

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000176-MR

YAKOV G. DRABOVSKIY

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT  
HONORABLE STEPHEN N. FRAZIER, JUDGE  
ACTION NO. 01-CI-00263

KENTUCKY BOARD OF MEDICAL LICENSURE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

BUCKINGHAM, JUDGE. Yakov G. Drabovskiy appeals pro se from an order of the Lawrence Circuit Court which dismissed with prejudice his petition of appeal of a final order that affirmed an Emergency Order of Suspension issued by the Kentucky Board of Medical Licensure suspending his medical license. We affirm.

Prior to the suspension order, Dr. Drabovskiy was licensed by the Medical Board to practice osteopathy in the Commonwealth of Kentucky. In August 2000, Dr. Drabovskiy began treating patients in association with Dr. Frederick Cohn in Paintsville, Kentucky. In August and September 2000, the Medical

Board initiated an investigation in response to grievances it had received from a local police officer and a local physician concerning the drug prescribing practices of Dr. Cohn. The Medical Board suspended its investigation when it discovered several state and federal law enforcement agencies were already investigating Dr. Cohn.

In February 2001, the law enforcement agencies seized patient records, sign-in sheets, and prescription records from Dr. Cohn's office pursuant to a search warrant. In August 2001, both Dr. Cohn and Dr. Drabovskiy were arrested by federal authorities and indicted for various federal controlled substances and money laundering offenses. More specifically, Dr. Drabovskiy was indicted in federal district court on four counts of Conspiracy to Distribute and Distribution of Controlled Substances without Legitimate Medical Purpose,<sup>1</sup> one count of Health Care Fraud,<sup>2</sup> and two counts of Forfeiture.<sup>3</sup> As part of his conditions of release on bond, Dr. Drabovskiy was required to not engage in private medical practice without court approval and to make full disclosure of the pending charges if he sought employment as a medical provider from a public entity.

On September 20, 2001, Inquiry Panel B of the Medical Board convened a special meeting at which it considered a memorandum prepared by a Medical Board investigator, the arrest

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<sup>1</sup>21 U.S.C. § 841(a)(1), 21 U.S.C. § 846, and 18 U.S.C. § 1956(h).

<sup>2</sup>18 U.S.C. § 1347.

<sup>3</sup>21 U.S.C. § 853 and 18 U.S.C. § 982.

warrant and criminal complaint in the federal prosecution, and a report from a Medical Board consultant. Computer scheduling and sign-in sheets revealed that on several occasions, Dr. Drabovskiy saw over 120 patients in one day and prescribed the same combination of drugs including Lorcet, Xanax, and Soma. During the office search, several preprinted prescription pads for the above drugs were seized. The Medical Board consultant, who was a licensed physician, stated that based on his review of over 50 patient charts, Dr. Drabovskiy conducted little or no physical examination of patients and prescribed the same controlled substances regardless of the complaint. He opined that this conduct represented a past, present, and future threat to patients by distributing controlled substances without sufficient medical justification.

On September 25, 2001, the Inquiry Panel B issued an Emergency Order of Suspension finding under KRS<sup>4</sup> 311.592(1) that Dr. Drabovskiy's practice constituted a danger to the health, welfare, and safety of his patients or the general public based on probable cause to believe that he had violated KRS 311.595(4) and (9), as illustrated by KRS 311.597(1)(a), (b), and (d), (3), and (4). The panel then ordered an emergency hearing be held within 10 days as provided by KRS 13B.125(3) and 201 KAR<sup>5</sup> 9:081.

On October 8, 2001, an emergency hearing was held before a hearing officer at which Dr. Drabovskiy was present and represented by counsel. The Medical Board consultant testified

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<sup>4</sup>Kentucky Revised Statutes.

