RENDERED: July 2, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003329-MR

KENNETH R. ESTES (DMD) APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 97-CI-000785

KENTUCKY BOARD OF DENTISTRY APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Kenneth R. Estes, D.M.D. (Dr. Estes) appeals from an order of the Jefferson Circuit Court entered on November 26, 1997, which affirmed an order of the Kentucky Board of Dentistry (the Board) which temporarily suspended his license to practice dentistry. We affirm.

On April 17, 1996, the Board issued a three-count accusation against Dr. Estes seeking disciplinary action for gross ignorance or inefficiency in the profession. Specifically, the accusation alleged that Dr. Estes rendered improper treatment to Sabrina Anderson (Anderson) and Deborah Farley (Farley). A formal administrative hearing on the board's accusations was

conducted. Based on the evidence produced at the hearing, the Board found that Dr. Estes improperly treated Anderson and Farley. The Board ordered that Dr. Estes' license be suspended for one year on both counts. Under the terms of the order, the first 30 days of each sentence were to be effective immediately and the remaining eleven months were probated. The sentences were to run concurrently. The Board's order was subsequently affirmed by the Jefferson Circuit Court and this appeal followed.

Before addressing the merits of Dr. Estes' appeal, a brief review of the standard of review is in order. Our chief concern in reviewing administrative actions is the question of arbitrariness. Kentucky Board of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642 (1994). In determining whether an agency's action is arbitrary we look at three considerations:

> (1) was the agency's action within the scope of its granted powers; (2) did the agency provide procedural due process; and (3) was the agency's decision supported by substantial evidence.

Commonwealth, Revenue Cabinet v. Liberty National Bank of Lexington, Ky. App., 858 S.W.2d 199, 201 (1993). In reviewing questions of fact, we will not reverse an agency's findings unless they are not supported by substantial evidence. Commonwealth, Cabinet for Human Resources, Interim Office of Health Planning and Certification v. Jewish Hospital Healthcare Services, Inc., Ky. App., 932 S.W.2d 388, 390 (1996). In order to reverse, the appellant must bring forth evidence of the type which compels a decision in his favor. Mill Street Church of Christ v. Hogan, Ky. App., 785 S.W.2d 263, 266 (1990). However,

because statutory construction is a question of fact, an agency's interpretation of regulations or statutory law is not binding on this Court. Jewish Hospital, 932 S.W.2d at 390.

> I. WAS DR. ESTES DENIED DUE PROCESS OF LAW WHEN RECUSED BOARD MEMBERS PARTICIPATED IN THE HEARING PROCESS?

At the outset of the hearing, it was announced that Dr. Bill Smith and Dr. Dan Clagett would be recused from sitting on the Board because they were members of the Board's law enforcement committee and had participated in the initial investigation of Dr. Estes. It was also announced that Dr. Stephen Schuler had recused himself because he practices in the same city as Dr. Estes.

Over Dr. Estes' objection, Dr. Smith was allowed to assist Board counsel during the hearing. At the close of evidence, Dr. Estes' attorney read the following stipulation into the record:

> During the course of the hearing, the hearing involving Dr. Estes on September 14, 1996, Drs. Schuler and Dr. Clagett at different points in the proceeding, in writing and orally, approached counsel for the Board for purposes of giving questions to be used during [Board counsel's] examination of the witnesses at the hearing.
>
> Furthermore, we're stipulating that during a recess the hearing examiner directed Doctor Clagett to speak to [Board counsel] regarding procedure of the case.

Counsel for Dr. Estes then moved that the proceedings be dismissed "based on a violation of the regulations regarding who can participate in this administrative proceeding or a violation

of due process rights which are--which belong to Dr. Estes." The motion was denied.

