

IN THE COURT OF APPEALS OF IOWA

No. 9-978 / 09-0721
Filed December 30, 2009

JERRY G. SCHAAF, M.D.,
Petitioner-Appellant,

vs.

IOWA BOARD OF MEDICINE,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II,
Judge.

Appeal from the district court ruling that affirmed the disciplinary action of
the Iowa Board of Medicine. **REVERSED AND REMANDED.**

Michael Sellers of Sellers, Haraldson, & Binford, Des Moines, for
appellant.

Thomas J. Miller, Attorney General, and Theresa O'Connell Weeg,
Assistant Attorney General, for appellee.

Considered by Sackett, C.J., Vaitheswaran and Danilson, JJ.

SACKETT, C.J.

Petitioner-appellant, Jerry Schaaf, M.D., appeals from the district court ruling on judicial review that affirmed the disciplinary action of the Iowa Board of Medicine (“board”). He contends no substantial evidence supports the board’s finding of guilt of the allegations contained in the complaint and statement of charges. He also contends the complaint should have been dismissed based on the defense of laches, and he was prejudiced by the delays in reporting, investigating, and prosecuting the case. We reverse and remand.

BACKGROUND. In 1998, a complaint was filed with the Iowa Board of Medicine, alleging Dr. Schaaf sexually abused the complainant in July of 1973 when the complainant was fourteen years old and continued to abuse him during his high school years. Included with the complaint was a 1997 letter written by complainant’s mother, stating that her son went with Dr. Schaaf to Omaha on the July 1973 weekend in question, stayed overnight at the doctor’s apartment there, and seemed upset after his return.

The board’s investigator interviewed some witnesses and determined that nothing inappropriate occurred, yet the investigation remained open. The investigator retired in 2001. In October of 2003 another investigator was assigned the case. She interviewed the complainant’s mother in September of 2004. The mother stated her son acted upset on returning from the weekend in Omaha with Dr. Schaaf but did not report any abuse. The same day that the investigator interviewed Dr. Schaaf’s mother, the investigator also served Dr. Schaaf with his first notice of the complaint that had been filed in 1998. In

January of 2005 complainant's mother signed a letter stating the 1997 letter had been dictated to her by her son and the statements in that letter were not true.

In April of 2006 the board filed formal disciplinary charges against Dr. Schaaf, alleging he engaged in unethical or unprofessional conduct or practice harmful or detrimental to the public. Dr. Schaaf filed a motion to dismiss based on laches. The board ruled the defense of laches was not available in board disciplinary proceedings. In an interlocutory appeal, the district court ruled laches was available and remanded to the board to consider the defense. On remand, in an order denying the motion to dismiss, the board concluded the thirty-four-year period between the alleged misconduct and the statement of charges "must be treated no differently than the shorter time gaps discussed in prior [Iowa] Supreme Court cases." The board further concluded Dr. Schaaf did not prove prejudice.

In November of 2007 the case was heard by a panel of the board. In January of 2008 the panel issued its proposed decision. It contained detailed findings, assessments of credibility, and conclusions. The panel found the State had satisfied its burden of proof. It found the complainant's testimony "more consistent, better supported, and more plausible" than Dr. Schaaf's. It recognized "some inconsistencies," but found the testimony and evidence from the complainant and the State outweighed the credibility and evidence from Dr. Schaaf. The panel concluded that Dr. Schaaf violated the statutes and rules concerning unethical or unprofessional conduct or practice harmful or detrimental to the public. It imposed sanctions that included a \$10,000 civil penalty, a

requirement Dr. Schaaf have a chaperone present when treating minor children, and five years of probation. Dr. Schaaf appealed to the full board.

Following receipt of written briefs and oral arguments, the board issued a final order on appeal in June of 2008. "Upon review of the entire record, and the arguments made by both parties on review, the board voted to adopt the panel's decision in its entirety." The board affirmed the proposed decision. Dr. Schaaf filed a request for rehearing. The State joined his request.

