

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001768-MR

ALI SHAMAEIZADEH, M.D.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 03-CI-010888

KENTUCKY BOARD OF MEDICAL
LICENSURE

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; HENRY AND SCHRODER, JUDGES.

COMBS, CHIEF JUDGE: Ali Shamaeizadeh, M.D. (Dr. Ali), asserts lack of jurisdiction in appealing from an order of the Jefferson Circuit Court which dismissed his petition for review of a decision of the Kentucky Board of Medical Licensure (the Board). In seeking reinstatement of his license to practice medicine, Dr. Ali argues that the circuit court violated his statutory and constitutional rights by refusing to review the Board's denial of his application. We agree. Thus, we vacate and remand.

On March 7, 2000, the Board revoked Dr. Ali's license to practice medicine in Kentucky. The final order of revocation was affirmed on appeal by the Jefferson Circuit Court and subsequently by this Court.

In October 2003, Dr. Ali applied to the Board for reinstatement of his medical license pursuant to KRS¹ 311.607, which provides as follows:

- (1) Except for disciplinary actions taken pursuant to KRS 311.595(8) and KRS 311.599,^[2] a licensee who has had his license revoked may, after two (2) years from the effective date of the revocation order, petition the board for a license to again practice in the Commonwealth of Kentucky.
- (2) The board shall not be required to issue a new license as described in subsection (1). No new license shall be issued to such former licensee unless the applicant satisfies the board that he is presently of good moral character and qualified both physically and mentally to resume the practice of medicine without undue risk or danger to his patients or the public.
- (3) In the event that the board should issue a new license under the circumstances as described in this section, the new license shall be under probation for a period of not less than two (2) years nor more than five (5) years, and any subsequent violation during the probation period shall result in automatic revocation of license.

¹ Kentucky Revised Statutes.

² Neither of these statutes is applicable to the instant action.

On December 3, 2003, the Board entered an order denying the application for reinstatement as follows:

Having considered all of the available information and being sufficiently advised, Hearing Panel A **CONCLUDES** that the licensee has failed to meet his burden, under KRS 311.607(2), to satisfy the Panel "that he is presently of good moral character and qualified both physically and mentally to resume the practice of medicine without undue risk or danger to his patients or the public." Accordingly, Hearing Panel A **ORDERS** that the licensee's petition for reinstatement is **DENIED**.

Furthermore, having considered all available information, particularly the licensee's disciplinary history before this Board and the bases for those disciplinary orders, Hearing Panel A **ORDERS** that it will not consider another petition for reinstatement filed by the licensee prior to its November 2013 meeting, a period of ten (10) years. (Emphasis in original.)

On December 12, 2003, Dr. Ali filed a petition in the Jefferson Circuit Court seeking judicial review of the Board's order. He alleged that the Board's order was arbitrary and capricious because it was not supported by substantial evidence. He also claimed that the Board acted in disregard of its statutory authority by limiting his ability to request reinstatement for a period of ten years when the pertinent statute specifically provided that a licensee might apply for

reinstatement after two years from the date of revocation of the license.

The Board responded to the petition by filing a motion to dismiss. It argued that there is no provision in KRS 311.607 providing for judicial review of the Board's denial of Dr. Ali's application for a license. It also argued that its order was not a final order as contemplated by KRS 311.593, the statute governing judicial review of the Board's orders. The Jefferson Circuit Court accepted the Board's reasoning and dismissed the petition without addressing Dr. Ali's substantive claims that the Board acted arbitrarily and/or in excess of its expressed authority. This appeal followed.

Dr. Ali argues that he has both a statutory and a constitutional right to judicial review of the Board's denial of his petition for reinstatement. His statutory argument is based on KRS 311.593(2), which provides:

Any physician who is aggrieved by a final order of the board denying a license or rendering disciplinary action against a licensee 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.

We agree that this statute entitles Dr. Ali to judicial review of the Board's denial of his application for reinstatement of his medical license. There is no dispute that

Dr. Ali is a physician who was aggrieved by the Board's order denying him a license. There is also no dispute that Dr. Ali filed a timely petition in the proper county in accordance with KRS Chapter 13B.

The Board contends that the review afforded by KRS 311.593(2) applies only to orders that: (1) deny an **initial** application for a license or (2) revoke an existing license. It takes the position that the statute is not applicable to applications for reinstatement of a license. We disagree.

