NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 1774

SAMUEL B. HOWELL, PH.D.

VERSUS

LOUISIANA STATE BOARD
OF EXAMINERS OF PSYCHOLOGISTS

Judgment Rendered: March 26, 2008

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Appealed from the
Nineteenth Judicial District Court in and for the
Parish of East Baton Rouge, State of Louisiana
Docket Number 553,133

Honorable Wilson Fields, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

Guidry, J. concurs in the result.

WHIPPLE, J.

The issue presented in this appeal is whether an applicant for licensure is entitled to a hearing prior to denial of a license to practice psychology in the State of Louisiana. The district court determined that such a hearing was necessary and remanded the matter to the Louisiana State Board of Examiners of Psychologists (Board) to conduct a hearing. For the reasons that follow, we reverse the judgment of the trial court and reinstate the decision of the Board.

BACKGROUND

The plaintiff, Samuel B. Howell, has a Ph.D. in psychology and was licensed as a psychologist in the State of Virginia.[1] In August 2000, while he lived in Virginia, Dr. Howell began a relationship with a young man through the Internet. The relationship progressed from Internet chats to telephone calls, and eventually, Dr. Howell and the young man agreed to meet in person in Charlotte, North Carolina, where the young man was to be visiting family.

Dr. Howell was 43 years old at the time he began the relationship, and he allegedly believed the young man to be 18 years old. However, after meeting him, Dr. Howell discovered that the young man was only 14 years old. Nevertheless, Dr. Howell continued to cultivate the relationship with the young man and eventually began a sexual relationship with him. The young man's parents ultimately called law enforcement authorities, and Dr. Howell was arrested during one of his trips to North Carolina. He pled guilty to sexual abuse of a minor[2] and was sentenced to 21 months in federal prison. He also was required to complete three years of probation. After Dr. Howell was convicted of this felony, his license to practice psychology in Virginia was suspended.

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[1]The background information set forth herein was obtained from the report of Dr. William Janzen, upon referral from the U. S. Department of Probation and Parole Service, and other documents appearing of record or released by Dr. Howell in connection with his request for licensure in Louisiana.

[2]In various places throughout the record, the crime also is referred to as statutory rape or interstate commerce with intent to commit sex abuse of a minor.

After he was released from federal prison in 2002, Dr. Howell moved to New Orleans. On January 11, 2005, while he was still on probation for this conviction, Dr. Howell wrote a letter to the Board seeking information concerning the possibility of becoming licensed in the State of Louisiana. At that time, Dr. Howell had never been licensed as a psychologist in the State of Louisiana, and his license in Virginia had been suspended after his conviction. Dr. Howell was advised that he could submit an application, but was specifically informed that no promises would be made concerning the potential for successful licensure. After several months during which Dr. Howell and the Board corresponded, Dr. Howell submitted an application for licensure with the Board on January 3, 2006.

In connection with his application, Dr. Howell also submitted his academic transcripts and various recommendations from other psychologists. These recommendations were generally supportive of Dr. Howell's application; however, they noted the inappropriateness of his relationship with the young man and expressed reservations about Dr. Howell's ability to counsel adolescents. The Board also obtained, with Dr. Howell's permission, a report from Dr. William Janzen, Dr. Howell's treating psychologist. Although generally favorable, Dr. Janzen's report acknowledged that Dr. Howell was still working through the various issues that had led to him becoming involved in the relationship with the young man.[3]

After reviewing all of these documents, the Board denied Dr. Howell's application for licensure as a psychologist in the State of Louisiana. In a letter dated February 12, 2007, the Board specifically stated that it believed that Dr. Howell's prior felony conviction would substantively affect his ability to practice

[3]According to Dr. Janzen, Dr. Howell continues to experience periodic sadness and depression, although he is no longer chronically depressed and despondent. Dr. Janzen further states that Dr. Howell exhibits features of an avoidant personality disorder and opines that Dr. Howell's history of social inhibition and inadequacy probably contributed to his sex offense. Dr. Janzen further acknowledges that some of these feelings continue to persist; however, he asserts that Dr. Howell does not appear to be controlled by these feelings at this time.

psychology. Although this letter referenced only LSA-R.S. 37:2950, the minutes of the Board meeting in which Dr. Howell's application was denied also referenced LSA-R.S. 37:2353, 2356, 2359, and 2950, stating as follows:

> Dr. Howell's application materials were reviewed in conjunction with AG Opinion 06-0194. The Board determined that . . . Dr. Howell was convicted of a felony offense which is directly related to the practice of psychology. By motion . . . and in accordance with the provisions of Louisiana R.S. 37:2353, 2356, 2359, and 2950, the Board, in its discretion, denied his application for licensure as a psychologist in the State of Louisiana.