The board granted the requests for rehearing and heard additional evidence in July of 2008. Dr. Schaaf provided a report from a second evaluation he underwent. The State presented evidence concerning Dr. Schaaf's treatment of two patients with whom he also had had sexual relationships. The board concluded the report from Dr. Schaaf's second evaluation did not provide new information and found no reason to change its appeal decision. The board further concluded the new evidence from the State "must be considered to determine whether the sanctions are sufficient to protect the public." It affirmed the prior board decision in all respects except to add a requirement that Dr. Schaaf complete a sexual-boundaries program. Dr. Schaaf sought judicial review.

In his petition for judicial review, Dr. Schaaf alleged he

was deprived of any possibility of a fair hearing or a fair outcome due to the age of the complaint when it was filed and also due to the extended period of time involved in the investigation by the board and its rulings at various stages during the proceedings.

He further alleged his substantial rights were prejudiced by the actions of the board on many of the grounds set forth in Iowa Code section 17A.19(10).

The court considered the record from the board's action and the written and oral arguments of the parties. Considering the laches defense, the court found

that the first element of the laches defense, unreasonable delay, has been proven by clear, convincing, and satisfactory evidence in this case. Complainant waited almost twenty-five years to file a complaint with the board after the alleged incident occurred. This fact alone could constitute an unreasonable delay; however, the fact that the board waited another eight years before filing a formal statement of charges against [Dr.] Schaaf makes the delay even more unreasonable. Nearly thirty-three years elapsed between the July 4, 1973 alleged incident and the filing of charges on April 27, 2006. The court finds this to be an unreasonable delay.

The court then considered each of Dr. Schaaf's arguments concerning prejudice and found he did not prove

by clear, convincing, and satisfactory evidence that he was prejudiced by the unreasonable delay, especially in light of the fact that complainant and [Dr.] Schaaf were the only true witnesses to the alleged incident, and both were available to testify. Therefore, the court determines that [Dr.] Schaaf's laches defense must fail.

The court then considered whether substantial evidence supported the board's decision. The court quoted the board's findings on credibility quoted above and recited the bases for the board's credibility determination. The court concluded:

The board made its factual determination by assessing the credibility of complainant and [Dr.] Schaaf. While evidence certainly exists to undermine complainant's credibility, the question on judicial review is not whether evidence supports a decision that was not made, but whether evidence supports the decision that the board actually made. The board's finding that complainant's testimony was more credible than [Dr.] Schaaf's testimony is supported by substantial evidence in the record. Therefore, the court finds that the board's decision is supported by substantial evidence.

The court affirmed the board's decision. Dr. Schaaf appealed.

SCOPE AND STANDARDS OF REVIEW.

We review agency action for correction of errors at law. We apply the standards set forth in the Administrative Procedure Act, Iowa Code ch. 17A, to determine whether our conclusions are the same as those of the district court. Pursuant to Iowa Code section 17A.19(10), a court must reverse agency action when any one of several enumerated circumstances exists and substantial rights of the person seeking judicial relief have been prejudiced as a result.

Doe v. Iowa Bd. of Med. Exam'rs, 733 N.W.2d 705, 707 (Iowa 2007) (citations and internal quotations omitted). The board's findings are akin to a jury verdict, and we broadly apply them to uphold the board's decision. See *Second Injury Fund v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994). Evidence is substantial if reasonable minds would find it adequate to reach the same findings. *Murillo v. Blackhawk Foundry*, 571 N.W.2d 16, 17 (Iowa 1997). Assessing the weight of the evidence is within the exclusive domain of the board. *Burns v. Bd. of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993). As trier of fact, the board has the duty to determine the credibility of the witnesses. See *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). Courts are not allowed to reassess the weight of the evidence upon review. *Christensen v. Snap-On Tools Corp.*, 602 N.W.2d 199, 201 (Iowa Ct. App. 1999).

