

argues that the Board: (1) improperly applied Section 16(a) of the Occupational Therapy Practice Act (Act)² by imposing a five-year suspension; (2) abused its discretion by failing to give significant weight to mitigating factors and the passage of time in imposing the suspension; (3) erred by refusing to consider the hearing examiner's recommendation that Van Ness' license be suspended for a period of six months; (4) erred by not following its previous decisions; and (5) erred in finding that Van Ness' conduct deprived special education students of necessary treatment. Discerning no error, we affirm.

I. BACKGROUND

Van Ness held a license to practice occupational therapy that was first issued by the Board on March 28, 2005. (Board Final Adjudication and Order (Final

² Act of June 15, 1982, P.L. 502, as amended, 63 P.S. § 1516(a). Section 16(a) provides that:

The board shall refuse to issue a license to a person and, after notice and hearing in accordance with law, may suspend or revoke a license or refuse to renew a license, or may impose probationary conditions, where the licensee or applicant for license is guilty of unprofessional conduct which has endangered or is likely to endanger the health, welfare or safety of the public. Unprofessional conduct shall include the following:

- (1) Obtaining a license by means of fraud, misrepresentation or concealment of material facts.
- (2) Being guilty of unprofessional conduct as defined by a rule established by the board or violating a code of ethics adopted by the board

Id.

Order), Findings of Fact (FOF) ¶ 1.³) Shortly after obtaining her license, Van Ness began working as an independent contractor for a Pennsylvania rehabilitation services provider (Provider). (FOF ¶¶ 5, 6.) Provider furnishes occupational therapy by utilizing Individual Education Plans and 504 Plans as required under the Americans with Disability Act.⁴ (Final Order at 7.) Van Ness worked as an occupational therapist for Provider from May 2005 through February 2009. (FOF ¶ 6.) During her tenure with Provider, Van Ness provided therapy to special education students, ages 3-21, with the Chester County Intermediate Unit (CCIU) at the Coatesville Area School District. (Final Order at 7.) Services were provided to students at school, in homes, and at daycare centers and therapy sessions usually lasted for 30 minutes per student. (Final Order at 7.)

During a four-month period from September 2008 to January 2009, Van Ness “submitted bills for services she purportedly rendered as an [o]ccupational [t]herapist to clients at [CCIU] to Provider.” (FOF ¶ 7.) Starting in December 2008, irregularities in Van Ness’ billing were noticed by Provider when Van Ness submitted bills showing that she worked on recognized holidays when the school was closed. (Final Order at 7.) Between September 2008 and January 2009, Van Ness overbilled 419.5 hours of services to CCIU. (FOF ¶ 8.) Van Ness did not actually provide any of the 419.5 hours of services to clients at CCIU and Provider paid her \$16,150.75 for the overbilled services. (FOF ¶¶ 9, 10.)

³ Although Van Ness appended the Board’s Final Order to her brief, the Board’s Final Adjudication was omitted from the brief in contravention of Rule 2111(b) of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 2111(b). The Board’s Final Adjudication may be found in the reproduced record at R.R. 60a-69a.

⁴ Americans with Disability Act of 1990, 42 U.S.C. §§ 12101-12213 (2012).

When confronted by Provider over the irregularities, Van Ness first claimed they were mistakes; however, when confronted a second time she offered to resign. (Final Order at 7.) When questioned by Provider about the lack of documentation to support Van Ness' billing submissions, Van Ness stated that she intentionally overbilled Provider and that she engaged in her behavior because of greed. (FOF ¶¶ 12, 14; Final Order at 8.) In order to falsely overbill 419.5 hours of services to CCIU, Van Ness included approximately 600-700 additional entries in the bills she submitted to Provider. (FOF ¶ 13.)

After the false billing came to light, Provider terminated Van Ness as an independent contractor. (Final Order at 8.) Provider subsequently deducted Van Ness' last compensatory payment of \$6,028.33 from what was owed Provider for the overbilled services. (FOF ¶ 15.) Van Ness attempted to reimburse Provider for the compensation she received for the overbilled hours. (FOF ¶ 16.) Specifically, Van Ness "reserved \$10,122.42 by placing the money in her attorney's escrow." (FOF ¶ 16.) Van Ness also voluntarily visited a therapeutic counselor from March 2009 through July 2009 and from November 2010 through February 2011 to address issues arising from her improper behavior while providing professional services for Provider and to explore the root causes of her conduct. (FOF ¶ 17; Final Order at 8.)

