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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CAROL ANN DELA TORRE,

Plaintiff and Appellant,

v.

BOARD OF BEHAVIORAL SCIENCES
DEPARTMENT OF CONSUMER AFFAIRS,

Defendant and Respondent.

F063562

(Super. Ct. No. 11CECG00955)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Carlos A. Cabrera, Judge.

W. Scott Quinlan for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Alfredo Terrazas, Assistant Attorney General, Janice K. Lachman and Lorrie M. Yost, Deputy Attorneys General, for Defendant and Respondent.

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Petitioner and appellant Carol Ann Dela Torre (appellant) appeals from a judgment denying her petition for writ of administrative mandate and affirming the decision of the Board of Behavioral Sciences (board) to impose discipline on her clinical social worker's license. Appellant asserts that neither the administrative law judge (ALJ) nor the trial court made the appropriate findings and that the trial court did not issue the required statement of decision. Appellant also argues the evidence presented to the ALJ was insufficient to establish that her conviction for misdemeanor grand theft was substantially related to the qualifications, functions, or duties of a licensed clinical social worker (LCSW) because the crime did not, to a substantial degree, evidence present or potential unfitness to perform the functions authorized by such a license in a manner consistent with the public health, safety, or welfare. She contends that neither the ALJ nor the trial court appropriately analyzed the evidence presented on the issue, including the evidence of her post conviction remorse, competence, and accomplishments. Appellant additionally contends the evidence of rehabilitation did not support the agency's decision to impose discipline, in this case by a stayed revocation of her license. Finally, appellant asserts the disciplinary proceeding was barred by the statute of limitations. On all issues we disagree and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Appellant is an LCSW. She was one of the founders and was the clinical director of Genesis Family Center (Genesis), a non-profit child welfare agency. In 1996, the Genesis board of directors issued a corporate credit card to appellant. Appellant's sister, a cofounder of Genesis and its chief executive officer, told appellant she could use the card for personal purchases although she would have to repay the agency for such charges. Appellant used the credit card from 1996 through 2001, incurring \$48,533 in charges for personal purchases. During that period, appellant did not reimburse the agency for the charges. In 2001, Genesis sought to hire a chief financial officer (CFO). Appellant's sister told appellant the finances would be examined and appellant would

have to repay the charges. Only then did appellant stop using the charge card for personal purchases. By 2003, Genesis's accounts were audited, the personal charges were identified, and the Genesis board of directors made demand upon appellant for repayment. Appellant completed reimbursement to Genesis in January 2004.

In 2005, appellant was indicted on one count of felony grand theft. On June 18, 2008, appellant entered a plea of no contest to count 1 of the amended indictment, misdemeanor grand theft. (See Pen. Code, §§ 17, subd. (b), 484, 487, subd. (a).) On August 5, 2008, pursuant to the plea agreement, appellant was placed on probation for two years, with various conditions imposed.

The board is the licensing body for clinical social workers. (Bus. & Prof., § 4990.18, subd. (a).)¹ It filed an accusation against appellant dated January 15, 2009. The accusation sought suspension or revocation of appellant's license pursuant to sections 4996.11 and 4992.3 and California Code of Regulations, title 16, section 1881.²

¹ All further statutory references are to the Business and Professions Code, unless otherwise indicated.

² Section 4996.11 gives the board jurisdiction to suspend or revoke the license of a person "who is guilty on the grounds set forth in Section 4992.3." In 26 separate subdivisions, section 4992.3 lists various types of "unprofessional conduct" that permit denial, suspension, or revocation of a license. Subdivision (a) states, in part: "The conviction of a crime *substantially related to the qualifications, functions, or duties* of a licensee or registrant under this chapter. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, or duties of a licensee or registrant under this chapter." (Italics added.) (Subd. (d), not charged here, states that unprofessional conduct also includes "[i]ncompetence in the performance of clinical social work.")