On March 12, 2007, Dr. Howell filed a petition for judicial review, contending that the Board improperly denied him a hearing prior to denying his application for licensure. In his petition, Dr. Howell asserted that he was entitled to a pre-determination hearing on his application pursuant to LSA-R.S. 37:2359(C), LAC 46:LXIII.1501(A), 1511(A), and 1511(B), and the Louisiana Administrative Procedure Act (APA), LSA-R.S. 49:950, *et seq.* The Board answered the petition and submitted the entire record of the administrative proceeding.[4] After a hearing, the district court determined that the Board had improperly failed to grant Dr. Howell a pre-determination hearing and remanded the matter to the Board to hold such a hearing. Specifically, the district court relied on the Board's Rules for Disciplinary Action, Chapter 15 of LAC 46:LXIII, and LSA-R.S. 49:961(A) in reaching its decision.[5] It is from this judgment that the

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[4]The Board also filed a declinatory exception pleading the objection of lack of subject matter jurisdiction or, in the alternative, a peremptory exception of no cause of action. The trial court denied these exceptions.

[5]Specifically, the district court's judgment stated, in pertinent part:

> IT IS ORDERED, ADJUDGED AND DECREED that, pursuant to La. R.S. 49:961(A), the provisions of the Administrative Procedure Act concerning adjudication apply, and that LAC [46:LXIII], Chapter 15 (Rules for Disciplinary Action) apply and are not exempted by Rule 1501B and that, accordingly, the February 7, 2007 action of the Louisiana State Board of Examiners of Psychologists denying without prior hearing the application of Samuel B. Howell, Ph.D., for licensure as a psychologist in the State of Louisiana, be and is hereby reversed; and the matter is remanded to the Louisiana State Board of Examiners of Psychologists to hold a hearing on the application of Samuel B. Howell, Ph.D., for licensure as a psychologist in the State of Louisiana.

Board has appealed.

DISCUSSION

According to the language of the judgment in this matter, the district court apparently determined that the provisions of the APA concerning adjudications applied, thus entitling Dr. Howell to a pre-determination hearing regarding his application for license. As support for this determination, the district court relied, in part, on LSA-R.S. 49:961(A), which provides, "[w]hen the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of [the APA] concerning adjudication shall apply." In relying on this statute, the district court apparently concluded that LSA-R.S. 49:961(A) **created** a right to a pre-determination hearing. However, it is well-settled that the APA does not create an independent right to a hearing before a state agency can take any action. Rather, the APA merely sets forth the procedures to be followed if a hearing is required by the constitution or the statutory authority under which the agency is acting. See Delta Bank & Trust Company v. Lassiter, 383 So. 2d 330, 333 (La. 1980).

As defined in the APA, an "adjudication" is the agency process for the formulation of a decision or order. LSA-R.S. 49:951(1). A "decision" or "order" is further defined as "the whole or any part of the final disposition ... of any agency, in any matter other than rulemaking, **required by constitution or statute to be determined on the record after notice and opportunity for an agency hearing** ...." (Emphasis added). LSA-R.S. 49:951(3). Therefore, unless there is some provision in the constitution or statutes requiring a hearing, an agency disposition is not a "decision" or "order," and there is no "adjudication" as defined by the APA. Government Computer Sales, Inc. v. State Through Division of Administration, 98-0224, pp. 5-6 (La. App. 1st Cir. 9/25/98), 720 So. 2d 53, 56; see also, Moity v. Firefighters' Retirement System, 2006-0775, pp. 7-8 (La. App.

1st Cir. 3/23/07), 960 So. 2d 158, 163, writ denied, 2007-0829 (La. 6/1/07) 957 So. 2d 183.

A two-part test is applied to determine if an action is a decision or order rendered pursuant to an adjudication, as defined by the APA. Government Computer Sales, 98-0224 at p. 6, 720 So. 2d at 56. The first question is whether the party aggrieved is claiming a constitutionally protected right, such as a liberty or property right. When governmental action deprives a party of such a right, procedural due process applies, encompassing the right to a hearing, notice, record, and judicial review. If, however, no constitutionally vested right is at issue, the second prong of the test requires a determination of whether the legislature, through the pertinent statutes, has deemed the governmental action so important as to require a hearing on the record and notice thereof. Government Computer Sales, 98-0224 at p. 6, 720 So. 2d at 56-57.

Dr. Howell does not contend that any constitutionally protected right is at issue in this matter. Rather Dr. Howell contends that certain statutes, as well as the rules promulgated by the Board, require a hearing before the Board can deny an application for licensure. In support of this argument, Dr. Howell relies on LSA-R.S. 37:2359(C), which provides:

> Proceedings for disciplinary action or for the denial or withholding of a license under the authority of this Section shall be conducted in compliance with the Louisiana Administrative Procedure Act, R.S. 49:950 et seq. The board may require a person against whom disciplinary action has been taken by the board after hearing to pay reasonable costs of the proceedings incurred by the board for hearing and any judicial review, including attorney, stenographer, and witness fees. These costs shall be paid no later than thirty days after the adjudication by the board becomes final. No license shall be issued, reinstated, or renewed until such costs have been paid.

According to Dr. Howell, the requirement that the proceedings for the denial of a license be conducted in compliance with the APA is sufficient to require an adjudication in all cases involving the denial of an application for licensure. This argument is without merit.

