health Program at OHFLAC. (App. 74.) Dr. Lowther-Berman testified that OHFLAC's regulations required that an organization seeking to be designated as a behavioral health center by OHFLAC must show that its professional staff members are professionally licensed. She explained the grave importance of this requirement, stating the complex procedures and treatments administered at behavioral health centers require high levels of training, and professional licensure is the only way to guarantee that counselors and therapists have that training. (App. 79-83.) On December 16, 2013, the ALJ agreed with OHFLAC's position that the behavioral health center regulations require all counselors and professional personnel to be professionally licensed. (App. 537). The Cabinet Secretary for the Department of Health and Human Resources adopted the ALJ's recommendation on April 3, 2014. (App. 557).[5] On May 7, 2014, DVCC appealed the Secretary's decision to the Circuit Court of Kanawha County, West Virginia. (App. 559.)

On January 14, 2016—over a year and a half after DVCC filed its appeal—the Circuit Court affirmed the Cabinet Secretary's decision to deny behavioral health licensure to DVCC.

[5] Paragraph 4 of the April 3, 2014, Final Order erroneously states "Failure to comply with this order within thirty (30) days of receipt of this Order may result in the revocation of licensure to operate the Center." This is in error as DVCC was applying for initial licensure and therefore did not have a license to revoke.

(App. 674). The court reasoned that OHFLAC's interpretation of the Licensure Rule is reasonable, explaining that "[l]icensed staff is required because under the legislative rules, behavioral health centers have numerous mandates that can only be accomplished by licensed personnel." (App. 679.) Accordingly, "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." (*Id.*) As such, the court concluded, "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." (App. 680.)

DVCC now appeals that decision.

SUMMARY OF ARGUMENT

Although DVCC advances three assignments of error, the first two are duplicative, and the third can be easily disposed of. In its first and second assignments of error, DVCC essentially argues that OHFLAC's interpretation of the Licensing Rule is unreasonable. DVCC contends that because it is a nonprofit, and the statute pertaining to counseling licensure exempts counselors and therapists who work for nonprofit organizations, it is therefore entitled to operate as a licensed behavioral health center without having any licensed counselors or therapists on staff. But DVCC's argument fails because it ignores the deference that is owed to OHFLAC's reasonable interpretation of its own regulation. OHFLAC interprets the Licensure Rule as requiring that all professional staff at *any* behavioral health center must be licensed, and it presented ample evidence of mandates and requirements of counselors in behavioral health centers that justify this interpretation. OHFLAC maintains that it is irrelevant that the counseling licensure statute exempts certain individuals from the licensure requirement for counseling and

therapy at nonprofits. One may be able to provide counseling and therapy at a nonprofit organization without a license from the Board of Examiners of Counseling. But if that nonprofit organization lacks licensed professional staff, then it cannot be licensed as a behavioral health center by OHFLAC. In other words, it may be able to offer counseling services, but it cannot be licensed as a behavioral health center.

Second, DVCC's procedural due process rights were not violated during the administrative procedures in this case. Basically, DVCC argues that the Department took too long to render its decision in this case; that the Department took four months when it should have taken no more than 45 days. While the Department's decision may have taken longer than is expected, DVCC fails to explain how this short delay violated its constitutional rights, particularly since the Circuit Court's ruling on DVCC's appeal was not issued for more than a year and half after the appeal was filed. Merely taking longer than 45 days to issue an administrative ruling did not itself violate DVCC's procedural due process, and this claim too must fail.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case raises no substantial questions of law, and Petitioner fails to identify any prejudicial error. Consequently, oral argument is not necessary, and a memorandum decision affirming the ruling below is appropriate. *See* Rev. R.A.P. 21.

STANDARD OF REVIEW

The administrative hearing regarding DVCC's behavioral health licensure was held in accordance with the Administrative Procedures Act ("APA"), W. Va. Code § 29A-5-1, *et seq.* Under the APA, "appellate review of a circuit court's affirmance of agency action is *de novo,* with any factual findings made by the lower court in connection with alleged procedural defects

being reviewed under a clearly erroneous standard." Syl. Pt. 1, *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 517 S.E.2d 763 (1999).

ARGUMENT

I. The Circuit Court properly deferred to OHFLAC's interpretation of the Licensure Rule, which requires that all professional staff at a behavioral health center be licensed.

This appeal is centered on OHFLAC's interpretation of the Licensure Rule. As shown by this litigation, that Rule is ambiguous. The Licensing Rule states, as a prerequisite for behavioral health center licensure, "All professional staff and consultants of the Center shall be in compliance with applicable State professional licensure requirements." W. Va. Code St. R. § 64-11-5.5.g. On the one hand, DVCC maintains that the Rule requires OHFLAC to examine the licensing requirements of any professional staff implicated, and if any licensing exemption exists, DVCC contends, then OHFLAC is obligated to apply that exemption.[6] DVCC argues that it is not required to have any licensed professional staff because it is a nonprofit, and the Board of Examiners in Counseling—one of the many licensing boards that regulates these "professional staff and consultants"—has exempted from its licensure requirements "counselors . . . in any public or private nonprofit corporation." W. Va. Code § 30-31-11(a)(4). On the other hand, OHFLAC insists that the Licensure Rule requires all professional staff and counselors of a behavioral health center to be licensed regardless of any particular exemption found within a Chapter 30 statute.