<sup>5</sup>Kentucky Administrative Regulations.

concerning his review of the medical records associated with Dr. Drabovskiy's practice. He concluded Dr. Drabovskiy provided controlled substances as the exclusive form of treatment without performing any type of meaningful medical analysis or consideration of alternatives. He felt Dr. Drabovskiy endangered his patients and the general public by over-prescribing controlled substances that were dangerous and medically unnecessary. The Medical Board investigator also testified about his visits to the Paintsville office during which he saw over 100 patients in the waiting room and the preprinted prescription pads. Dr. Drabovskiy offered no testimony at the hearing and merely argued that he had acted at the direction of Dr. Cohn.

On October 12, 2001, the hearing officer entered a final order affirming the prior Emergency Order of Suspension. He held there was substantial evidence that Dr. Drabovskiy failed to conform to the standards of acceptable and prevailing osteopathic practice within the Commonwealth as defined under KRS 311.595, KRS 311.597, and 201 KAR 9:005 Section 1(1)(b). He found substantial evidence that Dr. Drabovskiy's method of prescribing controlled substances constituted his usual and customary practice, represented a danger to the health, safety, and welfare of patients by exposing them to unnecessary risks and possible addiction, and endangered the public by increasing the supply of sought after prescription drugs in the illegal prescription drug trade.

The hearing officer noted that while the Medical Board had the burden of proof, under KRS 13B.125(3), an "emergency

order shall be affirmed if there is substantial evidence of a violation of law which constitutes an immediate danger to the public health, safety, or welfare." (Emphasis added). He found Dr. Drabovskiy's practice represented a pattern of conduct violating KRS 311.597(1), (3) and (4), and KRS 311.595(9). He rejected Dr. Drabovskiy's defense as unpersuasive and as a failure to comply with the professional responsibility of each individual physician. Finally, the hearing officer stated the purpose of this hearing was merely to determine whether there was substantial evidence to support the emergency order and another final hearing would be available to determine the validity of the substantive charges. The final order concluded with notice to the parties of their appeal rights as provided by KRS 13B.140, KRS 311.593, and 201 KAR 9:081 Section 9(5).

On November 5, 2001, Dr. Drabovskiy, acting pro se, filed a document in the Lawrence Circuit Court objecting to the Emergency Order of Suspension as beyond the Medical Board's legal rights and being unjustified under the facts. The Medical Board was served with this document by certified mail on November 8, 2001. On November 17, Dr. Drabovskiy filed a document entitled "Motion" moving the court to review, stay, and revoke the Emergency Order of Suspension and to conduct a hearing on the motion. On November 28, 2001, the Medical Board filed a motion to dismiss the action based on improper venue. On January 10, 2002, the circuit court entered its finding of fact and order dismissing the action on procedural grounds as being untimely. This appeal followed.

Dr. Drabovskiy seeks review of the Medical Board's action in issuing an emergency order suspending his license on substantive grounds arguing there were insufficient emergency conditions to justify the order. He contends that he poses no danger because his practice has been limited by the federal district court under his conditions of release. Dr. Drabovskiy maintains that the circuit court should not have dismissed his petition as untimely because he was abandoned by his attorney and was forced to pursue the appeal pro se.

Our review of the record raises serious questions with regard to dismissal of the action as untimely.<sup>6</sup> As the circuit court correctly noted, under KRS 13B.140, a party seeking judicial review of a final order of an agency "shall institute an appeal by filing a petition in the Circuit Court . . . within thirty (30) days after the final order of the agency is mailed or delivered by personal service." The circuit court based its decision by referencing October 12, 2001, as the date the final order concerning the emergency order of suspension was mailed and November 17, 2001, as the date Dr. Drabovskiy filed his appeal of the agency order. The record reveals, however, that Dr. Drabovskiy filed a document challenging the Medical Board's action on November 5, 2001, in which he cited KRS 13B.140(1) and asked the circuit court to revoke the Emergency Order of Suspension. Attached to this document were copies of the Emergency Order of Suspension and the complaint seeking a hearing

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<sup>6</sup> We note that the Medical Board did not argue to the trial court that the appeal was not timely filed.

based on the emergency order. Summons was issued, and these documents were served on the Medical Board. While the November 5, 2001, filing was not titled, we believe it was sufficient to constitute compliance with KRS 13B.140(1), making the appeal timely.<sup>7</sup>

