

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001344-MR

WILLIAM A. PHILLIPS, D.M.D., J.D.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN MERSHON, JUDGE
ACTION NO. 97-CI-02709

GARY MUNSIE AND
KENTUCKY BOARD OF DENTISTRY

APPELLEES

AND

NO. 1998-CA-001407-MR

WILLIAM A. PHILLIPS, D.M.D.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 97-CI-05965

KENTUCKY BOARD OF DENTISTRY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: HUDDLESTON, JOHNSON, AND KNOFF, JUDGES.

KNOFF, JUDGE. Appellant, Dr. William A. Phillips, appeals from the following two (2) orders of the Jefferson Circuit Court: (1) the order entered on May 28, 1997, which denied appellant injunctive relief and dismissed his declaratory judgment action for failure to exhaust administrative remedies; and (2) the order entered on May 5, 1998, which found that the Kentucky Board of Dentistry's (the Board) final order was supported by substantial evidence and that 201 KAR 8:430, section 2(8) was constitutional.

On March 6, 1997, the Board issued an accusation against appellant alleging that he had violated KRS 313.130, KRS 313.140 and 201 KAR 8:430, section 2(8) by recommending dental services without justification. Prior to an administrative hearing, appellant filed a complaint in Jefferson Circuit Court seeking to enjoin the Board from proceeding with the disciplinary hearing and requesting the court to declare 201 KAR 8:430, section 2(8) unconstitutional. On May 28, 1997, the circuit court denied injunctive relief and dismissed the action for failure to exhaust administrative remedies. Appellant appealed to this court and filed a motion for emergency and intermediate relief. Appellant's motion for emergency relief was denied on July 10, 1997, and intermediate relief was denied on July 29, 1997. The appeal then proceeded in case NO. 1997-CA-001344.

On July 11, 1997, an administrative hearing was conducted by a panel of the Board, which found appellant had

violated KRS 313.130(3) and 201 KAR 8:430 § 2(8) and recommended a three (3) month suspension. Enforcement of the suspension was stayed, and appellant's license was placed on probation. The hearing panel's findings of fact, conclusions of law, and recommended order was adopted by the Board as its final order. Appellant appealed the final order to the Jefferson Circuit Court. On May 5, 1997, the circuit court found 201 KAR 8:430 § 2(8) was constitutional and there was substantial evidence to support the Board's final order. Appellant appealed to this court in case NO. 1998-CA-001407. Appeals NO.1998-CA-001407 and NO.1997-CA-001344 have been consolidated for our review.

By virtue of KRS 313.150(1), the Board has the power to conduct administrative hearings and to sanction dentists in various ways, from reprimand to suspension or revocation of a dentist's license. The administrative hearings are conducted in accordance with KRS Chapter 13B. KRS 313.150(2). The standard of review for a final order of the Board is found in KRS 13B.150(2):

The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Without support of substantial evidence on the whole record;
- (d) Arbitrary, capricious, or characterized by abuse of discretion;
- (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;

(f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2);
or
(g) Deficient as otherwise provided by law.

On appeal, appellant argues (1) that the Board exceeded its authority when it promulgated 201 KAR 8:430, section 2(8); (2) that the regulation is unconstitutionally vague and ambiguous; and (3) that the Board's final order is not supported by substantial evidence.

Appellant contends that the Board was prohibited from enacting 201 KAR 8:430 because the legislature expressly reserved the authority to define "unprofessional conduct" in KRS 313.140. We note that the list of acts declared to be "unprofessional conduct" in KRS 313.140 are prefaced by the statement: "[u]nprofessional conduct includes, but is not limited to, the following acts" This clearly demonstrates the legislature's intent to provide an illustrative rather than an exclusive list of acts. Appellant's contention that the legislature reserved exclusive authority to define "unprofessional conduct" is without merit and ignores the plain meaning of the language within KRS 313.140.

Pursuant to KRS 313.220, the Board is authorized to promulgate administrative regulations pertaining to the practice of dentistry. An administrative body shall not modify or vitiate a

statute through administrative regulations, and any regulation which does so is void. KRS 13A.120(2). An administrative body shall not expand upon or limit a statute through internal policy, memorandum, or other form of action. KRS 13A.130. While 201 KAR 8:430 does provide more specific definitions of "unprofessional conduct" than those found in KRS 313.140, it does not modify or vitiate KRS 313.130(3) or KRS 313.140.

Appellant next argues that 201 KAR 8:430 § 2(8) is unconstitutionally vague and ambiguous. "In the construction of administrative regulations, we [the courts] are governed by the same rules which would apply in construing statutes in the same field." Louisville Edible Oil Products, Inc. v. Revenue Cabinet, Ky. App., 957 S.W.2d 272, 274 (quoting Revenue Cabinet v. Joy Technologies, Inc., Ky. App., 838 S.W.2d 406, 409 (1992)). Statutes are to be construed so as to preserve their constitutionality wherever possible. Revenue Cabinet v. Joy Technologies, Inc., Ky. App., 838 S.W.2d 406 (1992). Two (2) general principles underlying our standard of review for vagueness are: "[f]irst, a statute is impermissibly vague if it does not place someone to whom it applies on actual notice as to what conduct is prohibited; and second, a statute is impermissibly vague if it is written in a manner that encourages arbitrary and discriminatory

enforcement." State Board for Elementary and Secondary Education v. Howard, Ky., 834 S.W.2d 657, 662 (1992) (citing Musselman v. Commonwealth, Ky., 705 S.W.2d 476 (1986)).

201 KAR 8:430, section 2(8) states that a licensee shall be guilty of "unprofessional conduct" if the licensee "[p]rovides or recommends dental services without justification." Appellant contends that the phrase "without justification" is susceptible to endless interpretation, preventing any actual notice of what conduct it proscribes and encouraging arbitrary enforcement. We find that 201 KAR 8:430, section 2(8) is not void for vagueness or ambiguity.

The ordinary meaning of the word "justify" is "to show to be just, right, or in accord with reason" *Webster's New World Dictionary* at 766 (2nd College Edition, 1976). In the dental profession, an individual dentist's professional judgment can be measured against the standards developed in the education and training of dentists. These standards can be gleaned from educators and experienced practitioners within the profession. In this context, each dentist should be able to justify his/her treatment recommendations with reasons that are acceptable to the profession.

Appellant's final assignment of error alleges that the Board's order is not supported by substantial

evidence of record. After considering the testimony of Drs. Marquetta Poynter, Jeffrey Klein, Frederick Parkins, and appellant, the hearing panel concluded that the appellant lacked justification for recommending fillings on three (3) of the patient's teeth, identified as A, K, and L. Acting as trier of fact, an administrative agency is afforded great latitude to evaluate the evidence including the credibility of witnesses. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972). It is clear from the Board's findings that it gave great weight to the testimony of both the appellant and the appellant's witness, Dr. Parkins. After reviewing the whole record, we find that the Board's findings were supported by substantial evidence and will not be disturbed on appeal.

For the reasons stated above, the orders of the Jefferson Circuit Court are hereby affirmed.

ALL CONCUR.

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