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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MARK IBSEN, M.D., Petitioner, v. MONTANA STATE BOARD OF MEDICAL EXAMINERS, Respondent.	Cause No. DDV-2016-283 **ORDER ON PETITION FOR JUDICAL REVIEW**

Petitioner Mark Ibsen, M.D. (Ibsen), represented by John C. Doubek, petitions for judicial review of the Final Order of the Respondent Montana State Board of Medical Examiners (Board) indefinitely suspending his medical license until the conditions of the Final Order are met to the satisfaction of the Board or its designee. The Board is represented by Graden Hahn.

The parties have briefed the matter and the Court has conducted oral argument. The matter is ready for decision.

FACTUAL AND PROCEDURAL BACKGROUND

The Board's Final Order on review before this Court followed two and one-half years of administrative proceedings concerning Ibsen.[1] These proceedings began when a former employee filed a complaint against Ibsen with the Board alleging Ibsen had overprescribed narcotics for a number of patients. Based on this complaint, the Board decided to initiate an investigation. The focus of the investigation before the Board initially concerned whether Ibsen's record keeping was inadequate. Ibsen would not concede on this point, with the result that the matter went to a hearing. The hearing lasted four days.

On July 9, 2013, the Board's screening panel issued its notice of proposed board action and opportunity for hearing regarding Ibsen's medical license. Ibsen requested a contested case hearing on the Board's proposed action.

On October 21-22, 2014 and December 3-4, 2014, the hearing officer, appointed by the Board, heard the contested case. Ibsen and the Department of Labor and Industry (Department)[2] appeared and presented evidence and testimony at the hearing.

On July 12, 2015, the hearing officer entered a proposed order. On September 21, 2015, the Board's adjudication panel (Panel) issued its scheduling order allowing Ibsen and the Department the opportunity to file exceptions to the hearing officer's proposed order pursuant to the Montana Administrative Procedure Act (MAPA). Ibsen and the Department both submitted briefs on

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[1] Ibsen notes that § 2-4-623(1)(a), MCA, generally requires the Board to issue its decision within 90 days after a contested case hearing is considered submitted for a final decision. In this case, the contested administrative hearing occurred on October 21 and 22, 2014 and December 3 and 4, 2014. The hearing officer entered his proposed order on June 12, 2015, over six months later, and the Board did not enter its final order until March 22, 2016, nine months after the hearing officer issued his decision and 15 months after the contested administrative hearing.

[2] The Department is the administrative agency in which the Board is located. Title 37, Chapter 3, MCA.

exceptions and requested oral argument before the Panel. On November 19, 2015, the Panel heard oral arguments on the parties' exceptions to the proposed order.

After reviewing the record and considering the parties' briefs and arguments, the Panel moved to reject the hearing officer's proposed order, concluding certain findings of fact proposed by the hearing officer were not based on substantial competent evidence and certain proposed conclusions of law drawn from those findings of fact were incorrect. The Panel then moved to table the case to allow the parties to file proposed final orders addressing the issues raised by the Panel's oral argument, before it addressed modifications to the proposed order and issued a final decision. The Panel requested the parties to provide arguments why the Panel should accept, reject, or modify each of the hearing officer's findings of fact and conclusions of law, and to cite evidence supporting the parties' arguments for rejections or modifications.

Both parties filed proposed orders. The hearing officer's proposed order contained 186 findings of fact and 10 conclusions of law. Ibsen proposed rejecting finding of fact 160 and conclusion of law 8. The Department, on the other hand, proposed modifying or rejecting 80 of the hearing officer's 186 findings of fact and rejecting conclusions of law 5 and 7.

On January 14, 2016, the Panel reviewed and made its determination regarding the hearing officer's proposed order. The Panel accepted and incorporated into the Board's final order the findings of fact and conclusions of law to which neither party objected. The Panel then addressed, in turn, the balance of the proposed findings of fact and conclusions of law considering the parties' arguments and the Panel members' own review of the administrative record. After its hearing, the Panel directed the Board's counsel to reduce its decisions to writing

for the Panel's final review and approval. On March 22, 2016, the Board convened to make its final edits, and then issued its Final Order.[3]

The Department published the Final Order, and Ibsen's license was suspended and he was reported to the National Practitioner Data Bank. Ibsen filed a petition for judicial review and application of temporary restraining order and temporary injunction. At the same time, Ibsen filed his brief in support of his petition and application for temporary restraining order.