California Code of Regulations, title 16, section 1881, subdivision (e), provides that the board may suspend or revoke the license of one who "[c]ommits any dishonest, corrupt, or fraudulent act which is substantially related to the qualifications, functions or duties of a licensee."

The matter was heard by an ALJ on July 26, 2010. At that time, apparently in response to appellant's assertion of the statute of limitations of section 4990.32,³ the attorney for the board moved to strike the Code of Regulations allegation (which focused on conduct) from the accusation, leaving only the statutory allegation (which focused on the criminal conviction). The board presented documentary evidence of appellant's conviction and the factual allegations contained in the indictment. Appellant presented evidence from appellant's professional colleagues to the effect that appellant had displayed professional competence at all times: before, during, and after her crime and her conviction. Appellant testified concerning the circumstances of the crime and the conviction. Pursuant to stipulation of the parties, appellant subsequently submitted an order dismissing her conviction pursuant to Penal Code section 1203.4 (dismissal of charges after successful completion of probation).⁴

³ Section 4990.32, subdivision (a), states: "Except as otherwise provided in this section, an accusation ... against a licensee or registrant under the chapters the board administers and enforces shall be filed within three years from the date the board discovers the alleged act or omission that is the basis for disciplinary action or within seven years from the date the alleged act or omission that is the basis for disciplinary action occurred, whichever occurs first." Subdivision (f) provides that the "limitations period provided by subdivision (a) shall be tolled during any period if material evidence necessary for prosecuting or determining whether a disciplinary action would be appropriate is unavailable to the board due to an ongoing criminal investigation."

⁴ Although "evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code" is to be considered by the board when making the determination whether to suspend or revoke a license under California Code of Regulations, title 16, section 1814, subdivision (a)(5), it is not determinative. Section 4992.3, subdivision (a) provides, in part: "The board may order any license or registration suspended or revoked ... when an order granting probation is made suspending the imposition of sentence, *irrespective of a subsequent order under Section 1203.4 of the Penal Code* ... dismissing the accusation, information, or indictment." Thus, the fact that a conviction may have been expunged pursuant to Penal Code section 1203.4, subdivision (a) does not preclude a board from relying on it to issue an order of discipline. (See *Krain v. Medical Board* (1999) 71 Cal.App.4th 1416, 1424.)

The ALJ issued a proposed decision that was adopted by the board as its final decision. The ALJ made factual findings that included: appellant used company credit cards for personal expenses for six years without making any attempt to return the money taken; appellant did not stop taking the money until she learned the board of directors had retained a CFO who would discover what she was doing; appellant waited an additional two years, until the agency actually demanded reimbursement, before paying back the money she took; and appellant took a total of \$48,553. The ALJ also found: the agency had “substantial surplus funds” so appellant’s action “did not have an effect on the level of services Genesis provided”; appellant successfully completed her court probation; appellant’s petition under Penal Code section 1203.4 had been granted by the court; witnesses who worked in appellant’s field greatly respected her professional competence; appellant had not “allowed” the “hardships that came with the charges and conviction” to affect her professional work; appellant had volunteered with the Red Cross in New Orleans after Hurricane Katrina to help victims of the disaster; and appellant was sincere, credible, contrite, and remorseful at the hearing. The ALJ concluded that appellant was convicted of a crime that was substantially related to the qualifications, functions, and duties of an LCSW; the conviction occurred within the limitations period; the evidence did not support appellant’s contention that “she [was] fully rehabilitated and that no discipline should be imposed”; and that “failure to impose discipline in this case would constitute a failure to discharge the board’s obligation to protect the public.” The ALJ proposed, and the final decision of the board ordered, that appellant’s LCSW license be revoked, the revocation stayed, and a probationary license issued for three years on certain stated conditions. The board denied appellant’s request for reconsideration.