Dr. Estes argues that the indirect participation of the recused Board members violated 201 KAR 8:410 Section 2 and 201 KAR 8:400 Section 5. As to Dr. Estes' argument concerning 201 KAR 8:410 Section 2, that particular provision provides "a board member who has participated in the investigation of a disciplinary action...will not sit as a member of the board hearing that particular action." This argument is without merit as there is no evidence which shows that any of the recused Board members directly participated in the hearing or rendering of the judgment.

Under 201 KAR 8:400 Section 5, "any board member who participated in the preliminary investigations shall not participate in the hearing process." Dr. Estes maintains that by participating indirectly through advising Board counsel and by providing Board counsel with questions to ask witnesses, the recused Board members participated in the hearing process and thus violated 201 KAR 8:400 Section 5.

We agree with the trial court that Dr. Estes places too much emphasis on the word "process." As the trial court noted, "[t]he Board members in question did not "hear" evidence, rather, they continued the process initiated by their investigation by assisting the Board's counsel." As such, Dr. Smith, Dr. Clagett and Dr. Schuler were serving in much the same capacity as co-counsel or other legal assistants in aiding lead counsel at trial. Had the recused Board members acted to directly question

witnesses, or to make arguments directly to the sitting Board members, we may have been persuaded otherwise.

II. WAS IT IMPROPER FOR THE HEARING OFFICER TO PERMIT DEBORAH FARLEY TO TESTIFY VIA SPEAKER PHONE?

Shortly after filing her complaint against Dr. Estes, Farley moved to Florida. When Board counsel sought to allow Farley to testify by speaker phone on July 13, 1996, the first day of the hearing, Dr. Estes objected. Dr. Estes argued that Board counsel had plenty of time to depose Farley and present a transcript in lieu of live testimony prior to the hearing. Despite Dr. Estes' objection, the Board voted to allow the testimony.

Because of time constraints, Farley was not able to testify on the first day of the hearing. On the second day of the hearing, September 14, 1996, Board counsel again sought to introduce her testimony via speaker phone. Dr. Estes objected, and again argued that the Board had taken no steps to obtain Farley's testimony since July. The Board again voted to allow the testimony.

Dr. Estes maintains that Farley's speaker phone testimony was improper on two grounds: (1) he was not able to confront her face to face, and (2) there was no way to insure that the person testifying was Farley. Dr. Estes also maintains that it was improper for Farley to be sworn to testify by a court reporter who was not in her presence.

We agree with Dr. Estes that Farley's testimony should not have been admitted as she was not properly sworn. As Farley

was testifying via speaker phone, there was no way to visually verify that she was who she claimed to be.

However, we also agree with the trial court's conclusion that allowing Farley to testify was merely harmless error. As the trial court found:

> even discounting the testimony of Ms. Farley...there is ample evidence in the record to support her claim of injury. The photographs and medical records from St. Luke's Hospital were sufficient bases for concluding that she suffered an injury at the hands of appellant.

We have reviewed Farley's complaint submitted to the Board with the accompanying photographs, the medical records, and the other testimony presented in conjunction with Farley's claim. Having done so, we believe that there was sufficient evidence aside from Farley's testimony to permit the proceedings to continue.

> III. WAS IT IMPROPER FOR THE HEARING OFFICER TO ALLOW PHOTOGRAPHS PURPORTED TO BE OF DEBORAH FARLEY INTO EVIDENCE?

When Farley submitted her written complaint to the Board, she included three color photographs of a woman with a large bruise on her chin area. Gary Muncie, executive director of the Board, testified that the three photographs were included with the complaint and were subsequently placed in the complaint file. The hearing officer allowed the photographs to be introduced into evidence over Dr. Estes' objection, stating:

> I think there has been sufficient authentication that they come [sic] in as party of the business, as part of his duties as director. He receives, so I think that is sufficient authentication.

The hearing officer then decided to admit Farley's complaint as Exhibit 23 with the photographs marked as A, B, and C to that exhibit.