Nevertheless, we believe the circuit court's order of dismissal may be affirmed on substantive grounds. See, e.g., Commonwealth, Natural Resources & Environmental Protection Cabinet v. Neace, Ky., 14 S.W.3d 15, 20 (2000) (appellate court may affirm trial court under alternate theory not relied on by trial court); Board of Education of McCreary County v. Williams, Ky. App., 806 S.W.2d 649, 650 (1991) (appellate court will affirm correct decision of trial court even if lower court reached its decision through incorrect or different reasoning). As in the circuit court, our standard of review of agency action is limited to whether the agency acted within its statutory powers, whether the parties were afforded procedural due process, and whether the agency's decision was supported by substantial evidence. See Urella v. Kentucky Bd. of Medical Licensure, Ky., 939 S.W.2d 869, 873 (1997) (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972)); Kentucky Bd. of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 643 (1994). Substantial evidence is defined as evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable people. See Commonwealth, Cabinet for Human Resources v.

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<sup>7</sup> The document filed by Dr. Drabovskiy on November 17, 2001, was entitled as a motion.

Bridewell, Ky., 62 S.W.3d 370, 373 (2001); Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002). An appellate court should not engage in a de novo review of the evidence or substitute its own judgment for that of the agency on factual issues even though there may be contrary or conflicting evidence. Urella, supra; Ward, supra; Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 410 (1994).

The Medical Board clearly acted within its statutory powers under KRS 311.592 and KRS 311.595. The Board also had authority to temporarily suspend Dr. Drabovskiy's license without a hearing under due process provided it conducted a reasonably prompt post-deprivation hearing. Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979); Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). In this case, the Medical Board did conduct a full evidentiary hearing on the temporary suspension and emergency order on a date agreed to by the parties with Dr. Drabovskiy present with counsel. Thus, he was afforded adequate procedural due process.

Dr. Drabovskiy's major complaint is that the emergency order was not supported by substantial evidence. At the October 8 hearing, Dr. Drabovskiy offered no evidence to rebut the Medical Board's extensive evidence of his excessive prescription practices. We agree with the Medical Board that Dr. Drabovskiy's assertion that he was acting under the direction of Dr. Cohn was



not sufficient to preclude temporary suspension of his license. Dr. Drabovskiy has an individual duty to abide by the legal and professional standards imposed on physicians. In addition, his asserted defense was not supported by any evidence in the record. The Medical Board's decision that Dr. Drabovskiy engaged in an ongoing pattern of unacceptable prescribing practices of controlled substances in violation of Kentucky law and posed an immediate danger to public health, safety, or welfare was supported by substantial evidence.

Dr. Drabovskiy's argument on appeal that he posed no danger because he was not practicing medicine as a result of the restrictions placed on him by the federal district court under his conditions of release on bond is equally unpersuasive. The conditions did allow him some limited ability to practice for public entities and were subject to modification or elimination by the federal court at any time. However, the Medical Board was not required to rely on the federal court's action in protecting the citizens of the Commonwealth under its licensing authority. Dr. Drabovskiy misunderstands the purpose and licensing authority of the Medical Board to prevent prospective, as well as, past violations in the public interest. The fact that he is not currently practicing medicine does not prevent the Medical Board from temporarily suspending his license based on a valid finding of potential violations. In any event, Dr. Drabovskiy will be accorded another full evidentiary hearing on the merits of the charges against him, probably following resolution of the federal prosecution. Finally, we note that Dr. Drabovskiy has not shown

that this defense was raised in the October 8 hearing, and therefore, it was unpreserved. See Urella, 939 S.W.2d at 873 (failure to raise an issue before an administrative body precludes the assertion of that issue in an action for judicial review). Consequently, Dr. Drabovskiy's petition for review of the Emergency Order of Suspension was subject to dismissal on the merits.

For the foregoing reasons, we affirm the order of the Lawrence Circuit Court.

ALL CONCUR.

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