Appellant filed a petition for writ of administrative mandate in the trial court. The matter was heard on June 3, 2011. On August 17, 2011, the trial court issued a 13-page statement of decision (denominated “Order Denying Mandamus Relief”). On September 14, 2011, the trial court entered judgment denying the petition.

DISCUSSION

The right to practice one's profession is a fundamental vested right. (*Gillis v. Dental Bd. of California* (2012) 206 Cal.App.4th 311, 318.) “[I]f an administrative agency revokes a person’s professional license, a trial court must apply its independent judgment when reviewing the agency’s decision on a petition for writ of mandate.” (*Ibid.*) When presented with a petition for a writ of mandamus upon the ground that the evidence before the administrative agency did not support the findings, the trial court “must find abuse of discretion if the weight of the evidence fails to support the findings.” (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 510, fn. 1; see also Code Civ. Proc., § 1094.5, subd. (c).) “““When an appeal is taken from the trial court’s determination, it is given the same effect as any other judgment after trial rendered by the court: the only question is whether the *trial court’s* (not the administrative agency’s) findings are supported by substantial evidence. [Citation.] Conflicts in the evidence must be resolved in favor of the judgment and where two or more inferences can be reasonably drawn from the facts, the reviewing court must accept the inferences deduced by the trial court.’ [Citation.] However, ‘... the trial court’s legal conclusions are open to our examination to determine if errors of law were committed.’ [Citation.]””” (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1440.)

A. *The Trial Court’s Findings and Decision*

In its order, the trial court stated: appellant stole from her employer “for years, not just in one isolated incident,” the misconduct only stopped when appellant was ““caught,”” and the loss was “over \$48,000”; appellant did not make reimbursement until the board of directors demanded it, said demand occurring two years after appellant knew Genesis was hiring a CFO to go “through the books”; that “while [appellant] continues to claim that she had always intended to pay back the Agency, she admits that she failed to keep track of the personal items she was charging”; and that “dishonesty is particularly troubling where the licensee is dealing with troubled and at-risk children who she was

responsible for guiding towards a self-sustaining life.” The trial court found the conviction to be sufficiently related to appellant’s duties as a licensee because part of her job was to write grants and solicit funds to be used for troubled youth. Instead of using that money to help those children, she stole up to \$48,000 of it and used it for her personal expenses until reimbursement was demanded by the agency’s board. Contrary to appellant’s contention, the trial court made the findings required and, based on our review of the record, substantial evidence supported them.

Appellant also contends the trial court failed to issue a statement of decision “addressing the key controverted issues” specified by appellant in her request for a statement of decision. We similarly reject this contention. The trial court here issued a 13-page written statement of decision in which it reviewed the evidence in detail, stated the correct standard of review for its evaluation of that evidence, and fully explained its reasons for concluding the board’s exercise of disciplinary authority was supported by the weight of the evidence. The court was not required to do more. In some instances, appellant’s request for statement of decision addressed immaterial issues, on which the court was not required to make a finding. (See *Colombo Construction Co. v. Panama Union School Dist.* (1982) 136 Cal.App.3d 868, 878.) Thus, while appellant’s first requested finding was that her “misdemeanor conviction was not, under the circumstances surrounding it, a crime that evidenced moral turpitude,” the issue of moral turpitude is irrelevant to the statutory standard for discipline of a licensee under section 4996.11. As relevant here, the standard incorporated in that section only requires that the crime be substantially related to the qualifications, functions, or duties of a licensee. (See § 4992.3, subd. (a).)