Dr. Estes maintains that the photographs were improperly admitted because the Board counsel failed to lay a proper foundation and because they were not properly authenticated. We disagree. Under 201 KAR 8:410:

> The tribunal shall not be bound by the technical rules of evidence. Subject to the discretion of the board or the hearing officer, the tribunal may receive any evidence which it considers to be reliable[.]... Documentary evidence may be admitted in the form of copies or excerpts, and need be authenticated only to the extent that the tribunal is satisfied of its genuineness and accuracy. Tangible items may be received into evidence without the necessity of establishing a technical legal chain of custody so long as the board is satisfied that the item is what is represented to be[.]

We do not believe that the hearing officer abused his discretion in admitting the photographs. Even if the pictures were inadmissible, there was still enough evidence in the record to allow the proceedings to continue.

> IV. DID THE TRIAL COURT ERR IN FINDING THAT THE BOARD'S CONCLUSIONS REGARDING ANDERSON AND FARLEY WERE SUPPORTED BY SUBSTANTIAL EVIDENCE?

Dr. Estes argues that the Board's findings concerning his treatment of Anderson and Farley were not supported by substantial evidence. Having reviewed the three volume transcript of the hearing and the exhibits thereto, we find Dr. Estes has failed to show that he produced evidence which compels a finding in his favor.

V. WERE THE BOARD'S FINDINGS CONCERNING ANDERSON SUPPORTED BY EXPERT TESTIMONY?

In regard to Anderson, the Board found:

> From the facts found above, it is the Board's determination that while Respondent's contract was to treat Anderson over a period of 36 months, he voluntarily agreed to continue treatment beyond this period. As such, he had a continuing duty to ensure that Anderson would receive quality treatment consistent with reasonable dental practice. The evidence does not support sufficient cause to extend Anderson's treatment to 5 ½ years, and it does not serve to excuse the fact that, in November 1995, when treatment was discontinued, Anderson still had approximately 16 - 18 months of treatment awaiting her before it could be considered completed.
>
> ...
>
> From the entire record presented, the Board concludes that Respondent inappropriately treated Sabrina Anderson by using an extraordinary long treatment time in excess of 5 years, from 7/9/90 - 11/8/95, to render orthodontic dental treatment, in violation of Count II of the Accusation, and that such conduct violates the provisions of KRS 313.130(3) by constituting unprofessional conduct, gross ignorance and inefficiency in the profession.

Dr. Estes contends that the Board's determination that Anderson's treatment time was extraordinarily long is not supported by expert testimony. We disagree.

Dr. Timothy Perkins (Dr. Perkins), an orthodontist, testified before the Board concerning Dr. Estes' treatment of Anderson. According to Dr. Perkins, he saw Anderson on January 25, 1996. On that date, he took an oral history from Anderson and her mother, examined Anderson, took several x-rays, and made molds of her mouth. His examination of Anderson showed

that several teeth had no braces and a lower arch wire was missing. Dr. Perkins also found that several teeth were misaligned and certain braces were either misaligned or missing entirely. He felt that Anderson's dental hygiene was fairly good, and further characterized it as average for a person her age. Anderson told him that she began treatment with Dr. Estes in 1990.

Dr. Perkins testified that his review of the x-rays he took showed a Class I skeletal malocclusion. In regard to the length of treatment, Dr. Perkins testified:

> Q. Now, with all of that being the facts that you found in January, do you have an opinion just as to whether this person needed further orthodontic treatment?
>
> A. Yes.
>
> Q. And could you say within a reasonable degree of dental certainty if you're talking about months of treatment or years of treatment for those teeth to be into more of a normal condition?
>
> A. I would estimate that it would take approximately 16, 18 months to correct the situation.
>
> Q. Now, is that an unusual length of time for some patients who present with those facial and dental features?
>
> A. No. That would be maybe two years with these same features, but since some of the alignment has already been done, 18 months would be probably an accurate time frame.