In interpreting statutes, it is our task to ascertain the intent of the legislature. Commonwealth v. Reynolds, 136 S.W.3d 442 (Ky. 2004). In this case, the legislative intent is expressed in the most explicit language of the statute. KRS 311.593(2) provides that: "**[a]ny physician who is aggrieved by a final order of the board denying a license . . . may seek judicial review**" (Emphases added.) The Board's argument would require a re-writing of the statute to add words of limitation of our own invention that were not the product of legislative drafting. Such an undertaking is assuredly beyond the legitimate scope of our review.

In enacting KRS 311.607, the legislature circumscribed the authority of the Board so as to prevent it from revoking a medical license permanently. It provided physicians an opportunity (after the passage of two years) to prove themselves

qualified to practice medicine once again and to obtain a new license. Although KRS 311.607 itself does not provide for judicial review of the denial of an application for reinstatement, it must be juxtaposed with the plain language employed in KRS 311.593(2). The statutory scheme requires that the statutes be read in conjunction with one another and that they be harmonized accordingly to achieve the overall legislative intent.

In support of its position, the Board urges that the order denying Dr. Ali's application for reinstatement does not qualify as a "final order" as contemplated by KRS 311.593. Under the Board's analysis, the only final order in Dr. Ali's case was the order of revocation of Dr. Ali's license originally entered in 2000; it characterizes its most recent order merely as a refusal to modify its previous order of revocation instead of as a new order denying a license. We find this argument to be unsound.

In the recent case of Kentucky Board of Medical Licensure v. Ryan, 151 S.W.3d 778, 780 (Ky. 2004), the Supreme Court held that the Board has no authority to enter an order modifying a final decision revoking a medical license. Once the Board revokes a license, it loses authority to consider remedial relief in the nature of that which would ordinarily be available

pursuant to CR³ 60.02. Id. It is limited to issuing a new license pursuant to the reinstatement procedure set forth in KRS 311.607. Id. Thus, the order denying Dr. Ali's application for reinstatement cannot be deemed as the denial of a motion for modification as the Supreme Court has expressly denied the possibility of the modification of a previously issued final order.

The legislature has created a procedure for reinstatement of a medical license; it is a proceeding separate and distinct from the disciplinary action that preceded the revocation of the license. The order adjudicating the application for reinstatement concludes that process and constitutes a final order. If a physician is aggrieved by the final order, that order becomes subject to judicial review.

The Board argues that because it is vested with discretion in deciding whether to grant or to deny an application for reinstatement, the legislature did not intend that its ruling be subject to the judicial review provisions of KRS 311.593(2). While KRS 311.607 gives the Board broad discretion in assessing whether a doctor's credentials should be reinstated, that discretion is not absolute. Contrary to the Board's argument, KRS 311.607 cannot be read in a vacuum so as to vest that discretion with immunity from the judicial review

³ Kentucky Rules of Civil Procedure.

granted by KRS 311.593(2). Again, the related statutes must be construed in conjunction with one another.

In addition to Dr. Ali's statutory right to review, he is also entitled to such review pursuant to Section 2 of the Kentucky Constitution as interpreted by American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Commission, 379 S.W.2d 450, 456 (Ky. 1964).

Basically, judicial review of administrative action is concerned with the question of *arbitrariness*. On this ground the courts will assume jurisdiction even in the absence of statutory authorization of an appeal. There is an inherent right of appeal from orders of administrative agencies where constitutional rights are involved, and section (2) of the Constitution prohibits the exercise of arbitrary power. (Citations omitted.)

The Board has cited cases from foreign jurisdictions holding that upon the suspension of a doctor's license to practice medicine, he has no property interest warranting due process protections. However, those cases address instances in which a party aggrieved by an administrative decision has failed to follow the statutory procedures for obtaining judicial review. Failure to follow the procedures allowing for review is generally fatal. See, Taylor v. Duke, 896 S.W.2d 618 (Ky.App. 1995). However, the Constitution of Kentucky very plainly protects all persons from the arbitrary acts of administrative

agencies. As recognized in American Beauty Homes, supra, the non-ministerial orders of an administrative agency are inherently reviewable for abuse or arbitrariness regardless of whether there is a statutory procedure established for that purpose. Id.; see also Triad Development/Alta Glyne, Inc. v. Gellhaus, 150 S.W.3d 43 (Ky. 2004). Thus, whether scrutinized under either KRS 311.593(2) or Section 2 of the Kentucky Constitution, Dr. Ali's licensing grievance is entitled to judicial review.

The order of the Jefferson Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Fox DeMoisey
Jonathan E. Breitenstein
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

C. Lloyd Vest, II
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

J. Fox DeMoisey
Louisville, Kentucky