In other important instances, such as appellant’s requests numbered 9, 11, and 12, the court did not address appellant’s request by reference to the numbered requests, but

the court fully and completely discussed the evidence relevant to the issue and stated in detail its reasons for resolution of the issues in question.⁵ As to other requested findings, appellant has not established the prejudice required for reversal of the judgment for failure to make the findings: “Even though a court fails to make a finding on a particular matter, if the judgment is otherwise supported, the omission to make such finding is harmless error unless the evidence is sufficient to sustain a finding in favor of the complaining party which would have the effect of countervailing or destroying other findings.” (*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 524.) Here, for example, the court’s failure to make an express finding on the credibility of witnesses, as sought in paragraphs 5 and 6 of appellant’s request for statement of decision, would not negate the finding that appellant still presented a risk of harm to the public. Appellant’s argument to the contrary is based on the unduly narrow premise, which we discuss below, that only a lack of proficiency of a licensee’s clinical skills can demonstrate unprofessional conduct. Accordingly, any failure of the court to make findings on requested issues did not prejudice appellant.

B. The Requisite Nexus

A board may suspend or revoke a license if the licensee has been guilty of unprofessional conduct. (§ 4992.3.) Unprofessional conduct includes the conviction of a crime “substantially related to the qualifications, functions, or duties of a licensee.” (*Id.*, subd. (a).) A crime or act is “considered to be substantially related to the qualifications, functions or duties of a person holding a license ... if to a substantial degree it evidences present or potential unfitness ... to perform the functions authorized by ... her license in a manner consistent with the public health, safety or welfare.” (Cal. Code Regs., tit. 16,

⁵ Paragraph 9 requested a finding that “Based upon the evidence as a whole, [appellant] is rehabilitated.” Paragraph 11 requested a finding that “The Board failed to establish that [appellant] was not rehabilitated.” Paragraph 12 requested a finding that “the Board gave no weight to its own criteria for rehabilitation”

§ 1812.) Appellant argues the evidence did not establish the requisite link between her criminal conviction and her current fitness to perform the duties of an LCSW.

Whether a conviction is substantially related to the qualifications, functions, or duties of a licensee is a question of law for this court's independent determination.⁶ (*Bekiaris v. Board of Education* (1972) 6 Cal.3d 575, 589; *Krain v. Medical Board*, *supra*, 71 Cal.App.4th at p. 1424; *Gromis v. Medical Board* (1992) 8 Cal.App.4th 589, 598.) In *Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, the Board of Medical Quality Assurance revoked a psychiatrist's license to practice medicine (but stayed the revocation and placed him on probation for three years) because the psychiatrist had incurred two felony convictions for tax evasion. (*Id.* at pp. 464-465, 468.) On appeal from the trial court's granting of a peremptory writ of mandate, the court found for the Board of Medical Quality Assurance. The court established as a generalized requirement that "utmost trust and confidence in the doctor's honesty and integrity" is at the core of the relationship between doctor and patient and is a component of fitness to perform duties under a medical license. (*Id.* at p. 470.) That requirement is equally strong in the case of an LCSW, who is statutorily permitted by her license to provide "counseling and ... applied psychotherapy" to her clients. (§ 4996.9.)⁷

In any event, the circumstances of appellant's crime establish a more specific nexus to the current or potential fitness for social work service which appellant seeks to require. Here, over a period of years, appellant stole from an agency specifically established to provide social work services, and she failed to repay the stolen funds until

⁶ Since we look at the evidence and make an independent determination on this issue, we need not address appellant's position that, when the ALJ and the trial court made their determination, they inappropriately analyzed the evidence.

⁷ Because of the counseling and mental health aspects of the LCSW profession, we find inapplicable the cases cited by appellant that arise from the field of the licensing of real estate brokers. (See, e.g., *Pieri v. Fox* (1979) 96 Cal.App.3d 802, 806.)

the theft was discovered and demand was made by the agency. While it appears that appellant's conduct did not *in fact* deprive appellant's clients of services because Genesis had sufficient funds at all times, the evidence clearly supports an inference that appellant was willing, over a course of several years, to put her own financial interests ahead of her clients' welfare. The evidence presented on the issue of professional competence established that appellant exhibited the same competence in her work before, during, and after she committed the crime for which she was convicted. Her competency being consistent, its existence after her crime and conviction does not render her less unfit at that point in time than the point in time during which she was committing the crime. The evidence of clinical competence in this case does not, therefore, alter the conclusion that appellant's criminal conduct demonstrated a willingness to use money intended for her clients' welfare for her personal financial gain.

