

**MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

LAW DOCKET NO: KEN-23-393

PATRICK GORDON
Appellant

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES
Appellee

*ON APPEAL FROM THE SUPERIOR COURT
FOR KENNEBEC COUNTY*

APPELLANT'S BRIEF

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FACTS AND PROCEDURAL HISTORY

It is undisputed that Attorney Patrick Gordon is a well-respected and distinguished attorney with a lengthy legal career. His career includes serving both as a prosecutor and as a defense attorney. Since 2010, he has been rostered with MCILS and has been practicing in several Courts within the State. *Appendix, at pp. 8-9.* He has been re-approved every year since that time. During those years, he has devoted countless hours serving indigent clients in the State of Maine. His ability to perform his services as an attorney for indigent clients is undisputed in this matter. In fact, during these proceedings, Attorney Gordon continued to service those clients for whom he was appointed to represent prior to his suspension. This case has nothing to do with Attorney Gordon's abilities and qualifications, but rather an arbitrary subjective decision by one individual as to whether Attorney Gordon "complied" with the "investigation" of the Executive Director.

As the result of an email from another MCILS attorney to MCILS, without Attorney Gordon's knowledge, then Interim Executive Director Andrus launched his own investigation into a billing issue for one particular former client of Attorney Gordon's. His previous MCILS voucher related to that client had previously been approved by the MCILS, as had hundreds of others submitted by Attorney Gordon. *See Hearing Exhibit Book, Exhibit 6 pp. 16-17.* It should also be pointed out that MCILS had already investigated Fairfield & Associates, Gordon's

employer, for billing related issues. A fact never acknowledged by MCILS or the Superior Court, as to the bias of the Executive Director in his investigation, despite repeatedly being pointed out by Gordon.

When the Interim Executive Director wrote to Attorney Gordon of his investigation and requested that Attorney Gordon provide a number of responses to his inquiry, Attorney Gordon immediately responded to the Interim Executive Director by email. *Appendix, at pp. 98-99.* He first questioned the procedure and the Interim Director's authority to commence an investigation of him without the full Commission's approval. That inquiry was quite reasonable as the Rules specifically reference the Executive Director, not the Interim Director, and provide no guidance to an attorney on how he/she could comply with an "investigation to the satisfaction of the Executive Director." In response, the Interim Director simply told Attorney Gordon he was fully authorized to conduct the investigation. It would have been a very simple task for the Interim Director to ask the Commission Chair for a quick letter indicating that he had the same authority as a full time Executive Director and setting forth how Attorney Gordon could comply to the "satisfaction of the Executive Director." Again, it was completely reasonable for Attorney Gordon to question the Interim Director's authority and the procedure. As is evident throughout all of the communications between the Interim Director and Attorney Gordon and his attorneys, Attorney Gordon was also

reasonably concerned about his duties under the Maine Rules of Professional Conduct.

Along those same lines, attempting to determine whether providing the requested information would run afoul of the Maine Rules of Professional Conduct, Attorney Gordon simply requested the Interim Director to inform him of the allegations and, more importantly, of the specific information the Interim Director wanted. *Appendix, at p. 95.* Again, the Interim Director refused to provide him with any specific information to allow Attorney Gordon to determine whether he could comply with both the request and his obligations under the Rules of Professional Conduct. Attorney Gordon's initial response says it all: "I am more than willing to respond to your questions I believe do not implicate confidential, privileged information." *Id., at p. 98.* Further, Attorney Gordon's attorney wrote to the Interim Director on May 13, 2021, again confirming that Attorney Gordon was "...not being difficult. Rather, he is trying to balance the various rules of confidence and complying with legitimate requests." *Id., at p. 116.*

With regard to providing responses to the Interim Director's specific inquiries:

1. Request number 1:

Attorney Gordon maintained he had no access to his MCILS voucher on Defender, which the Interim Director confirmed as true. Concerning

whatever other material the Interim Executive Director requested, Attorney Gordon was unable to comply without clarification and indicated that Bar Counsel advised him he could potentially violate the Rules of Professional Conduct by providing everything requested.¹ Despite Attorney Andrus testimony at the hearing that the Rules can only be interpreted correctly one way, clearly anyone who has contacted Bar Counsel knows that even Bar Counsel can see different interpretations of the Rules under particular circumstances. Also, Attorney Gordon's file likely left with the attorney that left the firm where Attorney Gordon was employed and took the client and file with her, making him unable to provide the same. He indicated that he made every attempt to locate the file, with no success. *Id., at p. 98-99.*