On March 5, 2012, the Commonwealth of Pennsylvania (Commonwealth), through the Department of State, issued a Notice and Order to Show Cause upon Van Ness, alleging that Van Ness is subject to disciplinary action under Section 16(a)(2) of the Act. Van Ness filed an answer and a formal administrative hearing

was held before a hearing examiner on August 29, 2012. The hearing examiner issued a Proposed Adjudication and Order on May 1, 2013.

The hearing examiner determined that Van Ness was subject to disciplinary action under Section 16(a)(2) of the Act. (Hearing Examiner Proposed Adjudication and Order (Proposed Order), Conclusions of Law (COL) ¶ 3, R.R. at 19a.) The hearing examiner found that Van Ness had violated a provision of the Board's Code of Ethics⁵ by using or participating in the use of communications containing "false, fraudulent, deceptive or unfair statements or claims when [Van Ness] submitted fraudulent bills for payment of services she did not render." (Proposed Order at 7, R.R. at 22a.) While the Commonwealth recommended that Van Ness' license be revoked, the hearing examiner found that the

⁵ 49 Pa. Code § 42.24(5). Section 42.24(5) provides that:

Purpose: The Board adopts the following Code of Ethics to establish and maintain a high standard of integrity and dignity in the profession and to protect against unprofessional conduct on the part of licensees. The Code of Ethics is adapted with permission from the "Occupational Therapy Code of Ethics" of the American Occupational Therapy Association (revised July 1994)

(5) *Principle 5.* Licensees shall provide accurate information about occupational therapy services. (veracity)

(i) Licensees shall accurately represent their qualifications, education, experience, training and competence.

(ii) Licensees shall disclose any affiliations that may pose a conflict of interest.

(iii) Licensees shall refrain from using or participating in the use of any form of communication that contains false, fraudulent, deceptive or unfair statements or claims.

Id.

Commonwealth's recommendation was "not fully supported by the record as reflected in prior Board action." (Proposed Order at 8, R.R. at 23a.) Therefore, the hearing examiner recommended that "[i]n order to protect the health and safety of consumers of occupational therapy from similar misconduct, to maintain the integrity of the profession, and to impress on [Van Ness] that such misconduct endangers her license to practice as an occupational therapist," the Board suspend Van Ness' license for six months. (Proposed Order at 8, R.R. at 23a.) The hearing examiner determined that a six-month suspension was consistent with prior decisions of the Board and cited to the Board's decision in Commonwealth v. Roxanne Chuk, OTA Docket No. 1086-67-01, File No. 01-67-00145 (Chuk). (Proposed Order at 8.)

The Commonwealth filed exceptions to the Proposed Order, arguing that Van Ness' license should be revoked. Van Ness also filed exceptions to the Proposed Order, arguing that the Board should stay Van Ness' suspension and impose a probationary period. Van Ness also filed objections to the Commonwealth's exceptions to the Proposed Order and the Commonwealth filed a reply to Van Ness' objections. The Board met, deliberated the matter on December 3, 2013, and issued its Final Adjudication and Order on March 7, 2014.

The Board found that it was undisputed that Van Ness intentionally overbilled Provider for 419.5 hours of service she did not provide during a four-month period. (Final Order at 8.) The Board concluded that Van Ness was subject to disciplinary action under Section 16(a)(2) of the Act for violating the Code of Ethics, 49 Pa. Code § 42.24(5)(iii), "by having used or participated in the use of

any form of communication that contains false, fraudulent, deceptive or unfair statements or claims when [Van Ness] submitted fraudulent bills for payment of services she did not render.” (Final Order, COL ¶ 3.) Moreover, the Board found that Van Ness “did not put on a defense other than minimum mitigation evidence,” which included reimbursing Provider through the company’s legal counsel and undertaking “therapy to address resulting issues . . . and explor[ing] the root causes for [Van Ness’] conduct.” (Final Order at 8.) Therefore, the Board suspended Van Ness’ license to practice occupational therapy for five years and required Van Ness to undergo counseling and obtain an assessment from a mental health professional prior to reinstatement. Van Ness now petitions this Court for review of the Board’s Final Order.⁶

II. DISCUSSION

a. Whether the Board abused its discretion in suspending Van Ness’ license to practice occupational therapy for five years.

