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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000097-MR

ONYINYECHI R. URADU, MD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 17-CI-004379

KENTUCKY BOARD OF
MEDICAL LICENSURE

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, LAMBERT, AND K. THOMPSON, JUDGES.

LAMBERT, JUDGE: In this administrative appeal, Onyinyechi R. Uradu, MD, has sought review of the December 18, 2017, opinion and order of the Jefferson Circuit Court upholding the Kentucky Board of Medical Licensure's (KBML) decision to place her medical license on probation pursuant to Kentucky Revised Statutes (KRS) 311.595(17) after the State Medical Board of Ohio (the Ohio

Board) suspended her license for violating statutes governing the practice of medicine in that state. Because we agree with Uradu that the portion of the administrative regulation at issue in this case is invalid, we reverse and remand.

The underlying matter began with the filing of a complaint by KBML on March 8, 2017, against Dr. Uradu related to her license to practice medicine in Kentucky. Her specialty is Family Medicine. In 2016, the equivalent licensure board in Ohio entered an order related to her license in that state for her actions in 2014. The Ohio Board concluded that between September 23, 2014, and September 26, 2014, Dr. Uradu had “knowingly exceeded the 100-patient limit set by federal law in prescribing buprenorphine for the treatment of narcotic addiction.” For this violation, the Ohio Board suspended her license for an indefinite period not less than 180 days and stayed all but five days of that suspension, subjected her to a one-year probation period upon the reinstatement of her license, and required her to submit documentation of her successful completion of a course related to prescribing controlled substances. KBML alleged in the complaint that through this conduct, Dr. Uradu had violated KRS 311.595(17) and that legal grounds existed for a disciplinary action in Kentucky. The matter was assigned to Hearing Officer Thomas J. Hellman.

In her response to the complaint, Dr. Uradu admitted that the Ohio Board had entered an order on September 14, 2016, related to her license to

practice medicine and that she had reported this order to KBML pursuant to the statutory and regulatory requirements. She admitted that she had exceeded the 100-patient limit, but she denied that the Ohio Board's order imposed any substantive restrictions on her ability to serve in her position as an Opioid Treatment Program Director, to prescribe medication, or limited her practice. She had also completed the required course in controlled substances prescriptions. As one of her defenses, Dr. Uradu stated that the "actions that precipitated the Ohio Board's Entry of Order were actions taken for the safety, health, welfare and best interests of her patients and lasted only a very short time until the patients could be transferred." She also stated that the Drug Enforcement Administration (DEA) and the Substance Abuse and Mental Health Services Administration (SAMHSA) had increased the patient limits from 100 to 275, removing the basis for the Ohio Board's disciplinary action and providing no basis for further action in Kentucky. Finally, Dr. Uradu stated that the KBML had discriminated against her by failing to take similar disciplinary action against other physicians. She sought dismissal of the complaint and a declaration that the statutes and regulations as applied to her were unconstitutional.

KBML moved the hearing officer for summary disposition pursuant to 201 Kentucky Administrative Regulations (KAR) 9:081 § 9(6) and KRS 13B.090(2), arguing that no genuine issues of material fact were in dispute in that

Dr. Uradu had admitted the allegations contained in paragraphs 1 through 5 of the complaint. KRS 311.595(17) permits the KBML to place a licensee on probation or to revoke or restrict a license based upon proof that the licensee had been subjected to a revoked, suspended, restricted, or limited license by the licensing authority in another state. Re-litigation of the disciplinary action is not required under this statute. In addition, 201 KAR 9:081 § 9(4)(c) requires the appropriate panel in Kentucky to impose the same substantive sanction as the discipline that was imposed in another state. By separate regulation (201 KAR 9:081 § 9(6)(a)), KBML is to expedite resolution of the complaint if it only charges a criminal conviction or disciplinary sanction that could be proven by accompanying official certification. And, like the statutory provision, 201 KAR 9:081 § 9(6)(c)(1) does not permit re-litigation of a criminal conviction or disciplinary sanction. KBML included certified copies of the Ohio Board's records related to its discipline of Dr. Uradu.

