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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Rene L. Johnson, Appellee, v. State of North Dakota, by North Dakota Board of Accountancy, Appellant.	**Supreme Ct. No. 20200196** **Civil No. 08-2020-CV-00939**

BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

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ARGUMENT

I. The Board granted Johnson her right to a hearing.

[¶1] Rene L. Johnson (Johnson) argues she was denied her right to a hearing under N.D.C.C. § 43-02.2-10, in relation to contemplated action against her certificate to practice public accountancy (Certificate). Appellee's Brief (Appellee's Br.) ¶¶ 40-55.

[¶2] In accordance with N.D.C.C. § 43-02.2-10, Johnson was provided multiple hearings as to the disposition of her Certificate. Then, only after consideration of Johnson's federal felony conviction for Wire Fraud and other relevant matters, the Board exercised its discretionary authority and revoked her Certificate. Johnson was not denied a hearing.

[¶3] Here, the Board scheduled informal hearings and met on three occasions to consider adverse action against Johnson's certificate: on July 24, 2018; on February 6, 2019; and, on February 18, 2020. In relation to the disposition of her Certificate, Johnson had ample opportunity to be heard, in any or all of these scheduled informal disciplinary hearings.

[¶5] Moreover, and most notably, during the Administrative Law Judge's (ALJ) adjudication of the Board's summary judgment motion, the ALJ correspondingly conducted a formal hearing on briefs in which Johnson was provided further meaningful opportunity to be heard as to the disposition of her Certificate. And, she was heard.

[¶6] During the course of these formal summary judgment proceedings, Johnson affirmatively provided the ALJ and the Board a personal affidavit, as well as a great number of other documentary evidence in defense, mitigation, and extenuation. Appellant's App. at 48-54. In the form of three Board meetings and the summary judgment proceeding, Johnson was provided a hearing before the Board on contemplated disciplinary action against her. Consequently, Johnson's claim she was denied a hearing is misplaced.

II. Three Board administrative meetings and an ALJ summary judgment proceeding constitute the administrative "hearing" the Board is required to afford Johnson pursuant to N.D.C.C. § 43-02.2-10 and N.D.C.C. ch. 28-32.

[¶7] This Court has broadly defined what is meant by an administrative "hearing." This Court a century ago conveyed "[t]he word 'hearing' contemplates an opportunity to be heard. That is, not merely the privilege to be present when the matter is being considered, but the right to present one's contention, and to support the same by proof and argument." State v. Milhollan, 50 ND 184, 187, 195 N.W 292, 295 (1923). This Court also has "adopted the rather broad definition of 'hearing' found in Webster's Second College Edition dictionary: 'a formal meeting (as of an investigative body or legislative committee) before which evidence is presented, testimony is given, etc.'" Aggie Invs. GP v. Pub. Serv. Comm'n of N.D., 451 N.W. 2d 141, 143 (N.D. 1990).

[¶8] Pursuant to N.D.C.C. § 43-02.2-10 and N.D.C.C. ch. 28-32, the Board provided Johnson multiple informal and formal hearings during which the Board contemplated action against her Certificate. Additionally, Johnson was provided another substantive opportunity to be heard during the ALJ formal administrative summary judgment process from October 21, 2019 to February 13, 2020. Appellant's App. at 40-58. In conducting this formal hearing on briefs utilizing these summary judgment proceedings, the ALJ and Board acted in accordance with N.D.C.C. ch. 28-32 and N.D. Admin. Code § 98-02-03-01 (permitting summary judgment motion when no material factual disputes exist).[1] Through

[1] North Dakota is in accord with other jurisdictions. A hearing on briefs comprises a hearing. In the context of certain civil proceedings, such as a motion for summary judgment, a hearing on briefs constitutes sufficient due process. See generally e.g., U.S. et al. v. Florida E. Coast Ry. Co., 410 U.S. 224, 241-42 (1973) (holding that a hearing requirement contained in the Administrative Procedure Act could be satisfied by allowing interested parties to file written submission of argument and evidence and did not require oral testimony or argument); Gray Panthers v. Schweiker, 652 F.2d 146, 148 n.3 (D.C. Cir.

this formal summary judgment hearing, the Board and the ALJ provided Johnson the opportunity to present arguments and evidence through written submissions.

[¶9] Whether, and to what extent, Johnson chose to participate in these rendered multiple informal and formal opportunities to be heard is not pertinent. What is material is that the Board made itself available for Johnson to provide personal testimony or other evidence to it in relation to any contemplated action against her Certificate. Johnson is incorrect in saying the Board denied her a hearing. Johnson was provided a fair hearing, and neither N.D.C.C. § 43-02.2-10 nor N.D.C.C. ch. 28-32 now requires any rehearing.

III. No factual or legal issues remain to adjudicate in any subsequent rehearing.

[¶10] Johnson contends that "the Board ... erred by issuing a final Order without a hearing when summary judgment did not resolve all pending factual and legal issues[.]" Appellee's Br. at ¶ 37; see also Id. at ¶ 40 ("the ALJ's recommended findings did not resolve all material factual issues"). More specifically, Johnson argues that the factual or legal "issue of the appropriate level of discipline remained unanswered." Id. at ¶ 41. Johnson then insists that yet another hearing is required to resolve what she purports is either an existing factual or legal issue as to the contemplated action against her Certificate.

[¶11] Johnson is again mistaken. There are no remaining factual or legal issues to resolve. Whether to impose discipline in an administrative case, and if it is imposed, the appropriate level of discipline, are not questions of fact. Nor are they matters of law. To the contrary, the decision to impose discipline, and if so, the level of that discipline, are both matters of the Board's statutory discretion. N.D.C.C. § 43-02.2-09.[2]

1980) ("paper hearing" falls within meaning of "hearing"); Perillo v. Johnson, 79 F.3d 441, 446 (5th Cir. 1996) (court "afforded the presumption of correctness to 'paper hearings'").

[2] It is well settled that the discretionary power to determine a particular administrative penalty vests solely with the Board. E.g., N.D. State Bd. of Med. Examiners-Investigative

[¶12] To assist in its consideration of potential discipline against Johnson, the Board requested an ALJ be designated "[t]o conduct the hearing and issue recommended findings of fact, conclusions of law, and order." Appellant's App. at 37 (emphasis in original). In so doing, the Board did not expressly request the ALJ to make a purely advisory recommendation as to matters within the Board's statutory discretion, specifically what, if any, contemplated disciplinary action it should take. Id.

[¶13] The assigned ALJ consequently conducted an administrative summary judgment hearing and resolved all factual and legal issues before him. Appellant's App. 55-57. Within this summary judgment process authorized under N.D.C.C. ch. 28-32, the ALJ provided Johnson the opportunity to be heard and, consequently, Johnson ensured she was. In fact, she filed two responses in the matter, and attached to them were a great number of documentary exhibits in defense, mitigation, and extenuation. Appellant's App. 48 - 54. Consequently, Johnson was provided another fair hearing under N.D.C.C. § 43-02.2-10.

[¶14] Notwithstanding Johnson's attempt to relitigate or play down her federal felony Wire Fraud criminal conviction during this administrative summary judgment hearing, at the conclusion of this administrative proceeding, the ALJ determined no dispute existed as to any material fact in relation to her felony conviction. Id. at 56. Upon this determination, the ALJ concluded the Board was within its statutory discretion to revoke her Certificate.

Panel B v. Hsu, 2007 ND 9, ¶ 42, 726 N.W.2d 216 ("Generally, the determination of the appropriate sanction to be imposed by the Board is a matter of discretion."); Larsen v. Comm'n on Med. Competency, 1998 ND 193, ¶ 32, 585 N.W.2d 801 ("Generally, if authorized by law and justified in fact, imposition of a regulatory sanction by an administrative agency is discretionary."); Steen v. N. D. Dep't of Human Servs., 1997 ND 52, ¶ 24, 562 N.W.2d 83 (citing Sletten v. Briggs, 448 N.W.2d 607, 611 (N.D.1989), *cert. denied,* 493 U.S. 1080, (1990)) (same); Matter of Prettyman, 410 N.W.2d 533, 537 (N.D. 1987) (same); Wisdom v. State ex rel. North Dakota Real Estate Com'n, 403 N.W. 2d 19, 22 (N.D. 1987) (same).

N.D.C.C. § 43-02.2-09(1)(h); Appellant's App. at 56-57. No further hearing under N.D.C.C. § 43-02.2-10 or N.D.C.C. ch. 28-32 is required.

IV. The Board's decision to impose an administrative sanction against Johnson, and, if so, the type of that sanction, are not questions of fact, nor are they matters of law – they are matters of the Board's discretion.

[¶15] Johnson argues that the ALJ should have issued findings of fact and a recommended decision as to the disposition of Johnson's Certificate. Appellee's Br. at ¶¶ 41, 43-44. Yet, a recommendation as to a matter of the Board's discretion would be advisory only.

[¶16] Given that the choice of sanction is solely a matter within the Board's statutory discretion, the ALJ chose not to recommend to the Board the level of discipline it should impose. Instead, the ALJ reiterated the Board's discretionary purview and accurately explained "[t]he Board may take other disciplinary action that is not as severe as revocation but the purview of the ALJ is making evidentiary determinations and any comment [from the ALJ] as to the discipline for Johnson would be mere suggestion." Appellant's App. at 57.

[¶17] In concluding the hearing, upon determining all material facts and resolving all applicable conclusions of law, the ALJ recommended the Board grant summary judgment against Johnson. Id. at 57. The Board "considered and appraised" the record. Id. at 61. The Board then adopted the ALJ's recommended "findings of fact and conclusions of law". Id. Johnson's written submissions and many evidentiary exhibits did not persuade the Board to ignore her federal felony Wire Fraud conviction. Id. at 18-31. The Board then, in an exercise of its statutory discretion, ordered the revocation of Johnson's Certificate. Id. at 60. This exercise of discretion concluded Johnson's administrative hearing proceedings, convened pursuant to N.D.C.C. § 43-02.2-10.

[¶18] Johnson now insists she should be granted a rehearing, as to the disciplinary sanction the Board imposed. However, N.D.C.C. ch. 28-32 does not contemplate, nor require, a bifurcated hearing process – the first part to decide evidentiary issues of fact and conclusions of law, and the second part to decide a discretionary disciplinary sanction.

[¶19] Yet another hearing as to the disposition of Johnson's Certificate is not required because no dispute of material fact exists to resolve. See generally Steele v. N.D. Workmen's Comp. Bureau, 273 N.W.2d 692, 701 (N.D. 1978) (agency must hold a formal hearing only when a material fact is in dispute); N.D. Admin. Code § 98-02-03-01 ("[a]n evidentiary hearing need be conducted *only* in cases where genuine issues of material fact must be resolved.") (emphasis added). Here, because no material questions of fact were in dispute, and only a question of law remained, this case was ripe for summary judgment.

[¶20] Here, N.D.C.C. § 43-02.2-09 clearly authorized the Board to revoke Johnson's Certificate based upon her federal felony Wire Fraud conviction. N.D.C.C. § 43-02.2-09(1)(h) ("The board may revoke any certificate for ... [c]onviction of a felony, or any other crime and element of which is dishonesty or fraud."). This is so as a matter of law.

[¶21] Accordingly, all germane questions of fact and matters of law were determined during the summary judgment hearing process relating to the Board's contemplated disciplinary action. No further questions of fact or matters of law remain to be decided in any additional or subsequent hearing. All evidentiary hearing requirements are satisfied.

[¶22] Consequently, only two questions remained, both of which are solely matters of the Board's discretion in relation to the disposition of Johnson's Certificate, and neither of which would be subject to another administrative hearing. These two remaining questions *that relate exclusively to the disposition of Johnson's Certificate* – (1) whether the Board

should impose a disciplinary sanction against Johnson and, (2) if so, *what* disciplinary sanction the Board should impose – are questions neither of fact nor of law.

[¶23] Johnson's argument for a rehearing fails because these two remaining matters, regarding whether to levy a sanction against Johnson and correspondingly the choice of that sanction, are matters of statutory discretion that fall squarely within the Board's discretionary purview.[3] It follows that the role of an ALJ is not required, and moreover, another separate hearing as to the disposition of Johnson's Certificate is not mandated.

[¶24] It remains the Board's discretion whether to impose an administrative sanction, and, if it does, the level of that sanction. This Court has long recognized its appellate oversight, as to these two discretionary agency choices, remains limited to reviewing whether the law authorizes the disciplinary sanction the agency imposed. See e.g., Larsen v. Comm'n on Med. Competency, 1998 ND 193, ¶ 32, 585 N.W.2d 801, 808 ("the issue becomes whether the revocation of Larsen's license to practice medicine was authorized by law."); Wisdom v. State ex rel. North Dakota Real Estate Com'n, 403 N.W. 2d 19, 22 (N.D. 1987) ("The only question here is whether a reprimand is authorized by law."); see also N.D.C.C. § 28-32-46 (district court appellate scope of review mentions no review of an agency's sanction choice, other than to verify whether that sanction is "in accordance with law.").[4]

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[3] See e.g., Larsen v. Comm'n on Med. Competency, 1998 ND 193, ¶ 34, 585 N.W.2d 801("The statute leaves the choice of the disciplinary action within the discretion of the Board...."); Panhandle Co-op Ass'n, Bridgeport, Neb. V. E.P.A., 771 F.2d 1149 (8th Cir. 1985) (administrative agency "assessment of a penalty is particularly delegated to the administrative agency. Its choice of sanction is not to be overturned unless 'it is unwarranted in law' or 'without justification in fact.' The assessment is not a factual finding but the exercise of a discretionary grant of power.") (citations omitted).

[4] Accord, e.g., Butz v. Glover Livestock Comm'n Co., Inc., 411 U.S. 182, 185–86 (1973) (appellate court may not reverse agency's choice of administrative sanction unless court determines it violates law or is not factually justified); In re License Issued to Zahl, 895 A.2d 437, 445 (N.J. 2006) (appellate review of an agency's choice of sanction is limited);

[¶25] Here, the Board's revocation of Johnson's Certificate is in accordance with the law. N.D.C.C. § 43-02.2-09(1)(h). After Johnson's summary judgment hearing, upon reviewing Johnson's felony Wire Fraud conviction, in view of the full statutory range of available administrative disciplinary sanctions the Board could take consequent to that conviction, the Board decided the disposition of Johnson's Certificate within that statutory range. The Board then exercised its discretion and revoked Johnson's Certificate. Appellant's App. at 60-61. The Board's action was neither arbitrary, unreasonable, nor unconscionable. The Board did not, in any way, abuse its discretion. In revoking Johnson's Certificate, the Board acted well within its discretionary statutory authority.

[¶26] Notwithstanding, Johnson requests this Court to now require the Board to reconsider its past lawful exercise of discretion, through either a bifurcated hearing process or a rehearing. However, Johnson is not entitled to either. Johnson's hearing proceedings under N.D.C.C. § 43-02.2-10 and N.D.C.C. ch. 28-32 are both legitimate and concluded. The district court order mandating a separate sanction hearing, when the Board has discretion as a matter of law to issue the administrative penalty it did, impermissibly encroaches upon the Board's lawful discretion to impose discipline within the statutory range of sanctions. [5]

CONCLUSION

[¶27] The district court erred in ordering the Board to hold yet an additional hearing in

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Devor v. Dep't of Ins., 473 So. 2d 1319,1320 (Fla. Dist. Ct. App., 1985) (propriety of insurance agent license revocation, as opposed to a lessor sanction, is not subject to court's review).

[5] Johnson did not cross-appeal. This case centers on whether Johnson was afforded a hearing. However, in continuing to seek a rehearing, Johnson brings four secondary arguments she previously raised at the district court. The district court, in its order, did not discuss nor rule upon any of these four collateral legal issues. Appellant's App. at 69-72.

relation to the disposition of Johnson's Certificate. This Court should reverse the district court order and reinstate the Board's revocation of Johnson's Certificate.

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Specifically, Johnson' again argues: (1) the administrative record did not support the Board's findings of fact and conclusions of law; (2) the Board's order deprived Johnson of property and liberty interests without due process of law; (3) the Board's order deprived Johnson of a neutral adjudicative body; and, (4) the Board deprived Johnson her right to conduct discovery. Appellant's App. at 63-68; Appellee's Br. at ¶¶ 56-62, 68-78. Johnson's renewed arguments lack merit:

(1) The sufficiency of the administrative record fully supports the Board's findings of fact. E.g., Appellant's App. at 18-31 (documenting Johnson's federal felony Wire Fraud conviction). Johnson's felony conviction is final for purposes of the revocation of her Certificate. The Board is not required to show any facts underlying Johnson's conviction.

(2) The Board's order did not deprive Johnson of property and liberty interests without due process of law. The Board revoked Johnson's Certificate only after three separate Board meeting hearings (Appellant's App. at 13-17; 60), Johnson's federal felony conviction (Id. at 18-31), and a formal administrative summary judgment hearing, (Id. at 40-58) all taking place over a period of twenty months. Id. at 37-58.

(3) The Board's order did not deprive Johnson of her right to a neutral adjudicative body. The Board regularly performed its duty and did not allow any preconceived biases to interfere with its decision. This legally constituted board acted upon the evidence alone. Further, an independent ALJ presided over the adjudicatory proceeding. Appellant's App., 37-58. Johnson has not shown improper Board bias.

(4) Finally, the Board did not deprive Johnson of her right to conduct factual discovery. The sole factual question before the Board, giving rise to Johnson's Certificate revocation, was whether or not she was convicted of federal felony Wire Fraud. She was. Appellant's App. at 18-31. No other factual issues exist that required discovery.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Rene L. Johnson, Appellee, vs. State of North Dakota, by North Dakota Board of Accountancy, Appellant.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20200196** **District Ct. No. 08-2020-CV-00939**

[¶1] The undersigned certifies pursuant to N.D. R. App. P. § 32(a)(8)(A) that the Reply Brief contains 12 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365-word processing software in Times New Roman 12-point font.

Dated this 23rd day of October, 2020.

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IN THE SUPREME COURTE

STATE OF NORTH DAKOTA

Rene L. Johnson, Appellant, vs. State of North Dakota, by North Dakota Board of Accountancy, Appellee.	**CERTIFICATE OF SERVICE** **Supreme Ct. No. 20200196** **District Ct. No. 08-2020-CV-00939**

[¶1] I hereby certify that on October 23rd, 2020, the following documents: **REPLY BRIEF, CERTIFICATE OF COMPLIANCE, and CERTIFICATE OF SERVICE** were filed through electronic filing and served upon Jesse Walstad at jwalstad@vogellaw.com.

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