

RENDERED: JANUARY 14, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002407-MR

AZHAR MASOOD, M.D.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 03-CI-001820

KENTUCKY BOARD OF MEDICAL LICENSURE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Azhar Masood, M.D. (Dr. Masood) has appealed from a Jefferson Circuit Court's Opinion and Order denying his Petition for Judicial Review of the Kentucky Board of Medical Licensure's (Board) final order denying his application for licensure. In asking this Court to require the Board to afford him an "appropriate due process hearing," Dr. Masood contends that his constitutional right to due process was violated 1) by the Board's arbitrary use

¹ Senior Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

of Kentucky Revised Statutes (KRS) 311.571(8)² and 2) by the trial court's review pursuant to KRS 311.593.³ We disagree with Dr. Masood's contentions and affirm.

The facts are as follows. Dr. Masood applied to the Board for a limited medical license in order to complete his residency program in Kentucky. Dr. Masood, educated in Pakistan and trained in Ohio, answered "no" to application questions one, four, eleven and twelve,⁴ affirming that he had not been the subject of any investigations resulting in limited staff privileges, or in dismissal or resignation from a postgraduate training program; and that he was not the subject of any

² Notwithstanding any of the requirements for licensure established by subsections (1) to (7) of this section and after providing the applicant . . . with reasonable notice of its intended action and after providing a reasonable opportunity to be heard, the board may deny licensure to an applicant . . . without a prior evidentiary hearing upon a finding that the applicant . . . has violated any provision of KRS 311.595 or 311.597 or is otherwise unfit to practice. Orders denying licensure may be appealed pursuant to KRS 311.593.

³ (2) Any physician who is aggrieved by a final order of the board denying a license . . . may seek judicial review of the order by filing a petition with the Circuit Court of the county in which the board's offices are located in accordance with KRS Chapter 13B.

⁴ 1. Have you ever been dismissed from, resigned while under investigation or failed to complete an academic year at a medical school or a postgraduate training program?
4. Has any hospital, hospital medical staff or other health care facility ever revoked, suspended, restricted, limited, reprimanded, placed on probation or otherwise disciplined your staff privileges?
11. Have you ever been convicted of a felony or misdemeanor by any state, Federal or International court? Are any criminal charges presently pending against you in any of those courts?
12. To your knowledge, are you the subject of any investigation for a criminal act?

investigations for a criminal act and currently had no pending criminal charges. His notarized signature acknowledged awareness that any false statement was grounds for denial of licensure.

Information from Dr. Masood's family practice residency at St. Vincent Mercy Medical Center in Toledo, Ohio contradicted Dr. Masood's application answers. St. Vincent reported that Dr. Masood did not complete the residency program; that he had been disciplined or under investigation; and that he had also had his duties limited. St. Vincent provided no further details, but information from the Ohio State Medical Board indicated that a criminal complaint had been filed against Dr. Masood for "gross imposition and menacing by stalking" which had resulted in St. Vincent suspending his privileges pending the investigation and later resulted in his dismissal.

The Board notified Dr. Masood upon receipt of this information, questioning the inconsistencies between it and the application. Ultimately the Board notified Dr. Masood in writing that it would consider his application on December 19, 2002; that this would be his only opportunity to appear and explain the inconsistency; and that pursuant

to KRS 311.571(8)⁵ and other statutes (copies of which were enclosed) the failure to disclose could be grounds for denial of the license.

Dr. Masood responded to the Board's correspondence and appeared before the Board. While acknowledging his awareness of a criminal complaint prior to the filing of the application, he indicated that the case had been dismissed but admitted having no documentation of such. He explained that the complaint came from a patient with psychiatric problems; that he never touched the patient inappropriately; that the patient was examined in the presence of a senior nurse; that pending the investigation he was put on a "research rotation" that the hospital considered to be "limited" duties; that because his uncle was gravely ill and the investigative process was taking too long, he resigned the residency to return to Pakistan; and that he learned later that the hospital had treated his resignation as a