In her response, Dr. Uradu objected to the motion for summary disposition, arguing that 201 KAR 9:081 § 9(4)(c) was "illegally contrived" because it exceeded its statutory authority, that KRS Chapter 13A forbade KBML from enlarging its delegated authorization in an administrative regulation, and that her due process rights were being denied because she was subjected to re-punishment in Kentucky. Dr. Uradu also sought a hearing on her complaint,

stating that genuine issues of material fact existed and that the Ohio certified documents were incomplete because a written copy of the amended final report/recommendation/order had not been included. She also wanted to update KBML on what had transpired since the Ohio Board action and provide an impact statement, not re-litigate the Ohio disciplinary process.

The hearing officer entered his findings of fact, conclusions of law, and recommended order on May 24, 2017, and in doing so found no disputed issues of material fact existed and granted KBML's motion for summary disposition. Based upon his findings, the hearing officer concluded that KBML had established by a preponderance of the evidence that Dr. Uradu had violated KRS 311.595(17) and was subject to sanction based upon the Ohio Board's order. The hearing officer rejected Dr. Uradu's arguments related to 201 KAR 9:081 § 9(4)(c), stating that the regulation was within KBML's discretion, and declined to address the constitutionality of KRS 311.595(17), although he did point out that KBML was not sanctioning her for a violation of an Ohio statute but for violating one in Kentucky. Furthermore, the amended report Dr. Uradu had attached to her filing was not certified or authenticated. Accordingly, the hearing officer recommended that KBML impose, at a minimum, the same sanctions against Dr. Uradu's medical license as the Ohio Board had imposed.

Dr. Uradu filed exceptions to the hearing officer's recommendations, arguing that she was denied due process and that he had limited KBML's statutory duty to exercise its discretion in disciplining her. She attached a personal statement dated June 7, 2017, in which she sought mercy and requested that KBML not penalize her any further. She also attached a letter and decision from the West Virginia Board of Medicine declining to find probable cause existed to initiate a complaint against her. Both of these documents, she asserted, supported her argument that the use of summary disposition prejudiced her interests.

On July 24, 2017, after considering the complaint, the hearing officer's recommendations, Dr. Uradu's exceptions, and a memorandum from KBML's counsel, KBML adopted the hearing officer's findings of fact and conclusions of law as well as his recommended order. It therefore placed Dr. Uradu's license to practice medicine in Kentucky on probation for one year; stayed the indefinite suspension of her license; and ordered her to submit proof that she had complied with the Ohio Board's requirement that she complete a course related to prescribing controlled substances, reimburse KBML for the cost of the proceedings, and not violate any provision of KRS 311.595 and/or KRS 311.597.

Dr. Uradu timely sought judicial review of KBML's order of probation in the Jefferson Circuit Court pursuant to the proper statutes and provided notice to the Kentucky Attorney General pursuant to KRS 418.075 as she

was contesting the constitutionality of 201 KAR 9:081 § 9(4)(c). She asserted that the regulation was illegal and unconstitutionally applied and that KBML violated its administrative regulation. Dr. Uradu demanded that the regulation in question be declared illegal and that the order of probation be vacated. KBML responded to Dr. Uradu's petition, arguing that it had acted both in compliance with the constitutional and statutory provisions and within its statutory authority, as well as with the support of substantial evidence. It had not acted arbitrarily or capriciously, and it had not abused its discretion in its order. Dr. Uradu also sought a stay of the period of probation, to which KBML objected. Dr. Uradu filed a motion for summary judgment and to vacate KBML's order of probation, making similar arguments about the application of 201 KAR 9:081 § 9(4)(c) and that the summary disposition process used by KBML violated Kentucky law. KBML's response was not included in the certified record, although Dr. Uradu replied to it.

The circuit court entered an opinion and order on December 18, 2017, finding and concluding in relevant part as follows:

When Dr. Uradu's license was renewed in Kentucky in 2016, she was directed to notify the Board immediately once a resolution was reached in an ongoing investigation by the State Medical Board of Ohio ("the Ohio Board"). That investigation, as duly reported to the Board by Dr. Uradu, resulted in a finding by the Ohio Board that Dr. Uradu prescribed narcotic medications to 171% more patients than permitted by state and federal law. This led to a subsequent investigation regarding Dr. Uradu's Kentucky license, which resulted in the KY

Board filing a formal complaint against her on March 8, 2017.