On March 24, 2016, this Court issued a temporary restraining order and temporary injunction. The Board complied that day. The Board later filed its Response to Ibsen's petition and moved the Court to dissolve the restraining order.

The parties completed briefing and the Court conducted oral argument. The petition is ready for decision.[4]

Having reviewed the record and considering the briefs of the parties, the Court concludes that the Board's decision should be vacated and this matter remanded for further proceedings. The Court's conclusion is based on the following procedural deficiencies.[5]

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[3] Ibsen argues that the Board failed to afford him an opportunity to file exceptions and arguments against the Board's final decision before it was issued, noting that § 2-4-621(1), MCA, requires that "the decision, if adverse to a party to the proceeding other than the agency itself, may not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision."

[4] In the interests of full disclosure, the Court advises that it has received several letters in this matter from third persons. The Court has not read or considered these letters as they are not a part of the administrative record under review.

[5] To be clear, the Court's conclusion that the Board's decision is based on the following procedural deficiencies, which in the Court's mind, deprived Ibsen of a fair and impartial administrative hearing and review. The Court has noted in its footnotes, however, other procedural deficiencies which also unfairly affected the process utilized by the Board. These deficiencies should likewise be addressed in further proceedings before the Board.

STANDARD OF REVIEW

The practice of medicine is a privilege granted by legislative authority and is regulated for the health, happiness, safety and welfare of the people. Section 37-3-101, MCA. The Board is the regulatory agency charged with the authority and duty to issue final decisions whether a physician has engaged in unprofessional conduct warranting discipline affecting his Montana medical license. Sections 2-3-102(1), and 37-3-203(1)(b), MCA.

When evaluating a hearing officer's proposed findings of fact, conclusions of law, and recommended order, an administrative review panel may reject or modify the conclusions of law only after a review of the complete record, and may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence. Section 2-4-621(3), MCA.

> An agency's reversal of a hearing examiner's findings cannot survive judicial review unless the court determines as a matter of law that the hearing examiner's findings are not supported by substantial evidence. Substantial evidence is more than a mere scintilla of evidence, but may be less than a preponderance. Our standard is not whether there is evidence to support findings different from those made by the trier of fact, but whether substantial credible evidence supports the trier's findings.

Schmidt v. Cook, 2005 MT 53, ¶ 31, 326 Mont. 202, 108 P. 3d 511 (citations omitted).

The Board may accept or reduce the recommended penalty in a proposal, but may not increase it without a review of the complete record. Section 2-4-621(3), MCA. The Board may utilize its members' collective experience, technical

competence, and specialized knowledge when evaluating the evidence in the case. Section 2-4-612(7), MCA.

Upon petition to this Court, the standard for review is set by MAPA:

> The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
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> (a) the administrative findings, inferences, conclusions, or decisions are:
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> (i) in violation of constitutional or statutory provisions;
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> (ii) in excess of the statutory authority of the agency;
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> (iii) made upon unlawful procedure;
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> (iv) affected by other error of law;
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> (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
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> (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
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> (b) findings of fact, upon issues essential to the decision, were not made although requested.

Section 2-4-704(2)(a)-(b), MCA.

A district court reviews an agency's administrative decision to determine if the findings of fact are clearly erroneous and whether the law is correctly interpreted. *Ostergren v. Dep't of Revenue*, 2004 MT 30, ¶ 11, 319 Mont. 405, 85

P.3d 738. In reviewing the Board's findings of fact, the standard for judicial review for the District Court is whether the findings are clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. *State Pers. Div. v. Dep't of Pub. Health & Human Servs., Child Support Div.*, 2002 MT 46, ¶ 18, 308 Mont. 365, 43 P.3d 305. If a finding is not supported by substantial evidence, if the Board misapprehended the effect of evidence, or if this Court's review of the record leaves it convinced a mistake has been made, a finding is deemed clearly erroneous. *Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, ¶ 10, 378 Mont. 324, 343 P.3d 1222. Whether substantial evidence supports a finding of fact is a question of law. *Dep't of Pub. Health & Human Servs.*, ¶ 25.