Van Ness does not dispute that she intentionally falsified her billing records, but essentially argues that the Board improperly applied Section 16(a)(2) of the Act and abused its discretion in imposing the five-year suspension. Van Ness points to several factors exhibiting the Board’s abuse of discretion and purely arbitrary application of its duties.

⁶ Our review of the Board’s decision “is limited to determining whether constitutional rights were violated, an error of law was committed or whether necessary findings of fact are supported by substantial evidence.” Barran, M.D. v. State Board of Medicine, 670 A.2d 765, 767 (Pa. Cmwlth. 1996). Moreover, “unless the licensing board is accused of bad faith or fraud, appellate review of a board’s disciplinary sanction is limited to determining whether the board flagrantly abused its discretion or executed its duties or functions in a purely arbitrary and capricious manner.” Blair v. Bureau of Professional and Occupational Affairs, State Board of Nursing, 72 A.3d 742, 750 (Pa. Cmwlth. 2013).

i. Van Ness' mitigation efforts

First, Van Ness argues that the Board erred by not giving significant weight to the mitigation efforts she undertook, including the full restitution made to Provider, the fact that she has been very contrite and cooperative throughout the full process, and that she underwent voluntary psychological counseling. Van Ness asserts that the Board's Final Order was harsh, severe, and excessive in light of her mitigation efforts and that the five-year suspension will effectively end her career as an occupational therapist.

Our Supreme Court has “established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power.” Slawek v. State Board of Medical Education and Licensure, 586 A.2d 362, 365 (Pa. 1991) (quoting Blumenschein v. Pittsburgh Housing Authority, 109 A.2d 331, 334-35 (Pa. 1954)). Moreover, courts:

“will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That the [C]ourt might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion.”

Id. (quoting Blumenschein, 109 A.2d at 335) (emphasis in original). Because Van Ness has not alleged fraud or bad faith by the Board, “our inquiry in this case

resolves itself into whether the agency's action was capricious or a flagrant abuse of discretion." Id.

In its Final Order, the Board concluded that "[t]he intentional entry of false information for billing records is a serious offense, demeaning the reputation of the health care system, which relies on the veracity of medical practitioners." (Final Order at 9.) The Board also determined that the repeated false billing over a four-month period was done purely for greed and that Van Ness "placed her desire for fiscal gain over the treatment needs of special needs children for whom she was responsible." (Final Order at 9.) Further, the Board concluded that Van Ness' actions "constituted a commission of fraud not only as regards the integrity of her employer, but also on the [CCIU]" and that Van Ness' "hugely unethical course of conduct deprived those special education students, ages 3 to 21 that included pre-schoolers, of necessary treatment *over the course of four months.*" (Final Order at 9 (emphasis in original).) The Board considered Van Ness' failure to provide services to be especially egregious in light of the vulnerable nature of the population served by Van Ness. (Final Order at 9.)

The Board considered itself "duty-bound to impose a disciplinary sanction" based on Van Ness' unprofessional conduct and violation of the Code of Ethics. (Final Order at 9.) In particular, the Board found that the "Code of Ethics, Principle 5, subtitled 'veracity' [struck] at the core of [Van Ness'] misdeeds in this matter." (Final Order at 9.) The Board also found that Van Ness "presented no testimony on her own behalf, but merely demonstrated that she attempted to make monetary restitution of ill[-]gotten gains and sought mental health therapy"

(Final Order at 9.) Thus, “[i]n order to protect the health and safety of consumers of occupational therapy from similar misconduct, to maintain the integrity of the profession, and to impress on [Van Ness] that such misconduct endangers her license to practice as an occupational therapist,” the Board suspended Van Ness’ license to practice occupational therapy for five years. (Final Order at 9.)