[6] The parties do not dispute the regulatory requirement that DVCC must satisfy the Licensure Rule to be licensed as a behavioral health center. Rather, they only dispute whether DVCC has satisfied it. Also, DVCC does not argue that the Licensure Rule itself exceeds, or is inconsistent with, OHFLAC's statutory authority; rather, DVCC simply argues that OHFLAC's interpretation of the Licensure Rule is wrong.

Given this ambiguity, the Licensure Rule must be interpreted, and OHFLAC's interpretation of the Rule is entitled to substantial deference. Justice Starcher has explained that an agency's interpretation of its own rule is subject to *Seminole Rock* deference, which says the interpretation should be affirmed "so long as it is 'reasonable,' that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Cookman Realty Group, Inc. v. Taylor*, 211 W. Va. 407, 415, 566 S.E.2d 294, 302 (2002) (Starcher, J., concurring) (internal quotations omitted) (citing *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945)). The reason for this deference is because the agency has subject matter expertise and it wrote the regulation, both of which give the agency special insight into the regulation's meaning and purpose. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S.144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.").

Considering the purpose of the behavioral health center regulations, as well as the other requirements that it imposes on behavioral health centers, OHFLAC's interpretation of the Licensure Rule is reasonable and must be affirmed. At the administrative hearing, OHFLAC explained the complex requirements imposed on behavioral health centers, which focus on consumer care and protection and justify the need for licensed professional staff:

1. Licensed counselors are required at behavioral health centers to conduct initial evaluation and assessments. W. Va. Code St. R. § 64-11-7.2. OHFLAC regulations require behavioral health centers to "have a written treatment plan that considers a consumer's needs and preferences . . . and the methods implemented shall be appropriate to a consumer's

identified needs." (App. 79.) Licensed professionals are needed because "persons that haven't been trained won't be able to link the appropriate methodology with the identified needs. Different needs require a different kind of methodology for treatment." (*Id.*)

2. Licensed staff is required at behavioral health centers to write diagnoses in standard language that are based upon accepted professional standards. W. Va. Code St. R. § 64-11-7.3.e.3. Treatment plans must address behavior management specific to a consumer's needs, and licensed staff is required to make those determinations. (App. 80). This is because treatment plans shall include specific goals to improve or maintain the mental health and optimal adaptive functioning of the individual and shall be based on assessments. (*Id.*)

3. Licensed staff is required at behavioral health centers to provide an adequate description of services. W. Va. Code St. R. § 64-11-7.1. Licensed staff is needed because "measuring . . . what is going on in that individual's life . . . if you assess that incorrectly there can be really negative outcomes." (App. 80.) Furthermore, behavioral health centers' treatment plans for consumers with complex need must be developed and reviewed by an interdisciplinary team. Dr. Lowther-Berman explained,

> [An interdisciplinary team] is a team of persons from different disciplines that have training in different fields; medical, counseling, behavior management, case management sometimes. They all have to come together, and yes, they do all have to have training in that field.

(App. 80.)

4. Licensed staff is required at behavioral health centers to create treatment plans. W. Va. Code St. R. § 64-11-7.3. Treatment plans are required to be signed and dated with progress notes or other documentation regarding services provided and outcomes. (App. 81.) Behavioral health centers are required to have an interdisciplinary team review and access

treatment plans at least every ninety days. (*Id.*) Behavioral health centers must also review and revise treatment plans, and licensed staff is needed to accurately assess the treatment. (*Id.*)

5. Licensed staff is required at behavioral health centers to have discharge planning following the treatment plan and a written discharge summary. W. Va. Code St. R. § 64-11-7.5. Licensed staff must be "trained in how to . . . identify the reasons for the discharge, that the discharge needs to occur, and to assess the status and conditions of the individual. (App. 81-82.)

6. Licensed staff is required at behavioral health centers to have all behavior intervention plans based upon functional analysis of the behavior. W. Va. Code St. R. § 64-11-7.6. Licensed staff is needed to take that information and create solutions to work with the consumer. (App. 82.) Additionally, licensed staff is required because "the center has to provide an environment that doesn't exacerbate the person's behavior[.]" (*Id.*)

Given this evidence and OHFLAC's rationale for its interpretation of the Licensure Rule, both the ALJ and the Circuit Court agreed with OHFLAC's interpretation that professional staff must be licensed at a behavioral health center. In its order affirming the Cabinet Secretary's final decision, the Circuit Court explained that licensed staff is required because under the Licensure Rule, behavioral health centers have numerous mandates that can only be accomplished by licensed personnel. The court rightfully rejected DVCC's position that it is exempt from licensure by holding "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." The court thus recognized the difference between simply offering unlicensed counseling at a nonprofit organization—which is permitted by the Board of Examiners of Counseling—and being licensed as a behavioral health

center. Indeed, if the position of the DVCC were adopted, nonprofit behavioral health centers would be authorized to provide services without qualified and licensed professional staff, to the detriment of the health and safety of the public.