> A reviewing body's standard on review 'is not whether there is evidence to support findings different from those made by the trier of fact, but whether substantial credible evidence supports the trier's findings. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more [than] a mere scintilla of evidence but may be less than a preponderance.'

Blaine County. v. Stricker, 2017 MT 80, ¶ 26, 387 Mont. 202, 394 P.3d 159 (internal citations omitted).

ANALYSIS

A. The Board's Appointment of the Hearing Examiner and Its Subsequent Rejection of the Hearing Examiner's Findings on the Basis that, because the Hearing Examiner Was Not a Doctor, He Was Not Competent to Make those Findings.

MAPA provides a specific set of procedures to guide a contested case through the administrative process. These procedures call for a hearing before a hearing examiner, § 2-4-612, MCA.

The agency, in this case the Board, is the entity responsible for appointing the hearing examiner:

> An agency may appoint hearing examiners for the conduct of hearings in contested cases. A hearing examiner must be assigned with due regard to the expertise required for the particular matter.

Section 2-4-611(1), MCA.

The second sentence of this provision is cause for concern in this matter. If a party to a contested case hearing believes for some reason that a hearing examiner is not competent to preside over the matter, the party may request the assignment of another hearing examiner.

> On the filing by a party, hearing examiner, or agency member in good faith of a timely and sufficient affidavit of personal bias, lack of independence, disqualification by law, or other disqualification of a hearing examiner or agency member, the agency shall determine the matter as a part of the record and decision in the case. The agency may disqualify the hearing examiner or agency member and request another hearing examiner pursuant to subsection (2) or assign another hearing examiner from within the agency. The affidavit must state the facts and the reasons for the belief that the hearing examiner should be disqualified and must be filed not less than 10 days before the original date set for the hearing.

Section 2-4-611(4), MCA.

In this case, the agency appointed a hearing examiner to hear Ibsen's contested case. After the hearing and in its consideration of the hearing examiner's proposed order, the Board wholesale rejected the majority[6] of the hearing examiner's findings of fact and certain of his conclusions of law on the basis that he was not a medical doctor and therefore not competent to make the findings he did:

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[6] The Board rejected findings of fact 40 through 120 of the hearing examiner's proposed order. *See*, Final Order, page 16.

> The Panel rejects H.O. FOF 40 through 120 based on its determination that none of these findings are supported by competent substantial evidence because they are all based on the Hearing Officer's personal interpretation and judgments of Dr. Ibsen's medical charts. Upon review of these findings and the record, the Panel agrees with the Department's argument in favor of rejecting all of these findings because the Hearing Officer is not trained in medicine, he did not rely on competent expert medical testimony to support these findings, and it is not within the Hearing Officer's competence to independently make medical judgments about whether Dr. Ibsen met the medical standard of care as evidenced in the medical records. Jan. 14, 2016 Tr. at 133:2-25, 134:1-14. To the extent these findings contain facts unrelated to the Hearing Officer's improper interpretation of the medical evidence, those facts are incidental and immaterial to the Board's Final Conclusions of Law and Final Order.

Final Order, page 16-17.

Based on this determination, the Board struck in their entirety the next 80 findings made by the hearing examiner. There was no individual consideration of each of these findings. This is contrary to the requirement set forth above that:

> An agency's reversal of a hearing examiner's findings cannot survive judicial review unless the court determines as a matter of law that the hearing examiner's findings are not supported by substantial evidence. Substantial evidence is more than a mere scintilla of evidence, but may be less than a preponderance. Our standard is not whether there is evidence to support findings different from those made by the trier of fact, but whether substantial credible evidence supports the trier's findings.

Schmidt v. Cook, 2005 MT 53, ¶ 31, 326 Mont. 202, 108 P. 3d 511 (citations omitted).

These deficiencies violate of the requirements of MAPA for the agency to appoint a competent hearing examiner and for proper review of the

hearing examiner's findings. It is analogous to the selection of a jury in a civil case and then when the verdict comes in against a party, that party asking for the selection of another jury. Except in this case, it is even more striking because it is the agency who selected the hearing examiner.

The Board had a statutory obligation to select a hearing examiner and to do so "with due regard to the expertise required for the particular matter." The Board had a duty to review each of the hearing examiner's proposed findings to determine whether they were supported by substantial evidence. The Board apparently feels it failed to comply with these requirements because it rejected wholesale several findings made by its hearing examiner on the basis that its selected hearing examiner was not competent to decide the matters before him.

B. Dr. Mary Anne Guggenheim's Comments.

During the Board's consideration of the proposed Order, Dr. Mary Anne Guggenheim, a member of the Board, made several factual statements about the experience of Dr. Charles Anderson, one of one of Dr. Ibsen's expert witnesses. Dr. Guggenheim's comments went to this witness' expertise to testify as he did. Dr. Guggenheim comments that she had known Dr. Anderson for a number of years and that he was not qualified as an expert witness[7] in the pertinent issues in this case. Dr. Guggenheim's statements, however, were not presented on the hearing record in this case and were not subject to cross-examination by Ibsen. Further, Dr. Guggenheim cited to and relied on two letters from Dr. Kneeland. These letters, however, were not admitted into evidence.

The Court concludes that this process also violates due process.

The Court recognizes that the Board may utilize its members' collective experience, technical competence, and specialized knowledge when evaluating the evidence in the case. Section 2-4-612(7), MCA. The Montana

[7] The hearing examiner had recognized Dr. Anderson as an expert witness.

Supreme Court has held the "court should give deference to an agency's evaluation of evidence insofar as the agency utilized its experience, technical competence, and specialized knowledge in making that evaluation." *Knowles v. State ex rel. Lindeen,* 2009 MT 415, ¶ 21, 353 Mont. 507, 222 P.3d 595.

What happened with Dr. Guggenheim's comments, however, was beyond and different from the use of experience, technical competence, and specialized knowledge. Distinguishing between the use of an agency's specialized knowledge as evidence and the evaluation of evidence is illuminated by *Banks v. Schweiker*, 654 F.2d 637, 641 (9th Cir. 1981). In *Banks*, an administrative law judge stated he had some familiarity with the Social Security District Office at issue and that no one in that office would have done what Banks alleged they had done. While the federal appeals court held that the administrative law judge could take judicial notice of facts that he knew, the plaintiff had to be given notice and an opportunity to present contrary evidence if a timely request was made. Because Banks was not afforded the opportunity to rebut this statement which the judge made and relied on, the court reversed and remanded the judgment of the district court. *Banks*, 654 F.2d 637, 642 (9th Cir. 1981). Though posed as an issue of judicial notice, *Banks* gives guidance to the case at hand.

Here we have a Panel member making a comment during deliberation as to the believability and expertise of Ibsen's expert witness. This information was presented to the entire Panel and used during the deliberation to reach its conclusion. Ibsen was not afforded the opportunity to cross-examine Dr. Guggenheim's comments nor was he afforded the opportunity to present evidence to rebut her assertion as required by law. Section 2-4-612(5), MCA; M.R.Evid. 201(e); *Frasceli, Inc. v. Department of Revenue Liquor Div.*, 235 Mont. 152, 157, 766 P.2d 850, 853 (1988).

In *Frasceli,* a hearing officer conducted a hearing about who should receive a new wine and beer license in Great Falls. The hearing officer issued a proposed order. Upon appeal by an unsuccessful applicant, the director of the Department of Revenue reversed the hearing officer's proposed order and awarded the license to the party appealing the hearing officer's proposed order. Upon appeal to the district court, the parties stipulated that the director conducted a personal unannounced visit to both applicants. The party appealing to the district court argued that this independent investigation by the director was improper.

The district court found the conduct to be improper, noting that these visits were made without notice to the parties. The district court found such an independent investigation irrevocably denied the parties the right to prior notice, the right to object to such visits, the opportunity to be present during the visits, the right to respond and present evidence and arguments, and the right to conduct cross-examination required for a full disclosure of the facts. The district court reversed the director's decision because it violated the parties' right to procedural due process, was made upon lawful procedure and was characterized by an abuse of discretion. The district court remanded to the Department of Revenue with instructions to enter a final decision adopting the recommendations of the hearing examiner.

On appeal, the Montana Supreme Court "affirm[ed] the District Court's conclusion that the matter in which the Director conducted his off-the-record visits prejudice substantial rights of the appellant[.] 235 Mont. at 155.

The Supreme Court discussed the flaw with the procedure used by the Director:

> We find that prior notice for a viewing is the general rule. See, 18 A.L.R.2d 552, Section 4 at 562:

Regarding administrative decision or finding based on evidence secured outside of the hearing and without the presence of interested party or counsel:

"'Even though an administrative authority has the statutory power to make independent investigations, it is improper for it to base a decision upon findings or facts so obtained, unless such evidence is introduced at a hearing or otherwise brought to the knowledge of the interested parties prior to decision, with opportunity to explain and rebut.'"

Chi Chi's owner argues that she had no way of knowing that the Director based his reversal and additional findings on facts or data obtained through his viewing. More importantly to the Court, we have no way to be certain that he did not.

We cannot comprehend the extent or the impact of the Director's inspection because there is no record of it. Lack of prior notice coupled with lack of any documentation is fatal to an ordinarily permissible inspection. When this type of conduct occurs under a MAPA proceeding, it violates certain other safeguards built in by statute: the right to respond and present evidence and argument on all relevant issues (Section 2-4-612(1), MCA), and the right to conduct a cross-examination sufficient for the full and true disclosure of facts (Section 2-4-612(5), MCA).

In this case, Dr. Guggenheim made certain factual comments and statements concerning the expertise, experience, and practice of Ibsen's expert witness. Her comments and statements on these points were made outside of the evidentiary record in this case. They were analogous to rebuttal testimony. Ibsen, however, was afforded no opportunity to cross-examine or rebut Dr. Guggenheim's "testimony." As in *Frasceli*, the importing of Dr. Guggenheim's

factual comments into the record, without giving Ibsen the opportunity to respond to them, violates several procedural safeguards built into the MAPA.

For similar reasons, Ibsen also takes special exception to the Board's reliance on a letter written by Dr. Kneeland. The Board relied on and treated this letter as evidence even though it was not part of the evidence submitted to the hearing officer or the Board. Ibsen argues the Board's use of and reliance on this letter is arbitrary, capricious, and clearly erroneous on its face. Ibsen further notes Dr. Kneeland's testimony to the Hearing Officer differed from what was stated in the letter. Therefore, Ibsen asserts, the Board's reliance on the letter, over Dr. Kneeland's own testimony, was error. The Court concludes that the Board's reliance on Dr. Kneeland's letter, as compared to his actual testimony before the hearing officer, suffers from the same flaw as the Board's reliance on Dr. Guggenheim's factual comments and statements.

And as in F*rasceli,* the Court must reverse the decision of the board based on this defective procedure.

SUMMARY AND REMEDY

The Court thus concludes that the two foregoing procedural deficiencies – the rejection of the hearing officer's findings, who was appointed by the Board, because the Board asserted he lacked the expertise necessary to make such findings and the importation of Dr. Guggenheim's comments and Dr. Kneeland's letter into the Board's deliberations – require reversal of the Board's decision. The question then arises as to the appropriate remedy.

In *Frasceli,* the district court remanded the matter to the Department of Revenue with instructions to reinstate the hearing officer's original decision. The Montana Supreme Court reversed this remedy by the district court:

> Chi Chi's argues that, even if the reversal of the Director's order is proper, it was an abuse of discretion

> for the trial judge to order reinstatement of the proposed order. We agree. Ordering the adoption of the hearing examiner's proposal simply is not an alternative authorized by statute.
>
> Thus, we remand to the agency on this issue for a final determination. The agency will have an objective and detached officer review the record, disregarding the Director's viewings. If the officer finds it necessary to supplement the record, the officer may take additional testimony or conduct a proper viewing with prior notice and a full record.

235 Mont. at 156.

The Court concludes this is the proper remedy in this case. The decision of the Board should be reversed. This matter should be remanded to the Board with instructions to appoint an objective, detached and qualified hearing examiner to review the record, disregarding Dr. Guggenheim's comments and Dr. Kneeland's letter. If the officer finds it necessary to supplement the record, the officer may take additional testimony or conduct a proper hearing with prior notice to create a full record.

ACCORDINGLY, IT IS ORDERED that the decision of the Board of Medical Examiners is **REVERSED**. The case is **REMANDED** to the Board of Medical Examiners for further proceedings as set forth herein.

DATED this 24 day of June, 2018.

JAMES P. REYNOLDS
District Court Judge

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