⁵ Although the letter cited KRS 311.571(7), KRS 311.571(8) is the applicable statute. Section 8 is a 2002 amendment and recodification of section 7. Both sections are identical in providing that the Board can deny licensure to an applicant without a prior evidentiary hearing upon a finding that the applicant has violated any provision of KRS 311.595 or 311.597, and the Board's order can be appealed pursuant to KRS 311.593. The 2002 amendment added the provision that before denial the Board must provide the applicant with reasonable notice of its intended action and a reasonable opportunity to be heard. The Board's letter, although citing the incorrect statutory section, followed the mandate of the 2002 amendment by reference in the body of the letter to the notice provisions.

dismissal for failing to complete the investigative process. He apologized to the Board for the incorrect answer, labeling it a mistake made in haste and a miscommunication. The Board initially considered continuing the process pending presentation of the dismissal documentation. Expressing some sympathy to Dr. Masood's situation, however, the Board ultimately denied the application.

On January 17, 2003, the Board issued its order denying licensure based on violations of KRS 311.595(1)⁶ and (21),⁷ sections specifically pertaining to his failure to disclose the limitation of duties and the dismissal/resignation.

Dr. Masood petitioned the trial court for review pursuant to KRS 311.593(2). The trial court issued an opinion and order affirming the Board. The court concluded that (1) KRS 311.530-.620⁸ prevailed over KRS Chapter 13B

⁶ Knowingly made or presented, or caused to be made or presented, any false, fraudulent, or forged statement, writing, certificate, diploma, or other thing, in connection with an application for a license or permit.

⁷ Been disciplined by a licensed hospital or medical staff of the hospital, including removal, suspension, limitation of hospital privileges, failing to renew privileges for cause, resignation of privileges under pressure or investigation, or other disciplinary action if the action was based upon what the hospital or medical staff found to be unprofessional conduct, professional incompetence, malpractice, or a violation of any provisions of KRS Chapter 311. This subsection shall not require relitigation of the disciplinary action.

⁸ The Kentucky Medical and Osteopathic Practice Act of 1972.

(Administrative Hearings); (2) that KRS 311.571(8) did not conflict with and was not superseded by KRS 13B.020(1); and (3) that the Board's actions were not an abuse of discretion, did not exceed statutory authority, and were not a violation of due process, because Dr. Masood was put on notice of one of the reasons for denial and given the opportunity to respond. This appeal followed.

On appeal Dr. Masood asks this Court to remand this matter to the Board for an "appropriate due process hearing," alleging as he did before the trial court that his due process rights were violated by the Board. He also argues that the trial court utilized the improper standard of judicial review. We affirm the trial court's opinion and order affirming the Board's denial of Dr. Masood's application.

We are not persuaded by Dr. Masood's contention that the Board and the trial court denied him due process by use of KRS 311.571(8) and 311.593 in lieu of KRS Chapter 13B. According to City of Bowling Green v. Board of Education of Bowling Green Independent School District, 443 S.W.2d 243, 247 (Ky. 1969):

There are three established rules of statutory construction which . . . are dispositive of the issue here presented. These rules are: (1) That it is the duty of the court to ascertain

the purpose of the General Assembly, and to give effect to the legislative purpose if it can be ascertained; (2) that conflicting Acts should be considered together and harmonized, if possible, so as to give proper effect and meaning to each of them; and (3) that as between legislation of a broad and general nature on the one hand, and legislation dealing minutely with a specific matter on the other hand the specific shall prevail over the general.

With regard to the first prong, the legislative intent of the medical licensure provisions is stated in KRS 311.555. The legislative purpose of KRS 311.530-.620 is to provide board regulation and control of the practice of medicine in Kentucky. We believe it is clear that the Board and the trial court effectuated the legislative intent of KRS 311.571(8) and 311.593. With regard to the second prong, we see no conflict. Both the medical licensure and administrative hearing procedures provide reasonable notice and a reasonable opportunity to be heard. With regard to the third prong, the specific medical licensure provisions prevail over the general statutes regulating administrative process. The Board provided reasonable notice and Dr. Masood took advantage of every reasonable opportunity to be heard. And, as demonstrated below, the Board's decision was properly reviewed by the trial court. Giving effect to the legislative purpose of KRS 311.571(8) and 311.593,

therefore, we hold that both statutes were constitutionally applied.