The Board may limit or restrict a medical license upon proof that the licensee has had his or her license to practice medicine in any other state, revoked, suspended, restricted, or limited or has been subjected to other disciplinary action by the licensing authority, without the necessity of relitigating of the out-of-state disciplinary action. KRS 311.595(17). Dr. Uradu contends that, while she was disciplined by the Ohio Board, that disciplinary action was unrelated to patient care and competency issues concerning her practice in Kentucky. Be that as it may, there was substantial evidence of record on which the Board could draw its conclusions. The Board correctly applied the law to those facts and acted within its authority to restrict Dr. Uradu's license based on infractions found by another licensing authority without further litigation. There is no evidence of record to suggest that the Board acted in violation of KRS 311.595 during this process.

Therefore, the circuit court affirmed KBML's July 24, 2017, order. This appeal now follows.

Uradu presents three arguments for our review. First, whether the regulation at issue is illegal; second, whether KBML violated the regulation; and third, whether the summary disposition procedure deprives her of due process and violates Kentucky law.

Generally, our standard of review in administrative appeals is as follows:

The purpose of judicial review of an appeal from an administrative agency is to ensure that the agency did

not act arbitrarily. *Baesler v. Lexington-Fayette Urban County Government*, 237 S.W.3d 209 (Ky. App. 2007). If the Court concludes that the agency applied the correct rule of law to the facts supported by substantial evidence, the final order of the agency must be affirmed. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406 (Ky. App. 1994).

Commonwealth, Energy & Environment Cabinet v. Spurlock, 308 S.W.3d 221, 223 (Ky. App. 2010). Our review here is *de novo* as “[t]he issues presented require only that we resolve whether the Cabinet properly applied the law.” *Id.*

First, Uradu contends that the regulation at issue – 201 KAR 9:081 § 9(4)(c) – is illegal because it exceeds the scope of the statute upon which it is based. KRS 311.595 addresses the denial, probation, suspension, or revocation of licenses and permits, and regarding this case it provides:

If the power has not been transferred by statute to some other board, commission, or agency of this state, the board may deny an application or reregistration for a license; place a licensee on probation for a period not to exceed five (5) years; suspend a license for a period not to exceed five (5) years; limit or restrict a license for an indefinite period; or revoke any license heretofore or hereafter issued by the board, upon proof that the licensee has:

...

(17) Had his license to practice medicine or osteopathy in any other state, territory, or foreign nation revoked, suspended, restricted, or limited or has been subjected to other disciplinary action by the licensing authority thereof. This subsection shall not

require relitigation of the disciplinary
action[.]

In 201 KAR 9:081, KBML promulgated regulations related to disciplinary proceedings. The section at issue, 201 KAR 9:081 § 9(4)(c), provides:

If a licensee has had disciplinary action taken against or sanctions imposed upon the licensee's license to practice medicine or osteopathy in any state, the appropriate panel:

1. Shall, at a minimum, impose the same substantive sanctions, up to and including permanent revocation or surrender, as a disciplinary sanction against the licensee's Kentucky license; and
2. In addition to those minimum sanctions, may take any other disciplinary action authorized by KRS 311.595, including revocation, against the licensee.

Urdu contends that because the statutory language is permissive, the mandatory language of the regulation makes it illegal. We agree.

Pursuant to KRS 13A.120(2)(i), “[a]n administrative body shall not promulgate administrative regulations . . . [t]hat modify or vitiate a statute or its intent.” And “[a]ny administrative regulation in violation of this section or the spirit thereof is null, void, and unenforceable.” KRS 13A.120(4). It has long been held in Kentucky that “[a]dministrative agencies are bound by the procedural dictates of the statutes and are not empowered to adopt regulations in conflict with

plain statutory provisions.” *Nat. Resources & Environmental Protection Cabinet v. Pinnacle Coal Corp.*, 729 S.W.2d 438, 439 (Ky. 1987).

In *Franklin v. Nat. Resources & Environmental Protection Cabinet, Commonwealth of Ky.*, 799 S.W.2d 1, 3-4 (Ky. 1990), the Supreme Court of Kentucky extensively addressed the interplay between regulations and their statutory counterparts in the area of strip mining.

First, it is contended that the statutes by which the regulation purports to have been enacted— viz., KRS 224.033, 350.020, 350.028, 350.225, 350.465, and 350.610—do not mention nor do they authorize prepayment of penalties as a condition precedent to a formal hearing. We agree.