2. With regard to the second inquiry, Attorney Gordon responded:

“In response to your second inquiry, I am unaware of services performed by paralegals and billed to MCLIS as having been performed by attorneys. I did note a billing entry by our former office manager that attributed the time to Attorney Shea. But, that seems to be time performed by the attorney that was only entered by the staff person. I am unclear if that is that is the issue to

¹ The Executive Director relied on the MCILS rule that allows the Commission to request confidential and privileged material, but undersigned suggests that no reasonable attorney weighing his law license against a Commission investigation would provide information that Bar Counsel says could jeopardize his/her license.

which you refer. I believe every one of my time entries was performed by me. **If there are specific time entries you question**, please let me know and I will investigate them further.” (*emphasis added*). *Id.*

Again, no response to this from the Interim Director. Attorney Gordon adequately responded to this request.

3. Attorney Gordon’s response to number 3:

“In response to your third inquiry, this was a bench trial. I do not know the voucher note to which you refer and again you have refused to provide any information. If you read my time entries, I never mention a jury trial. I simply refer to the matter as a trial. It was, in fact, a multiple day bench trial. I did see an entry where it appears one of my staff entered a calendar notification received from the court referencing a jury trial. However, my belief is that was simply entering a notification from the court. **Again, if there is something specific to which you refer, please provide me with that and I will research the issue further.**” (*emphasis added*). *Id.*

Again, no response from the Interim Director. Attorney Gordon adequately responded to this request.

4. Attorney Gordon’s response to number 4:

“In response to your final inquiry, I am not sure exactly of all the dates I met with [client]. This case is five years old at this point, and quite frankly, I

rarely entered all of my billing time, which has probably saved the Commission and the State thousands of dollars throughout the years. To the best of my recollection and trying to put this together from billing and other documents, I believe I met with [client] on 1/8/16, 3/18/16, 5/11/16, and 7/18/16 in Superior Court in Alfred, Maine (this does not include dates immediately before trial, trial and sentencing). I also know I met with [client] on several occasions at the York County Jail. I believe 2 of those dates to be 2/25/16 and 8/17/16. I also specifically remembering meeting with [client] on 2 other occasions right before trial at the York County Jail, but I do not know the dates.” *Id.*

Again, fully answered by Attorney Gordon and any attorney who does court appointed work and has a large caseload knows that not all billable entries get entered and billed, as Attorney Gordon referenced.

Despite providing these responses, Attorney Gordon goes on:

“I am certainly willing to provide whatever further information I can. If you can be more specific with your requests, that would be helpful. Further, if the question of the nature of this investigation and your role is made clear, then I would be willing to provide further documentation.” (*emphasis added*). *Id.*

On June 14, 2021, Attorney Gordon's attorney wrote to the Interim Director indicating that Attorney Gordon believed he had complied with the four inquiries made by the Interim Director and stated: "If there is additional information needed, please advise accordingly." *Id.*, at pp. 124-25. He then went on to address the three additional questions posed by the Interim Director:

"Regarding question five, Attorney Gordon does not have access to the MCILS voucher he submitted. He does have access to his internal billing notes. **He can provide additional detail if that is required** based upon the actual voucher. (*emphasis added*). Would it make sense to have a conference call to go over the voucher?" *Id.* No such conference occurred and the Executive Director had no recollection as to why he did not take Attorney Gordon up on this offer.

"Regarding question six, Attorney Gordon does not know what happened to the file. There is a possibility the file left the office with [another attorney], as she worked on the appeal in this matter." *Id.* The Executive Director acknowledged this happens when new attorneys are assigned to a case.

"Regarding question seven, Attorney Gordon initially did not realize [post conviction attorney] wanted the other [client] file. He reached out to her via email to inquire as to what she needed. When it became clear to my client she wanted the other files as well, he provided them to her." *Id.*

Again, Attorney Gordon individually, and through counsel, addressed or made every effort to address each one of the Interim Director's questions and offered to provide more assistance if the Interim Director clarified what Attorney Gordon was failing to provide, but that never happened.