DVCC fails to show that OHFLAC's interpretation of its legislative rule is unreasonable, and the ruling below must therefore be affirmed.

II. Petitioner's procedural due process rights were not violated in this case.

DVCC also argues that the length of time that it took for the ALJ to render its recommended decision, and then the Cabinet Secretary's adoption of that decision, violated its due process rights under the West Virginia Constitution.[7] DVCC's argument is without merit and must be rejected.

This Court has explained that for a party to establish a claim of delay in administrative proceedings, "actual and substantial" prejudice must be shown. *See* Syl. Pt. 5, *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011) (reviewing claim of delay in DMW administrative proceedings). DVCC's due process rights were not violated here, and DVCC shows no such prejudice. The ALJ level hearing was held August 28, 2013, and Proposed Findings of Fact and Conclusions of Law were due October 18, 2013. By Recommended Decision dated December 16, 2013, the ALJ agreed with OHFLAC's position, and on April 3, 2014, the Department's Cabinet Secretary adopted the ALJ's recommendation. And then after DVCC filed its appeal, the Circuit Court took more than a year to render its decision affirming the Cabinet Secretary's decision.

[7] DVCC's due process argument appears to rest on two constitutional due process guarantees: Article III, Section 10 of the West Virginia Constitution provides that "no person shall be deprived of life, liberty or property without due process of law," and Article III, Section 17 states that "justice shall be administered without . . . delay." Pet'r's Br. 12.

While this amount of time may not have been optimal, DVCC identifies no violation of its constitutional rights. DVCC argues that the administrative delay "caused a real and tangible harm," including its inability to obtain a certificate of need from the Health Care Authority. But it was not the delay in the administrative proceedings that caused this purported harm; rather, it was DVCC's failure to satisfy the requirements to be licensed as a behavioral health center by having the appropriate licensed professionals on its staff that have impeded DVCC's efforts.

Notably, DVCC does not cite a single case in its brief in which this Court held that a mere delay of a few months alone in the disposition of an administrative appeal is a *per se* violation of due process. Instead, DVCC cites just two cases to support its argument, and those cases are readily distinguishable from these facts. The first case DVCC cites, *Allen v. State Human Rights Comm'n*, 174 W. Va. 139, 324 S.E.2d 99 (1984), was a mandamus action involving delays of years and ultimate inaction by the West Virginia Human Rights Commission on several employment discrimination complaints. There, this Court determined that the Commission's mechanisms for disposing of complaints were deficient, from the docketing of complaints to the disposition of claims. Thus, this Court held that the extraordinary delay involved warranted mandamus relief. Likewise, *State ex rel. Bowen v. Flowers*, 155 W. Va. 389, 184 S.E.2d 611 (1971), was a mandamus action against the West Virginia Department of Welfare by a pharmacist who was being investigated for irregularities in his dispensing practices. The pharmacist was unable to conduct his business while the investigation was ongoing, and months passed without the Department granting the pharmacist a hearing. Given those facts, this Court found that the denial of the opportunity to be heard deprived the petitioner of his due process rights.

Here, however, there was no due process violation. As the Circuit Court properly determined, the length of the administrative proceedings did not affect the substantial rights of DVCC nor seriously affect the fairness, integrity, or public reputation of the judicial proceedings. DVCC was granted a hearing, and although there may have been some delay by the ALJ in issuing a decision, and then some delay by the Cabinet Secretary in approving that decision, that delay was not so long that it rises to constitutional proportions.

CONCLUSION

The ruling below must be affirmed.

Respectfully submitted,

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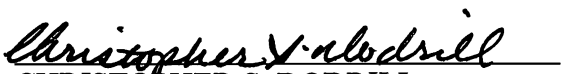

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v.

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

Respondent Below, Respondent,

CERTIFICATE OF SERVICE

I, Christopher S. Dodrill, Counsel for Respondent, do hereby certify that a true and accurate copy of the foregoing *Respondent's Brief* was served on the following individuals by delivery via Regular Mail and Electronic Mail, on this the 30th day of June 2016, addressed as follows:

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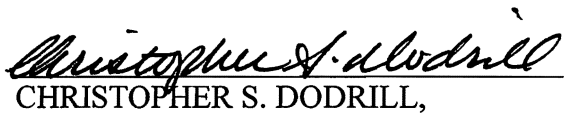

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