KRS 350.028(2) provides that the Cabinet has the power to conduct hearings under Chapter 224, which, in turn, provides in KRS 224.081 and KRS 224.083 that, whenever the Cabinet has reason to believe that a violation has occurred, it shall serve a written notice upon the violator and hold a hearing thereon. The statutes state that the hearing shall be one at which the party may be represented by counsel, may make oral or written arguments, offer testimony, cross-examine, issue subpoenas, etc. Of additional note is that KRS 224.083 provides that a record shall be kept of such hearing and made available. Under the regulation herein, the preliminary hearing does not follow the statute and the only way in which a formal hearing may be obtained is by the prepayment of the penalties and fines, which procedure is not mentioned or authorized by the statute.

KRS 350.028(4) provides that the Cabinet has the power to issue an order imposing civil penalties for violations after an opportunity for hearing, but again

makes no reference to prepayment of these penalties as a prerequisite to obtain a proper hearing.

KRS 13A.120(1)(i) prohibits an administrative agency from promulgating administrative regulations which modify or vitiate a statute or its intent. It is our holding that the prepayment requirement of 405 KAR 7:090(4) to obtain a formal hearing as prescribed by the statutes above referred to is a clear violation of this caveat and modifies and vitiates the statute, rendering the regulation “null, void and unenforceable” as set out in KRS 13A.120(2).

.....

Thus, it is our holding that that portion of 405 KAR 7:090(4) which requires prepayment of fines and penalties before a formal appeal may be perfected is contrary to Kentucky law and more stringent than the federal law, thereby rendering it null, void and unenforceable.

Franklin, 799 S.W.2d at 3-4. And more recently, this Court addressed the issue as related to restrictive conditions placed on future surface mining in a particular area:

Cabinet regulations have been held invalid where they required a regulated party to comply with terms more stringent than the requirements of SMCRA. *See Franklin*, 799 S.W.2d at 3. A regulation that violates this prohibition is “null, void, and unenforceable.” KRS 13A.120(4). Hence, in order to be valid, a regulation must “be justified by an express grant of regulatory authority clearly embracing that regulation.” *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 491 (Ky. 2009). The promulgating administrative body bears the burden of proving that a challenged regulation is valid. KRS 13A.140(1).

Laurel Mountain Resources, LLC v. Commonwealth, Energy & Environment Cabinet, 360 S.W.3d 791, 796 (Ky. App. 2012).

In its brief, KBML suggests that it had exercised its discretion when it adopted the regulation, but we cannot agree that this saves the regulation. We also disagree that invalidating this regulation would open Kentucky to the dangers of forum shopping as KBML may continue to sanction licensees for sanctions imposed in other states. Finally, we find no merit in KBML's argument that its regulation was mandated under KRS 218A.205(3)(f)3, which addresses the promulgation of regulations for controlled substances licensing. That statute provides:

(3) Each state licensing board shall, in consultation with the Kentucky Office of Drug Control Policy, establish the following by administrative regulation for those licensees authorized to prescribe or dispense controlled substances:

...

(f) The establishment and enforcement of licensure standards that conform to the following:

...

3. Restrictions mirroring in time and scope any disciplinary limitation placed on a licensee or applicant by a licensing board of another state if the disciplinary action results from improper, inappropriate, or illegal

prescribing or dispensing of
controlled substances[.]

However, KBML did not file charges against Uradu under this statute; it filed charges under KRS 311.595(17).

Our review of the statutory and case law convinces us that 201 KAR 9:081 § 9(4)(c) invalidly exceeds the grant of authority set forth in KRS 311.595(17) in that the regulation requires KBML to mandatorily impose the same substantive sanction imposed in another state, while the statutory language is permissive and therefore grants discretion to KBML. If such sanctions are to be mandatorily applied, it is within the province of the General Assembly to amend KRS 311.595(17) to make that the law in the Commonwealth. But until then, the portion of the regulation requiring KBML to impose the same sanction is invalid and unenforceable. Based upon this holding, we need not address the other issues Uradu raised in her brief, although we note that generally we find no issue with the summary disposition procedure if used in the appropriate case.

For the foregoing reasons, the Jefferson Circuit Court's opinion and order upholding KBML's order of probation is reversed, and this matter is remanded for further proceedings in accordance with this opinion, including vacating the order of probation.

ALL CONCUR.

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