During every step of the investigation Attorney Gordon was willing to provide further information and comply with the investigation, but the Interim Director refused to confirm his authorization to pursue the investigation or to tell him what he was lacking other than to just say it was not adequate. Again, it is important to note, that the Executive Director went to great lengths at the hearing to establish that he had authority to conduct the investigation. The issue is not whether he was in fact authorized, but rather whether Attorney Gordon reasonably questioned his authority and whether the Interim Director could have easily provided the answer.

Further, through two different attorneys, Attorney Gordon offered to sit down with the Interim Director to address his concerns. However, on both occasions, that never occurred. Again, the first offer occurred in June of 2021, for which the Executive Director could provide no explanation for not taking Attorney Gordon up on his offer. For the second offer, the Executive Director claimed that a lawsuit against Attorney Gordon's employer prohibited such a meeting. It is hard

to imagine how much more Attorney Gordon could have done than to make attempts to address the Director's concerns.

Further, at all times relevant to this case and this appeal, Attorney Gordon was an employee of Fairfield & Associates. He was never a partner. Consequently, all files, paper and digital, were, and are, the property of Fairfield & Associates. Attorney Gordon could not remove those files without the permission of Fairfield & Associates. Attorney Gordon was never court ordered to remove files as part of this matter. In fact, if Attorney Gordon had removed any files without the permission of Fairfield & Associates, he would have been committing theft pursuant to 17-A M.R.S. Section 353." Despite all of the arguments to this effect, neither the Commission nor the court even commented on this significant issue.

The Interim Director's conclusion that Attorney Gordon's responses were not adequate is subjective and is not conclusive of whether Attorney Gordon "complied" with the investigation. Attorney Gordon attempted to provide everything he could without violating the Rules of Professional Conduct, but instead of telling him specifically what he wanted, the Interim Director played a game of "cat and mouse" and then concluded Attorney Gordon had not "adequately" complied with his vague requests and that his responses were incomplete and/or unsatisfactory. *See Appendix, at pp. (2-3 court decision)*

Attorney Gordon filed a timely Rule 80C appeal of the Commission's decision to uphold the Executive Director's decision. *See Docket Record, at p. 1.* Attorney Gordon then filed a timely appeal of the Court's decision to uphold the agency decision. *Id., at p. 2.*

ISSUES PRESENTED

- I. Whether the Court abused its discretion in upholding the MCILS decision to suspend Attorney Gordon from the MCILS active rosters or made findings supported by the evidence.**
- II. Whether the Court erred in its legal conclusions.**

SUMMARY OF THE ARGUMENT

The MCILS decision suspending Attorney Gordon from the court appointed rosters was made upon unlawful procedure, affected by bias or by error of law, unsupported by substantial evidence on the whole record, and/or arbitrary or capricious or characterized by abuse of discretion.

The MCILS had no set standards or procedure for the Executive Director to make a subjective determination whether Attorney Gordon, complied with his investigation to "his" satisfaction. The process was completely arbitrary and affected by the bias of the Executive Director.

ARGUMENT

Standard of Review

When the Superior Court acts in an intermediate appellate capacity pursuant to M.R. Civ. P. 80C, the Law Court reviews the administrative agency's decision directly for an abuse of discretion, error of law, or findings not supported by the evidence. *See Rangeley Crossroads Coal. v. Land Use Regul. Comm'n*, 2008 ME 115, ¶10, 955 A.2d 223, 227. The Law Court reviews questions of law regarding administrative appeals de novo. *See Doane v. HHS*, 2021 ME 28, ¶16, 250 A.3d 1101, 1108

The Law Court will also not set aside an agency's interpretation of its own internal rules, regulations, or procedures unless the rules or regulations plainly compel a contrary result. *Rangeley Crossroads Coal.*, 2008 ME at ¶10, 955 A.2d at 227. However, an agency's interpretation will not be upheld if it is contradicted by the language and purpose of a statute. *Id.*

Agency rulings may be reversed or modified on an 80C appeal upon a finding that the administrative ruling is: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by bias or by error of law; (5) unsupported by substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion. *See* 5 M.R.S.A. § 11007(4)(C)(1)-(6).

I. Whether the Court abused its discretion in upholding the MCILS decision to suspend Attorney Gordon from the MCILS active rosters.

As the decision of the Kennebec County Superior Court shows, Attorney Gordon's suspension was the result of an arbitrary and subjective decision by the Interim Executive Director, based on his conclusion that Gordon's response to his "investigation" was incomplete and/or unsatisfactory.