On the facts established in this case, appellant's conviction evidenced to a substantial degree her present or potential unfitness to perform the functions authorized by her license. (§ 4992.3, subd. (a); Cal. Code Regs., tit. 16, § 1812.)

C. Rehabilitation and the Resulting Discipline

“While ... the trial court must exercise its own independent judgment in determining whether the findings which would justify discipline in the first place are supported by the weight of the evidence, the propriety of the penalty to be imposed—in the light of rehabilitation and other relevant factors—is vested in the discretion of the Board, subject only to ‘manifest abuse.’” (*Windham v. Board of Medical Quality Assurance, supra*, 104 Cal.App.3d at 473.) “[N]either a trial court nor an appellate court is free to substitute its own discretion as to the [penalty imposed]; nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh. [Citation.] Such interference ... will only be sanctioned when there is an arbitrary,

capricious or patently abusive exercise of discretion.” (*Cadilla v. Board of Medical Examiners* (1972) 26 Cal.App.3d 961, 968.)

California Code of Regulations, title 16, section 1814 lists eight criteria the board is to use when considering the suspension or revocation of a license.⁸ Appellant contends the board misapplied certain factors by drawing negative inferences from facts clearly intended by the regulations to be positive factors, and that the board and the trial court placed the burden of proof on appellant when, under the statutory scheme, absence of rehabilitation is part of the board’s burden of proof for the imposition of discipline. Thus, for example, the regulation requires the board to consider “[w]hether the licensee has complied with any terms of probation ... imposed against such person.” (*Id.*, subd. (a)(4).) In doing so in the present case, the board, while recognizing appellant had

⁸ California Code of Regulations, title 16, section 1814, subdivision (a) states:
“When considering the suspension or revocation of a license, the board, in evaluating the rehabilitation of such person and his or her eligibility for a license will consider the following criteria:
“(1) Nature and severity of the act(s) or crime(s) under consideration as grounds for suspension or revocation.
“(2) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for suspension or revocation under Section 490 of the Code.
“(3) The time that has elapsed since commission of the act(s) or crime(s) giving rise to the suspension or revocation.
“(4) Whether the licensee has complied with any terms of probation, parole, restitution or any other sanctions lawfully imposed against such person.
“(5) If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.
“(6) Evidence, if any, concerning the degree to which a false statement relative to application for licensure may have been unintentional, inadvertent or immaterial.
“(7) Efforts made by the applicant either to correct a false statement once made on an application or to conceal the truth concerning facts required to be disclosed.
“(8) Evidence, if any, of rehabilitation submitted by the licensee.”

successfully completed probation, concluded: “Good conduct while on probation, with a view to avoiding the risk of going to prison ... does not necessarily demonstrate integrity.” (See *Windham v. Board of Medical Quality Assurance, supra*, 104 Cal.App.3d at p. 473 [“The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.”].) Appellant contends this constitutes a failure to properly consider the successful-probation criterion.

First, the board is not required to give controlling effect to any single factor listed in the regulation. Instead, the board is required to exercise its discretion to weight the various factors in light of the facts of each particular case. (See *Windham v. Board of Medical Quality Assurance, supra*, 104 Cal.App.3d at p. 473; *Golde v. Fox* (1979) 98 Cal.App.3d 167, 188.) While this can be seen most clearly in the Penal Code section 1203.4 expungement criterion (*ante*, fn. 4), the requirement for weighing and balancing the criteria is inherent in the entire rehabilitation regulation. In the present case, the board expressly noted the presence of rehabilitation factors such as successful completion of probation, continuing clinical competence, and passage of time since the last impermissible use of the credit card. The board also, however, explained why those factors were less persuasive on the issue of rehabilitation in this case.

