NO. 30027

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

LILLIAN P. HOLCOMB, PH.D., Respondent-Appellant/Appellant, v. STATE OF HAWAIʻI, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, BOARD OF PSYCHOLOGY, Petitioner-Appellee/Appellee

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 08-1-423)

SUMMARY DISPOSITION ORDER
(By: Nakamura, C.J., Fujise and Leonard, JJ.)

Respondent-Appellant/Appellant Lillian P. Holcomb, Ph.D. (Holcomb), appeals from the order and judgment, which were entered on July 29, 2009 in the Circuit Court of the Third Circuit (Circuit Court),[1] affirming the suspension of Holcomb's license to practice psychology by Petitioner-Appellee/Appellee State of Hawaiʻi, Department of Commerce and Consumer Affairs, Board of Psychology. Holcomb argues that the Circuit Court violated her due process right to a fundamentally fair hearing because it affirmed: (1) the hearings officer's denial of Holcomb's Motion to Compel Discovery and Produce Respondent's Treatment File; (2) the hearings officer's method of allowing unverified witness testimony; (3) the hearings officer's rejection of Holcomb's expert witness's testimony and the

[1] The Honorable Greg K. Nakamura presided.

crediting of the testimony of the State's expert witness; and (4) the Board of Psychology's adoption of the hearings officer's findings and conclusions.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, as well as the relevant statutory and case law, we resolve Holcomb's points of error as follows:

(1) The Circuit Court did not violate Holcomb's due process right to a fundamentally fair hearing by affirming the hearings officer's denial of Holcomb's Motion to Compel Discovery and Produce Respondent's Treatment File, which sought to obtain the complaining patient's full treatment record.

First, Holcomb relies on authorities that require the hearings officer to receive evidence. See, e.g., Desmond v. Admin. Dir. of the Courts, State of Hawaiʻi, 91 Hawaiʻi 212, 220, 982 P.2d 346, 354 (1998), overruled on other grounds, 90 Hawaiʻi 301, 978 P.2d 739 (1998). But these authorities do not, on their face, stand for the proposition that the hearings officer is obligated to gather evidence on behalf of the respondent.

Second, while the Hawaii Administrative Rules (HAR) give the hearings officer in a psychologist license hearing the power to issue subpoenas and to rule on motions, see HAR § 16-201-17, they do not provide for a right to discovery similar to that available to a litigant in a civil suit. Although represented by counsel throughout the administrative proceedings, Holcomb did not request that the hearings officer issue a subpoena. Instead, Holcomb implicitly suggests that the motion to compel was the functional equivalent to a request for a subpoena but Holcomb provides no reasoning or authorities in support of this suggestion. Accordingly, Holcomb failed to avail herself of the procedures provided by the HAR for obtaining the complaining patient's full treatment record and, thus, waived any

potential right to additional procedural protections related to her quest to obtain those records. See Dragan v. Connecticut Med. Examining Bd., 613 A.2d 739, 746 (Conn. 1992) (holding that a doctor waived his right of cross-examination in a medical licensing hearing because he did not request the board to subpoena the witness or move the board to strike the testimony on direct examination).

Similarly, given that she could have asked the hearings officer or the director to issue a subpoena, Holcomb's argument that the futility exception to the administrative exhaustion requirement applies is unpersuasive. See, e.g., In re Doe Children, 105 Hawai'i 38, 60-61, 93 P.3d 1145, 1167-68 (2004) (rejecting a guardian ad litem's contention that the "futility exception" to the exhaustion-of-administrative-remedies requirement applied where there was an administrative process that could have provided the minor with the sought remedy even though the guardian ad litem did not have standing to seek such relief).

Furthermore, the statements of the hearings officer and the Board of Psychology regarding their respective roles in assessing the constitutionality of their own actions did not suggest that they acted arbitrarily or capriciously but, instead, merely noted that courts determine constitutional questions. See generally HOH Corp. v. Motor Vehicle Indus. Licensing Bd., 69 Haw. 135, 142, 736 P.2d 1271, 1275 (1987).

(2) The Circuit Court did not violate Holcomb's due process right to a fundamentally fair hearing by affirming the hearings officer's method of allowing unverified witness testimony.