As stated above, an agency's ruling may be overruled or modified upon a finding that the administrative ruling is, among other things, made upon unlawful procedure, affected by bias or by error of law, unsupported by substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion.

In this case, the administrative record made clear that the Interim Executive Director, created his own arbitrary, and unlawful, procedure for deciding whether Attorney Gordon, or other similarly situated attorneys, complied with his so called "broad investigatory authority." The MCILS had no set procedure for compliance with the Interim Executive Director's demands and there were no objective standards for determining whether Attorney Gordon, or other attorneys, complied with whatever procedure the then Interim Executive Director decided to engage in. In fact, there was no procedure at all, leaving it entirely up to the Interim Executive

Director to create his own rules and procedure. The record clearly establishes that Attorney Gordon went out of his way to try and comply with the demands of the Interim Executive Director, acting with no direct authority from the Commission itself. His attorneys even sent two separate invitations to the Interim Executive Director to sit down and have a meeting to discuss exactly what Attorney Gordon needed to do to pacify the Interim Executive Director. Instead of making it clear, the Interim Executive Director simply did not meet with Attorney Gordon and counsel, leaving everyone in a guessing game. The factual findings to support the MCILS decision to suspend Attorney Gordon are simply not supported by the record, and, in fact, are just the contrary. Attorney Gordon made every effort to comply with the wishes of the Interim Executive Director.

Further, for some reason, the MCILS had a particular bias against Mr. Gordon's employer, Fairfield & Associates and, in fact, launched a lawsuit against that firm. The Interim Executive Director and MCILS already had a bias against Attorney Gordon for his association with Fairfield, which caused them to treat him differently in the investigation.

Finally, the MCILS' decision was completely arbitrary, as there was no set standard for determining compliance with the Interim Executive Director's demands. It was completely fair for Attorney Gordon to request what authority the Interim Executive Director was acting under and what procedures were to be

followed. In fact, Attorney Gordon requested two separate meetings to address the concerns, but the Interim Executive Director testified that he did not know why the first one did not happen and then admitted that he had a conflict of interest in the ongoing investigation of Attorney Gordon, due to MCILS lawsuit against Fairfield and that he would not meet because of that fact. The Court's footnote 2 on page 4 of the decision says exactly how arbitrary the MCILS decision was: "Additionally, the Commission stated that if Attorney Gordon complied with MCILS' request, **to the satisfaction of the Executive Director**, then Gordon could apply for reinstatement pending any further investigation." (*emphasis added*).

Because the factual evidence showed that Attorney Gordon tried to comply with the Director's demands, the Director refused to meet with him and refused to clarify what exactly Attorney Gordon needed to do or what the investigation was about, and that the process was completely arbitrary and biased, the Court abused its discretion in upholding the MCILS decision.

II. Whether the Court erred in its legal conclusions.

As outlined above, the Court failed to apply the legal principles that must be applied to review of an agency action. Appellant has set forth how the Court failed to apply the facts to the legal analysis that the Court may overturn an agency decision if one of the six factors listed in 5 M.R.S.A. § 11007(4)(C)(1)-(6) exist.

The Court upholding the decision of the Commission that if Attorney Gordon complied with MCILS' request, to the satisfaction of the Executive Director, then Gordon could apply for reinstatement pending any further investigation, is wrong in that it provides arbitrary decision making with no set standards by the Commission, other than the subjective belief of the Executive Director on compliance. That formula is not only arbitrary, but also lends itself to bias in the decision making. There are apparently no checks and balances and no objective criteria as to how one complies with one person's (Executive Director) determination of what is compliance and what is not. The Commission's decision that it was not up to them whether there was compliance, but rather entirely up to the subjective belief of the Executive Director, cannot withstand scrutiny under 5 M.R.S.A. § 11007(4)(C)(1)-(6).

CONCLUSION

Because the Commission's decision to uphold the Executive Director's decision was made upon unlawful procedure, affected by bias or by error of law, unsupported by substantial evidence on the whole record, and/or arbitrary or capricious or characterized by abuse of discretion, the Superior Court abused its discretion and this Court should vacate the judgment.

Date: January 9, 2024

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CERTIFICATE OF SERVICE

I, Verne E. Paradie, Jr. hereby certify that I have forwarded two copies of Appellant’s brief via first class United States Mail to the following individuals:

Aaron Frey, AG

Date: January 10, 2024

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