Occupational therapists serve an extremely vulnerable segment of our society. Therefore, in order “to protect the public against unprofessional conduct on the part of licensees,” the Code of Ethics requires occupational therapists to “maintain a high standard of integrity and dignity.” 49 Pa. Code § 42.24. Here, it is undisputed that Van Ness intentionally overbilled Provider in violation of the Code of Ethics. Not only did Van Ness commit fraud against Provider, but Van Ness’ actions resulted in fraud against CCIU. While the Board may not have given significant weight to Van Ness’ mitigation efforts, it was not an abuse of discretion to discount these efforts based on Van Ness’ systematic and intentional false overbilling for four months that was motivated purely by greed.

Because Section 16(a)(2) of the Act permits the Board to suspend a license for violating the Code of Ethics, the Board’s determination to suspend Van Ness’ license to practice occupational therapy for five years was neither capricious nor a flagrant abuse of discretion in light of Van Ness’ fraudulent billing and her motivation for such billing. Accordingly, this Court may not substitute its judgment of what is reasonable for that of the Board. Slawek, 586 A.2d at 366.

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ii. The remoteness in time between Van Ness' conduct and her adjudication

Next, Van Ness argues that the Board abused its discretion in imposing the five-year suspension by not considering the passage of time between Van Ness' termination by Provider and the Board's Final Order. Van Ness contends that under Ake v. Bureau of Professional and Occupational Affairs, State Board of Accountancy, 974 A.2d 514, 520 (Pa. Cmwlth. 2009), "the nature of the offending conduct and its remoteness in time must be considered where an agency seeks to revoke a professional license." Van Ness also argues that the Board erred when fashioning the five-year suspension by failing to consider that Van Ness worked continually as an occupational therapist in the time period between her aforementioned conduct and the adjudication without further incident.

This case is distinguishable from Ake where the petitioner, a certified public accountant (CPA), received a criminal harassment conviction in Illinois. Id. at 515. The State Board of Accountancy (Board of Accountancy) initiated an enforcement action against the petitioner due to the conviction. Id. After a hearing, the Board of Accountancy revoked the petitioner's CPA credentials. Id. at 518. On appeal to this Court, we determined "that where 'prior convictions do not in any way reflect upon the [applicant's] present ability to properly discharge the responsibilities required by the position, . . . the convictions cannot provide a basis for the revocation of a . . . license.'" Id. at 520. Thus, we held "that the nature of the offending conduct and its remoteness in time must be considered where an agency seeks to revoke a professional license on the basis of a conviction." Id. Because seven years had elapsed since the conviction, the petitioner did not engage in similar conduct after the arrest, and the harassment

conviction did “not relate to any of the character qualities the legislature [had] identified as central to holding a CPA certificate, *i.e.*, honesty, integrity and being able to practice accounting in a non-negligent manner,” we held that the Board of Accountancy did not have a basis for revoking the petitioner’s license. Id.

Here, unlike Ake, the conduct for which Van Ness was suspended relates directly to the character qualities that are central to holding a license to practice occupational therapy. The Code of Ethics specifically states that occupational therapy “[l]icensees shall refrain from using or participating in the use of any form of communication that contains false, fraudulent, deceptive or unfair statements or claims.” 49 Pa. Code § 42.24(5)(iii). In contrast to Ake, Van Ness’ fraudulent billing reflects directly upon her “ability to properly discharge the responsibilities required by [her] position.” Ake, 974 A.2d at 520. In addition, whereas the Board in Ake imposed the most severe penalty by revoking the petitioner’s license, id. at 515, here the Board has only suspended Van Ness’ license. Finally, although Van Ness argues that she has practiced occupational therapy in the five years after she was terminated by Provider without further incident, the record is devoid of any evidence to support this contention. Therefore, the Board did not abuse its discretion in failing to consider the passage of time between the incident and its Final Order in fashioning Van Ness’ suspension.

b. Whether the Board erred as a matter of law in not following its past decisions and by not following the recommendation of the hearing examiner.

Next, Van Ness argues that the Board erred by not following the hearing examiner’s recommendation that Van Ness’ license to practice occupational therapy be suspended for six months. In recommending a six-month suspension,

the hearing examiner suggested that this penalty was consistent with prior decisions of the Board and cited the Chuk case. Van Ness also faults the Board for not following Chuk, in which the Board imposed a six-month suspension after the licensee committed a fraudulent act.