We likewise are not persuaded by Dr. Masood's argument that the trial court erred by failing to find an abuse of discretion in the Board's decision. KRS 311.555, which provides for judicial review of a decision of the Board, is a codification of the test set forth in American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450 (Ky. 1964). As such, on appeal, this Court must decide if the Board exceeded its statutory powers; if the procedures employed by the Board resulted in due process violations; and if the Board's actions constituted an abuse of discretion.

The record is clear that based upon the power granted to the Board by the General Assembly in KRS 311.530-.620, the Board did not exceed its statutory powers as it has the authority to deny a license to practice medicine.

With regard to the issue of due process, the Kentucky Supreme Court adopted the three-prong analysis from Mathews v. Eldridge, 424 U.S. 319, 333-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18, 32-33 (1976) in Division of Driver Licensing v. Bergmann, 740 S.W.2d 948, 951 (Ky. 1987). It requires consideration of the private interest

that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used; the probable value, if any, of additional or substitute procedural safeguards; and the government's interest that any additional procedural requirement would entail.

Looking at the Eldridge factors provides Dr. Masood no relief. While the private interest in obtaining a license to practice medicine is substantial, the state has a compelling interest in providing its citizens with quality health care. KRS 311.571(8), setting forth the procedure the Board must use when considering licensure, satisfies sufficient due process guarantees by requiring the Board to provide the applicant with reasonable notice of its intended action and a reasonable opportunity to be heard. The risk, therefore, of erroneous deprivation of a license under KRS 311.571(8) is unlikely given its notice provisions. In fact, the notice provisions were effective here. Dr. Masood was on notice from the signing of his application that a false statement could be grounds for denial of the application. He was given notice that the false application statement was an issue for the Board, and he took advantage of three opportunities (two written and one in person) to explain the inconsistency. He admitted

marking the answer incorrectly only after the Board received information to the contrary. Information used by the Board was within Dr. Masood's knowledge at the time of the filing of the application.

The additional Eldridge safeguard of a formal hearing is offered under the licensing statute pursuant to show cause orders (KRS 311.572). In any event, a hearing would not have afforded Dr. Masood any additional opportunity to provide the Board with more explanation on the incorrect answer than he gave in the three opportunities he received. Dr. Masood received adequate due process.⁹

The third American Beauty prong addresses the question of whether the Board's action is supported by substantial evidence. In the situation we have here where the Board's decision denied relief to the party with the burden of proof, the issue before us is whether the

⁹ While the record on appeal contains a Lucas County Ohio Common Pleas Court grand jury report dated November 1, 2002, finding no true bill against Dr. Masood with regard to a charge of gross sexual imposition, and a letter dated December 20, 2002, from an attorney indicating that he represented Dr. Masood in this matter and that "after an intensive investigation, it was apparent that Dr. Masood committed no criminal act and all charges were dropped," this information was not before the Board and does not appear in the record until filed as an exhibit to Dr. Masood's "Reply to Response to Petition for Judicial Review," filed in the trial court on June 30, 2003. As this information was not before the Board it cannot be considered by this Court. In any event, the Board's denial was not based on the failure to disclose the criminal charges but on the failure to disclose the limitation of duties and dismissal/resignation from the residency program.

evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it. McManus v. Kentucky Retirement Systems, 124 S.W.3d 454, 465-69 (Ky.App. 2003).

Here, Dr. Masood admitted to being aware of the issues pertaining to his departure from the Ohio hospital which were brought to the attention of the Board by the Ohio authorities, and admitted providing a false answer on his application. KRS 311.571(8) gives the Board the power to deny an application for licensure without an evidentiary hearing upon proof of a violation of KRS 311.595(1), knowingly making or presenting or causing to be made a false statement in connection with an application for a license. As a result of Dr. Masood's own answers, we cannot find compelling evidence in Dr. Masood's favor as to persuade a reasonable person to his way of thinking. There was no abuse of discretion by the Board.

The three-prong test of KRS 311.555 having been met, we can find no abuse of discretion in the Board's decision.

For the foregoing reasons, the opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Fox DeMoisey
Louisville, Kentucky

BRIEF FOR APPELLEE:

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