Holcomb's sole case citation supporting her argument that the hearings officer's method of allowing unverified witness testimony violated her due process rights is to Greene v. McElroy, 360 U.S. 474, 496-97 (1959). But the Greene decision

did not adopt a categorical rule regarding telephonic testimony or engage in a robust discussion of whether the challenged procedures under the particular circumstances comported with the Constitution. Id. at 508.

Courts have noted that telephonic testimony makes it difficult for the court to ascertain the identity of the witness and to gauge the credibility of the witness because the witness's demeanor cannot be observed by the judge. See, e.g., Ainsworth v. Astrue, Civ. No. 09-cv-286-SM, 2010 WL 2521432, at *4 (D.N.H. Jun. 17, 2010). Nonetheless, courts may permit telephonic testimony in civil proceedings, finding that this practice comports with due process requirements when the witness is sworn in, the adverse party has the opportunity to question the witness, and the witness lives out of state or otherwise is unable to physically attend the hearing. See, e.g., Barrera-Quintero v. Holder, 699 F.3d 1239, 1248 (10th Cir. 2012); In re MH-2008-000867, 236 P.3d 405, 409 (Ariz. 2010); Beltran-Tirado v. I.N.S., 213 F.3d 1179, 1185-86 (9th Cir. 2000); see also In re G Children, 115 Hawai'i 147, 165 P.3d 1048, No. 27866, 2007 WL 1147071, at *7-8 (App. Apr. 16, 2007) (mem.) (rejecting mother's assertion that her due process rights were violated when a family court, amongst other issues, permitted a social worker to testify by telephone at the trial). These three elements are present in this case.

Moreover, Holcomb's suggested procedural protection -- requiring the witnesses to sign in before a notary to verify their identities -- was unlikely to have a significant benefit in that there is nothing in the record that suggests there was any true question as to the identity of the complaining patient. The complaining patient also stated that he was alone when he provided his telephonic testimony, which reduces the likelihood that the procedure introduced a possibility of an erroneous deprivation due to collusion or intimidation amongst the State's

witnesses. Furthermore, the hearings officer stated that his findings and conclusions were primarily based on Holcomb's own statements and actions. Accordingly, the hearings officer's admission of the telephonic testimony did not create a substantial risk of an erroneous deprivation of Holcomb's property interest in her professional license. See In re G Children, 2007 WL 1147071, at *7-8; Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawai'i 217, 241, 953 P.2d 1315, 1339 (1998) ("Thus, if the Director's consultation of evidence outside the record did not affect the Temple's substantial rights, his decision must be affirmed despite the technical HAPA violation.").

(3) Holcomb failed to establish that, as a matter of law, the hearing officer erred by rejecting Holcomb's expert witness's testimony and crediting of the testimony of the State's expert witness. Holcomb's argument primarily reduces to an invitation for an appellate court to re-weigh the evidence presented to the hearings officer. This is not proper, especially when an appellate court is reviewing the findings of an expert agency dealing with a specialized field. See In re Application of Hawaiian Electric Co., Inc., 81 Hawai'i 459, 465, 918 P.2d 561, 567 (1996).

Additionally, Holcomb's assertion that the Board of Psychology erred by not conducting an inquiry into Holcomb's practice lacks any citations to the record or authority and is not obviously true given that the administrative hearing is an inquiry into the nature of Holcomb's practice.

(4) Finally, Holcomb does not present any new contentions, reasoning, or authorities to support her argument that the Circuit Court violated her due process right to a fundamentally fair hearing by affirming the Board of Psychology's adoption of the hearings officer's findings. Thus, given the

reasoning above, Holcomb's fourth point of error fails to present any reversible error.

Therefore,

IT IS HEREBY ORDERED that the Circuit Court of the Third Circuit's July 29, 2009 order and judgment affirming the suspension of Holcomb's license to practice psychology is affirmed.

DATED: Honolulu, Hawai'i, June 13, 2013.

On the briefs:

Steven D. Strauss,
for Respondent-
Appellant/Appellant.

Patrick K. Kelly,
Regulated Industries
Complaints Office,
Department of Commerce and
Consumer Affairs,
for Petitioner-
Appellee/Appellee.

Chief Judge

Associate Judge

Associate Judge