Based on Dr. Perkins' testimony that Anderson would require an additional 1 ½ years of treatment on top of the five

years she had already undergone, we do not believe that the Board's findings are unsupported by expert testimony.

IV. IS KRS 313.130(3) CONSTITUTIONAL?

Under KRS 313.130(3), the Board can take disciplinary action against any dentist for:

> Unprofessional conduct, gross ignorance, or inefficiency in his profession or failure to accumulate a sufficient number of points for continuing dental education[.]

Dr. Estes maintains that KRS 313.130(3) is unconstitutional because it does not give sufficient notice of the type of behavior proscribed. We disagree.

"A statute is impermissibly vague when a person disposed to obey the law cannot determine with reasonable certainty what conduct is prohibited." Craig v. Kentucky State Board for Elementary and Secondary Education, Ky. App., 902 S.W.2d 264, 268 (1995). However, "not all statutes which a reviewing court determines could have been drafted with greater precision are void-for-vagueness if the law provides sufficient warning to persons about what conduct is prohibited." Caretenders, Inc. v. Commonwealth, Ky., 821 S.W.2d 83, 87 (1991). Caretenders also recognized that it is not necessary for a statute to describe every way a violation could conceivably occur in order to withstand a challenge for vagueness. Caretenders, 821 S.W.2d at 88.

Dr. Estes' argument in this regard is similar to the argument made in Auxier v. Commonwealth, Board of Embalmers & Funeral Directors, Ky. App., 553 S.W.2d 286 (1977). In Auxier, the statute at issue provided that a funeral director's license

could be revoked for offering "any service which is not a normal function of a licensed funeral director or embalmer in a regular service." Auxier, 553 S.W.2d at 287. The appellant argued that the statute was overbroad because no definition was given for "normal function" and "regular service." In upholding the statute, the Court held:

> It is true that the words "normal" and "regular", standing alone, have very little meaning. However they are not standing alone; they are an integral part of the provision. Kentucky courts have long taken the position that the courts will "draw all inferences and implications from the act as a whole and thereby, if possible, sustain the validity of the act." Folks v. Barren County, 313 Ky. 515, 232 S.W.2d 1010, 1013 (1950). Id. at 1013, the court stated: "Where the lawmaking body, in framing the law, has not expressed its intent intelligibly, or in language that the people upon whom it is designed to operate or whom it affects can understand...the statute will be declared to be inoperative and void." [Emphasis ours.] There can be no doubt that the licensed embalmers and funeral directors are well aware of what constitutes the normal functions and regular services of their profession. Appellant even admits his action was not normal or regular. We, therefore, find that KRS 316.150(2) is not unconstitutionally vague or overbroad.

Id. at 335.336. Like Auxier, we believe that there can be no doubt that licensed dentists are well aware of what constitutes unprofessional conduct, gross negligence, or inefficiency in the profession. Furthermore, as the Commonwealth points out, similar statutes governing other professions have been upheld. See Nicholson v. Judicial Retirement & Removal Commission, Ky., 562 S.W.2d 306 (1978) (holding that "good cause" is not overbroad);

Kentucky Bar Association v. Kramer, Ky., 555 S.W.2d 245 (1977); Kentucky Bar Association v. Ricketts, Ky., 599 S.W.2d 454 (1980).

Having considered the parties' arguments on appeal, the order of the Jefferson Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS AND FURNISHES SEPARATE OPINION.

McANULTY, JUDGE, DISSENTING: Respectfully, I dissent. The trial court believed that appellant placed too much emphasis on the word "process." It is abundantly clear that the word process must be read together with the word preceding it, "hearing". Certainly, the indirect participation by the "recused" board members is exactly what the regulation sought to prohibit. By permitting the "recused" board members to do indirectly what they could not do directly eviscerates the regulation. I would remand the matter to the Board with instructions to appoint special board members, if necessary, thereby affording appellant a fair hearing in compliance with 201 KAR 8:400, § 5.

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