As noted above, the APA does not determine when a hearing is required. Instead, it merely establishes certain procedures to be followed in those circumstances in which a hearing is required by constitution or statute. Although LSA-R.S. 37:2359(C) does mention hearings in the context of disciplinary action, "disciplinary action" is distinguished from proceedings resulting in the denial of a license by the use of the disjunctive "or" in the first sentence of the paragraph. Moreover, the "denial" of a license is not referenced at all in the statements concerning hearings. Thus, the statute does not require a hearing prior to the denial of a license under the circumstances of this case.

Dr. Howell next contends that the "Rules for Disciplinary Action" promulgated by the Board require that a hearing be conducted before an applicant is denied a license. Specifically, Dr. Howell refers to Rule 1501(A),[6] which provides:

> These rules shall be applicable to any action of the [Board] to withhold, deny, revoke or suspend any psychologist's license on any of the grounds set forth in R.S. 37:2360 or under any other applicable law, regulation or rule.

We first note that this rule, by its own terms, applies only to the actions taken against a "psychologist's" license. A "psychologist" is statutorily defined in LSA-R.S. 37:2352(6) as "any person licensed as a psychologist under this Chapter." Because Dr. Howell has never been licensed in the state of Louisiana, he does not qualify as a "psychologist" as that term is defined in the statutes. Furthermore, Rule 1501(B) provides:

> These rules shall not be applicable to the licensure of psychologists pursuant to R.S. 37:2356, unless licensure is denied on one of the grounds set forth in R.S. 37:2360.

As Dr. Howell's application was one for initial licensure in this state under LSA-R.S. 37:2356, and his license was not denied on the grounds set forth in LSA-R.S.

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[6] LAC 46:LXIII.1501(A).

37:2360,[7] the Board's "Rules for Disciplinary Action," and any procedures set forth therein, are simply inapplicable.

In an argument apparently accepted by the district court, Dr. Howell contended that the reference to LSA-R.S. 37:2360 in Rule 1501(B) was in error and really should have referred to LSA-R.S. 37:2359. In support of this argument, Dr. Howell referred to the legislative history and disposition tables. According to these documents, the Board's rules were last amended in 1986; however, the statutes that they reference were amended, renumbered, and reenacted in 1987. No additional amendment of the rules ever took place after these statutory amendments. According to Dr. Howell, this is relevant because in 1986, the statute now numbered LSA-R.S. 37:2359 was numbered LSA-R.S. 37:2360. Thus, according to Dr. Howell, all references in the rules to LSA-R.S. 37:2360 should be interpreted to mean LSA-R.S. 37:2359, which would entitle him to a pre-denial hearing. According to Dr. Howell, applying the rule as written would lead to an absurd result, because LSA-R.S. 37:2360 is merely a listing of misdemeanors for which an alleged offender may be tried by the district attorney. The Board counters that to read the rules as suggested by Dr. Howell would totally undermine its rulemaking authority, and would essentially state that the Board has not known what its own rules have said or meant for the last 20 years.

An agency is entitled to great deference in the interpretation of the rules and regulations that it promulgates. See Matter of Recovery I, Inc., 93-0441 (La. App. 1st Cir. 4/8/94), 635 So. 2d 690, 696, writ denied, 94-1232 (La. 7/1/94), 639 So. 2d 1169. Interpreting the Board's rules in light of this standard, we find no absurdity in construing the rule as written. Nothing in LSA-R.S. 37:2360 prevents the provision from serving both as a prohibition of certain criminal activity, as well as grounds for denial of an application for licensure. Indeed, the most logical

[7]As noted above, the record indicates that his license was denied on the basis of LSA-R.S. 37:2353, 2356, 2359, and 2950.

interpretation is that the Board chose to establish a distinction concerning the necessity of a hearing regarding denial of an application for licensure on the ground that the applicant had been convicted of a felony, as in this case, as opposed to a situation in which the applicant had been convicted of a misdemeanor. Accordingly, we find that Dr. Howell was not entitled to a pre-determination hearing concerning his application for initial licensure in the state of Louisiana. Because there was no adjudication by the Board, the judicial review provision of the APA, LSA-R.S. 49:964, was not triggered.

Nevertheless, the right to some judicial review of administrative proceedings is presumed to exist. Moity, 2006-0775 at p. 8, 960 So. 2d at 163. The scope of review of administrative agencies in the performance of a discretionary duty is restricted to whether the agency's action can be deemed to have been unreasonable, arbitrary or capricious, or whether it amounted to an abuse of power. Id.

In creating the Board, the legislature determined that the Board was necessary to safeguard life, health, property, and the public welfare of this state, and in order to protect the people of this state against unauthorized, unqualified, and improper application of psychology. LSA-R.S. 37:2351. Employing the proper standard of review in light of the Board's purpose noted above, we find that the Board acted within its authority and, thus, did not act unreasonably in denying licensure to Dr. Howell based on his conviction of sexual abuse of a minor. Thus, the district court erred in reversing the decision of the Board and in remanding to the Board with the order that the Board hold a hearing.

CONCLUSION

For the above reasons, the July 16, 2007 judgment of the district court is

hereby reversed, and the decision of the Board is reinstated. All costs of this appeal are assessed to appellee, Samuel B. Howell.

REVERSED.