“While an administrative agency is not bound by the rule of *stare decisis*, an agency does have the obligation to render consistent opinions, and should either follow, distinguish or overrule its own precedent.” Standard Fire Insurance Company v. Insurance Department, 611 A.2d 356, 359 (Pa. Cmwlth. 1992) (citation omitted). Moreover, where a board has acted wholly inconsistently with its prior decisions, we have held that the board’s failure “to either explain, distinguish or overrule its prior decisions . . . *under the identical circumstances* . . . constitute[s] a clear error of law.” Gibson v. Unemployment Compensation Board of Review, 682 A.2d 422, 424 n.7 (Pa. Cmwlth. 1996) (emphasis in original).

Like the present case, in Chuk the Board also suspended an occupational therapist’s license for violating the Code of Ethics. There, the Board found that the licensee violated the Code of Ethics in two separate instances. Chuk, Docket No. 1086-67-01, File No. 01-67-00145, at 8-9. First, the Board found that the licensee recorded on a patient discharge summary that “she had in-serviced the nursing staff on the application, care, and wearing time of a splint device” when she never, in fact, instructed the nursing staff. Id. at 9. Second, the Board found that the licensee forged the signatures of four nursing assistants on a separate patient discharge summary to make it appear as though she had provided in-service instruction to them. Id. Because the licensee violated the Code of Ethics by not

accurately recording and reporting information, and by using communications “contain[ing] false, fraudulent, and deceptive statements,” the Board determined that the licensee was “subject to discipline for unprofessional conduct under [S]ection 16(a)(2) of the Act.” Id. at 9-10. The Board concluded that the licensee’s conduct could either expose patients to harm or impair their treatment and recovery. Id. at 11. Thus, the Board suspended the licensee’s license for six months. Id. at 14.

In the present case the Board distinguished Chuk, stating that Van Ness “engaged in false billing repeatedly over a four[-]month period, purely for greed This is not simply a matter of falsification of a discharge summary or forgery of the signature of another health care practitioner.” (Final Order at 9.) Unlike in Chuk, where the licensee engaged in two discrete instances of unethical and fraudulent conduct, here Van Ness repeatedly engaged in fraudulent behavior over a four-month period. Because repeated fraudulent activity over the course of four months is a more serious violation than two occurrences, the Board adequately explained and distinguished the outcome in this case from that in Chuk. Gibson, 682 A.2d at 424 n.7. Therefore, the Board did not commit an error of law in imposing a five-year suspension rather than a six-month suspension.

Similarly, there was no error by the Board in not following the hearing examiner’s recommendation to suspend Van Ness’ license for six months. Under Section 16(a) of the Act, it is the sole task of the Board to determine what sanction should be imposed; therefore, it was well within the province of the Board to impose a more severe penalty. 63 P.S. § 1516(a).

c. Whether the Board erred in finding that Van Ness' conduct resulted in her students being deprived of occupational therapy services.

Finally, Van Ness argues that there is not substantial evidence to support the Board's finding that Van Ness' conduct deprived her students of necessary treatment. (Final Order at 9.) Van Ness argues that there is nothing in the record to suggest that Van Ness did not provide occupational therapy services, neglected her duties, or that she was incompetent to perform occupational therapy. Van Ness contends that the severity of the Board's punishment resulted, in part, from this erroneous finding of fact.

While there is limited evidence in the record to support a finding that Van Ness' actions deprived students of necessary treatment, as previously demonstrated, it is undisputed that Van Ness violated the Code of Ethics by intentionally falsifying her billing information for four months. Because Van Ness' alleged failure to provide occupational therapy services was not necessary to the Board's determination that Van Ness violated the Code of Ethics, any mistake of fact made by the Board regarding Van Ness' provision of services is harmless error.

III. CONCLUSION

For the foregoing reasons, the Board's Final Order is affirmed.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joann Marie Van Ness, O.T.R/L., :
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 Petitioner :
 :
 v. : No. 558 C.D. 2014
 :
 Bureau of Professional and :
 Occupational Affairs, State Board :
 of Occupational Therapy Education :
 and Licensure, :
 :
 Respondent :

ORDER

NOW, November 6, 2014, the Final Order of the Bureau of Professional and Occupational Affairs, State Board of Occupational Therapy Education and Licensure, entered in the above-captioned matter is **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge