

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000534-MR

J. STEVE WARD, F.D./EMB.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 13-CI-00093 AND 13-CI-00301

KENTUCKY BOARD OF EMBALMERS AND
FUNERAL DIRECTORS; DANNY L. PERCELL;
JACK M. "SONNY" MEYER; WOODFORD R.
PORTER, JR.; MICHAEL "BRYSON" PRICE;
JOHN EVANS; AND FRANK L. NELSON
IN THEIR OFFICIAL CAPACITIES AS MEMBERS
OF THE KENTUCKY BOARD OF EMBALMERS
AND FUNERAL DIRECTORS

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * ** * ** *

BEFORE: CLAYTON, MAZE, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: J. Steve Ward appeals an order of the Franklin Circuit Court vacating an order of the Kentucky Board of Embalmers and Funeral Directors ("Board") and remanding for Ward to receive a new hearing. Ward raises myriad appellate claims in his brief: whether certain statutes are unconstitutional, whether

the Board selectively prosecuted Ward, whether the Board exceeded its authority, whether there were evidentiary errors, whether the Board erred by not permitting discovery, and whether the Board's decision was not supported by substantial evidence.

The Board filed a responsive brief and a motion to dismiss. In the latter, the Board argued that because their administrative order had been vacated and remanded for a new hearing, and because the circuit court's order is not otherwise final and appealable and does not resolve any of Ward's other claims, this Court is without jurisdiction to rule on Ward's appeal. Ward disagrees. Having reviewed the record and the applicable case law, we grant the motion to dismiss.

FACTS

Ward has been a licensed funeral director and embalmer for about three decades, during which time he has also served as Woodford County Coroner and been employed at Blackburn & Ward Funeral Home. In 2010, Ward was indicted on six counts of sexual crimes against a minor, to which he ultimately pled guilty to one count of sexual misconduct. He was sentenced to 360 days in jail and was shock probated after serving almost four months.

After being released from jail, the Board filed an Administrative Complaint against Ward alleging violations of Kentucky Revised Statutes (KRS) Chapter 316. A hearing was set for February, 2013. On January 28, 2013, Ward filed a complaint in Franklin Circuit Court seeking declaratory and injunctive

relief.¹ Ward also filed a motion to continue the hearing and stay further proceedings on the administrative complaint. On February 4, 2013, that motion was denied. A hearing was then held a few days later. At the hearing, it came to be known that Board Chair Danny Purcell conducted *ex parte* communications with Ward's wife both before and after the formal administrative complaint was issued. The Board nonetheless issued its Final Order on March 8, 2013, finding Ward violated KRS 316.150(1)(i),² and ordering him to pay a \$50,000.00 fine and serve a five-year suspension, probated for three years.

Three days later, Ward filed another Complaint in a separate civil action number in Franklin Circuit Court,³ once again asserting the claims from the declaratory and injunctive relief action, and also appealing the Board's administrative decision. The previously filed declaratory and injunctive relief action was consolidated with this latest action.

Following briefing, the Franklin Circuit Court found and held as follows:

¹ *Ward v. Kentucky Board of Embalmers & Funeral Directors*, 13-CI-00093.

² KRS 316.150(1)(i) reads:

- (1) The board may refuse to issue or renew, may revoke, or suspend and impose probationary conditions on the license of any Kentucky-licensed embalmer or Kentucky-licensed funeral director, and may issue a written reprimand and impose a fine, for:

....

- (i) Committing any act which constitutes unprofessional, fraudulent, misleading, corrupt, deceptive, or dishonest conduct. If the act constitutes a crime, conviction in a criminal proceeding shall not be a condition precedent to a disciplinary action.

³ *Ward v. Kentucky Board of Embalmers & Funeral Directors*, 13-CI-00301.

The integrity of the formal administrative process was compromised during these proceedings as Percell's actions clearly gave off the appearance that something was awry through his need to explain his actions during Carol Ward's [t]estimony. As such, Ward is entitled to a new hearing without the abovementioned issues. The Court declines to address the remainder of Ward's arguments.

Opinion and Order, p. 6 (alteration added). The Franklin Circuit Court reversed and remanded for a new hearing. It did not issue a final and appealable order, nor did it rule on any of Ward's other issues.

Ward then filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 59.05 to reconsider the court's order. Ward agreed that the Board Chair violated Ward's rights, but "respectfully disagree[d] with the Court's decision not to rule on the other issues Ward raised on appeal." At a hearing on the motion, the trial court noted that Ward could argue his other issues at or after the new administrative hearing is conducted. It then issued an order denying the CR 59.05 motion.

Ward then timely filed a notice of appeal for both Franklin Circuit Court orders.

MOTION TO DISMISS

The Board has moved to dismiss the instant appeal because the Franklin Circuit Court's order for a new hearing is allegedly an interlocutory order and not an appealable final judgment. In response, Ward claims that under KRS 13B.160 he is entitled to appeal to this Court the Franklin Circuit Court's appellate

ruling. Ward claims this statute grants him appellate rights regardless of any requirements in CR 54 or case law interpreting the same. We find Ward's argument on this issue erroneous because the statute granting Ward appellate rights requires use of CR 54.

As Ward's case involved disciplinary proceedings regarding his funeral director's license, his case initially proceeded through the agency hearing process. At the conclusion of that process, the agency, here the Board, issued an order. Ward, as the party disagreeing with the Board's order, then sought judicial review in circuit court pursuant to KRS 13B.140. The circuit court's review was properly confined to the record produced during the administrative hearing, except for a few exceptions, and was based on either the parties' oral arguments, written briefs, or both. KRS 13B.150(1).

After review of the arguments and record, the circuit court had two choices: either affirm the agency's final order or reverse and remand for further proceedings. KRS 13B.150(2). If the circuit court's decision constituted a "final judgment[,]" the aggrieved party could appeal to this Court "in accordance with the Kentucky Rules of Civil Procedure." KRS 13B.160.

Accordingly, for the instant case to be properly before us, two prerequisites are necessary: (1) a "final judgment" by the circuit court; and (2) an appeal that conforms with the Kentucky Rules of Civil Procedure. As final judgments are defined in CR 54, we now turn to those Rules to determine what constitutes a final judgment.

“A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02.” CR 54.01. Final judgments must adjudicate an entire claim, not just part of a claim. *Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99, 102 (Ky. App. 2011).⁴ The order must adjudicate “all of the rights of all of the parties[,]” to be a final and appealable order. *Wright v. Ecolab, Inc.*, 461 S.W.3d 753, 757 (Ky. 2015). Accordingly, if we find the circuit court here entered an order that only adjudicated part of the claim, or an order that did not determine all of the rights of all of the parties, then the order is not a final and appealable judgment. Such a finding is mandated in the instant case.

Here, the Franklin Circuit Court’s order addressed only one of Ward’s arguments, found it meritorious, and reversed the Board’s order and remanded for a new hearing.⁵ The court found the Board’s Chair conducted impermissible *ex parte* communications and should have been recused from the disciplinary proceeding. The Circuit Court labeled this behavior “unacceptable” and “troubling,” and found the “integrity of the formal administrative process was compromised[.]” The Board’s order has thus been vacated, and Ward has been

⁴ Though not currently before us, there are limited circumstances where multiple claims for relief are presented in an action and the court may “grant a final judgment upon one or more but less than all of the claims or parties” but “only upon a determination that there is no just reason for delay.” CR 54.02(1). The court must “recite such determination and shall recite that the judgment is final.” *Id.* Absent such a recitation, if the order or decision adjudicates less than all the rights and liabilities of each party, the decision is “interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” *Id.*

⁵ The Franklin Circuit Court also entered a second order summarily denying Ward’s motion to partially reconsider its original order. Our ruling herein applies to both orders collectively.

placed back in the administrative action's pre-hearing phase. In other words, there is now no order finding Ward violated KRS 316.150(1)(i), nor are there any sanctions currently imposed against Ward. Ward stands at the same position he stood before the hearing took place. We cannot know if the Board will conduct another hearing, nor what the facts will be if another hearing is held, nor what the outcome will be if another hearing is held.

Accordingly, the “judgment from which [Ward] s[eeks] to appeal does not adjudicate the rights of all the parties.” *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005). It simply vacates all of the Board's factual findings and the sanctions and calls for a new hearing. *See id.* Thus, it is not a final order and not appealable.

Contrasting the instant case with a similar agency-hearing appeal demonstrates the non-final nature of Ward's case. In *Board of Educ. of Fayette County v. Hurley-Richards*, 396 S.W.3d 879 (Ky. 2013), the Board of Education appealed the Fayette Circuit Court's order reversing the Board's order suspending a teacher and remanding for entry of an order that did not suspend the teacher. The order did not find any error with the hearing or the factual findings. It found a legal error with imposing sanctions.

The Supreme Court noted “the [adjudicative body's] function is to ascertain the facts of the event that transpired, and if the legal criteria for sanctions against the [licensee] exist, determine the sanction.” *Id.* at 890. The circuit court and the appellate courts both “accept[ed] in full the facts found by” the Board of Education and examined the legal question of whether those facts sustained a

sanction. *Id.* Thus, as resolution of the legal issues determined the outcome in the case, the Board of Education was properly appealing a final and appealable order that adjudicated the rights of all the parties.

In contrast, Ward's case presents us with no facts to review. Neither party contests that the Board's hearing was tainted by the Chair's *ex parte* communications. Even Ward's response to the motion to dismiss notes that "the Circuit Court's ruling as to the first hearing being biased is the law of the case." (Response, p. 6). In other words, there are no facts before us. The facts are yet-to-be-determined at the new hearing. The Board's factual findings stand vacated and remanded for a new hearing and new factual findings. Unless and until that occurs, neither this Court nor the circuit court can examine whether the facts in Ward's case align with the legal standards. Accordingly, there is no actual controversy before us, and we will not issue an advisory opinion regarding what we believe the law is. *See Foley v. Commonwealth*, 306 S.W.3d 28, 31 (Ky. 2010).

Ward alternatively argues that we can bypass the finality requirement because a second hearing would be an exercise in futility. We disagree. Ward's consistent disagreement with the facts and his many legal claims leave multiple issues dependent on the administrative hearing's factual findings.

In most administrative processes, parties must exhaust available administrative remedies before seeking judicial relief:

Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may: (1) function efficiently and have

an opportunity to correct its own errors; (2) afford the parties and the courts the benefit of its experience and expertise without the threat of litigious interruption; and (3) compile a record which is adequate for judicial review. In addition, an agency has an interest in discouraging frequent and deliberate flouting of the administrative process. [T]he exhaustion doctrine does not preclude, but rather defers, judicial review until after the expert administrative body has built a factual record and rendered a final decision. By honoring the exhaustion doctrine, courts avoid interfering with the administrative process, and the initial reviewing court benefits from the specialized knowledge of the agency. With increasing case loads and demands upon the courts, it is important to note that [t]he rule requiring exhaustion also promotes judicial economy by resolving issues within the agency, eliminating the unnecessary intervention of courts.

Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet, 133 S.W.3d 456, 471 (Ky. 2004) (footnotes and citations omitted, alterations in original).

However, if it would be an exercise in futility for the complainant to raise his or her issue before the adjudicative body, such as challenging a statute's constitutionality on its face, then the adjudicative hearing may be bypassed as the facts underlying the legal issue are unnecessary and the adjudicative body cannot determine the requisite legal issue. *See, e.g., Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001); *Kentucky Labor Cabinet v. Graham*, 43 S.W.3d 247 (Ky. 2001) (*abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004)). Ward's case does not present such a situation.

Ward’s arguments are a potpourri of fact-based and non-fact-based legal claims, and Ward’s constitutional arguments are both facial and as-applied. For example, Ward claims KRS 316.150(1)(i) is unconstitutionally vague on its face and as-applied. The latter claim is entirely fact-dependent and requires exhaustion of administrative remedies. And we cannot parse out the facial claim from the as-applied claim, as the cases of *Commonwealth v. AT&T Corp.*, 462 S.W.3d 399 (Ky. 2015), and *W.B. v. Commonwealth, Cabinet for Health and Family Services*, 388 S.W.3d 108 (Ky. 2012), control. In each of those administrative hearing cases, the Kentucky Supreme Court addressed facial and as-applied constitutional challenges to various Kentucky Revised Statutes on appeals from declaratory rights actions. Though the Court found exhaustion of administrative remedies was not necessary, it nevertheless weighed four “prudential” factors to determine whether the constitutional claims were ripe such that they should be addressed by the appellate court before the administrative process was concluded:

- (1) whether the record is fully developed by an actual administrative proceeding allowing the appellate court to evaluate the administrative process in practice;
- (2) whether the movant may succeed in the administrative process, thus obviating the need for consideration of the constitutional issues;
- (3) the fundamental principle that “constitutional issues should be avoided if possible;” and
- (4) whether deferment would allow the facial and as-applied challenges to be examined simultaneously.

W.B., 388 S.W.3d at 117.

In the instant case, were we to address the merits and not dismiss the appeal, these four factors weigh in favor of affirming the Franklin Circuit Court's order remanding for a new hearing. Under the first factor, the Franklin Circuit Court found the Board's Chair impermissibly tainted the administrative hearing with his *ex parte* communications. Accordingly, we do not have a valid administrative process to review. As Ward argues in his brief, the Board's disciplinary records show that in recent years it has permitted some felons to keep their licenses. Perhaps a second hearing with this taint removed will result in an outcome favorable to Ward.

As a new hearing has been ordered, the second and third factors also weigh against Ward. Should Ward succeed in the administrative process, it will obviate the need for us to consider the constitutional issues. And as we are bound to avoid constitutional issues if at all possible, it would be prudent for us to allow Ward's administrative process to restart anew. Thus, the first three factors weigh against Ward.

Finally, the fourth factor weighs against Ward. Deferment would allow the facial and as-applied challenges to be heard simultaneously. As the case currently stands, the original administrative hearing was tainted by the Board Chair's *ex parte* communications. Any as-applied analysis would be likewise tainted. Thus, by allowing the case to be remanded for a new hearing and adjudication, we allow both the facial and as-applied challenges to be heard simultaneously.

Likewise, Ward's selective prosecution claim hinges on the evidence adduced at the Board's hearing. As Ward argues in his brief, "[f]rom the evidence presented at Ward's hearing it is clear that the Board moved with a malicious bias against Ward, generated and inflamed by Ward's business and political rivals, and by Danny Purcell's obvious hostility." Aplt's Brf. at 19. We cannot address the merits of this claim without the results of a valid administrative hearing.

Simply put, a second hearing is not an exercise in futility. Many, if not most, of Ward's claims involve the facts adduced at the hearing and the procedural impropriety of the first hearing. As neither party disputes the Chair of the Board conducted improper *ex parte* communications and tainted the proceedings, remand for a new hearing may resolve Ward's claims partially or entirely. To rule on part of Ward's claims at this point would be to rule on an interlocutory order. We will not so act.

Finally, Ward argues the order denying the CR 59.05 motion is a final and appealable order. We likewise find this argument meritless. A panel of this Court has previously held that, "[o]rders granting or denying motions brought pursuant to CR 59.05 are non-final and non-appealable[.]" *Tax Ease Lien Investments I, LLC v. Brown*, 340 S.W.3d 99, 103 fn. 5 (Ky. App. 2011) (citing *Mingey v. Cline Leasing Service, Inc.*, 707 S.W.2d 794, 796 Ky. App. 1986)). This logic is sound, as a CR 59.05 motion can only serve to alter, amend, or vacate a

judgment. If that judgment is itself a non-final and non-appealable judgment, then the denial of a motion to alter, amend, or vacate the same suffers no conversion.

An unchanged, non-final judgment remains a non-final judgment.

Accordingly, having considered and rejected all arguments made by Ward, we GRANT the motion to dismiss the instant appeal.

ALL CONCUR.

ENTERED: _____

JUDGE, COURT OF APPEALS

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