Second, in a case such as this, the preliminary fact (the criminal conduct and conviction being substantially related to the duties under a license) must be established before the question of rehabilitation ever comes into play. Once the evidence establishes that fact, evidence of rehabilitation, by whomever that evidence is produced, must be evaluated to determine whether the rehabilitation evidence overcomes the continuing inference of unfitness established by that preliminary fact. The licensee does not have the burden to produce evidence of rehabilitation, but it is nevertheless true as a matter of the logical sequence of analysis in disciplinary cases, that the *evidence* of rehabilitation must overcome the persuasive force of the preliminary fact of unfitness if discipline is to

be mitigated or avoided. It is not surprising when, as here, all the evidence of rehabilitation is presented by the licensee, that the phrasing of a board or trial court's conclusions might be interpreted as being in terms of the licensee not establishing her rehabilitation. Such phrasing however, although inaccurate for the reasons described, does not reflect the actual decisionmaking process otherwise disclosed by this board's order or the trial court's statement of decision.

“One of the tests suggested for determining whether the administrative body acted within the area of its discretion is whether reasonable minds may differ as to the propriety of the penalty imposed. The fact that reasonable minds may differ will fortify the conclusion that there was no abuse of discretion. [Citation.]” (*Cadilla v. Board of Medical Examiners, supra*, 26 Cal.App.3d at 968.) In light of appellant's repeated unlawful use of the credit card over a period of years, and her failure to voluntarily reimburse her employer for an additional period until formal demand was made upon her by the agency, we cannot say the board abused its discretion in concluding that protection of the public required the imposition of discipline on appellant's license and that the discipline should be a stayed revocation and a probationary license.

D. Statute of Limitations

Without any support from the language of the statute, appellant contends the seven-year statute of limitations set forth in section 4990.32 “directly or by analogy” bars the present disciplinary proceeding. Section 4990.32, subdivision (a) provides that an accusation against a licensee shall be filed within three years after “the board discovers the alleged act or omission that is the basis for disciplinary action or within seven years from the date the alleged act or omission that is the basis for disciplinary action occurred, whichever occurs first.” The act upon which the disciplinary action in this case was based is specified by section 4992.3, subdivision (a) as the “conviction of a crime,” not the commission of a crime. Nevertheless, appellant contends her last unlawful use of the

credit card occurred more than seven years prior to the filing of the accusation and, as a result, the proceedings are barred under section 4990.32.

We conclude the date of the criminal conviction was the date the statute of limitations began to run under sections 4990.32, subdivision (a) and 4992.3, subdivision (a). A statute of limitations that requires the board to file disciplinary proceedings before the conclusion of the criminal proceedings would not benefit licensees. It is fair to the licensee not to make him or her defend against a disciplinary accusation while there are ongoing criminal proceedings, because the rights and burdens applicable in the two actions are different and full defense of the disciplinary action may prejudice the licensee's exercise of rights in the criminal case. Additionally, the facts of the present case support our conclusion. Appellant selects her final use of the credit card as the last relevant act or omission demonstrating unprofessional conduct. Her fraudulent use of her employer's money, however, continued for another two years, until she was forced to repay the money in an effort to extricate herself from the situation.⁹ In similar cases, such repayment might have occurred sooner, or not at all. Selection of the date of conviction rationally provides for certainty and uniformity in the application of the statute of limitations. Appellant offers no persuasive reason that would justify a departure from the clear language of the statute. We conclude the accusation was timely under the terms of section 4990.32, subdivision (a).

⁹ We note that the January 15, 2009, accusation was filed within seven years of appellant's repayment of the stolen funds in January 2004.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal. Appellant's request for expenses and costs pursuant to Code of Civil Procedure section 1028.5 is denied.

DETJEN, J.

WE CONCUR:

LEVY, Acting P.J.

GOMES, J.