MERITS. Laches Defense. Dr. Schaaf contends the board should have dismissed the complaint against him based on laches. Iowa is among "those jurisdictions willing to recognize a laches defense in a professional disciplinary action, but applying it to bar the action only if (1) the delay is unreasonable, and (2) prejudice to the licensee is established." *Miller v. Bd. of Med. Exam'rs*, 609 N.W.2d 478, 485 (Iowa 2000); *Sahu v. Bd. of Med. Exam'rs*, 537 N.W.2d 674, 676 (Iowa 1995). "The party asserting the defense carries the burden of

establishing the essential elements by clear, convincing, and satisfactory evidence.” *Sahu*, 537 N.W.2d at 676 (quoting *Committee on Prof'l Ethics & Conduct v. Wunschel*, 461 N.W.2d 840, 846 (Iowa 1990)). “[T]he mere passage of time is insufficient to bar the proceedings,” but we “allow the defense of laches if the licensee is prejudiced by an unreasonable delay.” *Id.*

We agree with the district court’s determination the delay in this case was unreasonable.¹ Dr. Schaaf argues he was prejudiced by the delay because (1) his own office records from the time of the alleged incident had been destroyed, (2) the records of complainant’s therapist had been destroyed, (3) complainant’s father had died, and (4) complainant’s mother was unavailable to testify due to failing health.

The board’s “order on respondent’s second motion to dismiss” considered each of the claims of prejudice made by Dr. Schaaf and concluded Dr. Schaaf did not demonstrate prejudice. The district court considered each of Dr. Schaaf’s claims of prejudice and rejected each of them.

From our review of the record, however, our conclusions are not the same as the district court’s. The length of the delay is substantially longer than cases cited in support of the district court’s decision. In *Miller*, 609 N.W.2d at 485, the

¹ We do not address the board’s argument the delay was not unreasonable because the board did not cross-appeal from the district court’s ruling. Although the board disagrees, this is not a situation in which the board seeks to uphold the district court’s ruling, but on a different ground than that relied on by the district court. See *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002) (noting “a successful party in the district court may, without appealing, save the judgment in whole or in part based on grounds urged in the district court but not included in that court’s ruling”). Here, the board argues the district court erred in determining the delay was unreasonable. A determination of the reasonableness of the delay was not a ground “not included in that court’s ruling.” See *id.*

court determined that when the investigation and peer review inquiries were factored in, roughly four and one-half years elapsed between the first complaint and the formal filing of charges against Miller. In doing so the court noted that the board conceded that devoting three years to investigating this matter was perhaps longer than the “ideal” but was not unreasonable. *Miller*, 609 N.W.2d at 485. The court further said they were inclined to agree with the board’s concession. *Id.* In *Sahu*, 537 N.W.2d at 675, Sahu was charged in federal court with inaccurate billing under the Medicaid program. There was a delay of seven years after the inaccurate billing before the board acted. The board had delayed filing the complaint during the pendency of the federal criminal charges. The court found the disciplinary proceeding was commenced within a reasonable time after the conclusion of the criminal trial. *Sahu*, 537 N.W.2d at 676.

We agree “the mere passage of time” is not sufficient to bar these proceedings. *See id.* However, the delay of forty-two years here, including about eight years between the time the board got the complaint, made one investigation, made a second investigation, and ultimately filed charges is clearly not ideal and is evidence of prejudice. This coupled with the fact that during the delay records were destroyed and the board admitted the complainant’s mother’s deposition into evidence. Thus Dr. Schaaf did not have the opportunity to cross-examine her in the presence of the decision-makers.² Given the changes in her narrative over time and the seriousness of the charge, we are not as sanguine as the panel of the board was that her deposition testimony “fairly constitute[d] her

² One of the panel members dissented from the decision not to have the record held open for her live testimony.

memory as to what occurred.” Dr. Schaaf has demonstrated he was prejudiced and has established his affirmative defense of laches. We therefore reverse the decision of the district court on judicial review and remand for dismissal of the disciplinary proceedings based on the 1973 incident.

REVERSED AND REMANDED.