

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 11-ALJ-11-0453-AP

Edward P. Trimmier, D.M.D. Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation,
State Board of Dentistry. Respondent.

APPELLANT'S PETITION FOR REHEARING

Paul D. de Holczer, Esquire (SC Bar No. 6905)
deHolczer Law PC
1911 Barnwell Street, Suite C
Columbia, South Carolina 29201-2605
(803) 708-3242
Attorney for Appellant

Columbia, South Carolina
July 15, 2013

Other Counsel of Record:
Sheridan H. Spoon, Esquire
LLR Office of General Counsel
Post Office Box 11329
Columbia, South Carolina 29211-1329

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INTRODUCTION

Pursuant to Rule 221(a), SCACR, the Appellant, Edward P. Trimmier, D.M.D. (hereinafter, “Appellant” or “Trimmier”), respectfully petitions this Court for a rehearing of Opinion No. 5154, dated July 3, 2013. A Rehearing is necessary when the Court has misinterpreted or overlooked an argument made by a party. Rule 221(a), SCACR; See also Kennedy v. S.C. Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001).

STANDARD OF REVIEW

The review of decisions from the ALC is governed by section 1-23-380(5) of the South Carolina Code (Supp. 2012), which states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

LAW/ANALYSIS

I. Violation of Section 40-1-110(1)

The Court of Appeals summarizes Appellant's argument referencing Section 40-1-110 of the South Carolina Code (2011): "Trimmier argues the Board exceeded its statutory authority by conditioning his relicensure upon action by the Georgia Board and because such a requirement was not a part of the 2002 consent agreement." Although Appellant respectfully submits that this argument should prevail, Appellant understands that this Court has rejected the argument that his application for licensure in 2010 was a continuation of the 2002 proceedings and, further, that this Court has held that the authority granted to the South Carolina Board (hereinafter, "Board") under section 40-1-110(1) is irrelevant to this appeal and cannot serve as a basis for reversing the ALC's decision. This is a part of Appellant's argument but not the whole of Appellant's argument. The Court has misinterpreted or overlooked arguments made by Appellant.

Appellant also argues that, if the Board is to condition his South Carolina license on any matters arising or occurring in the State of Georgia, it must give him notice and an opportunity to be heard on those matters. The Board has not done so. The record shows that the Board has received extensive material relating to matters in Georgia (much of which is available by download from the internet), but has not actually conditioned Appellant's license on any matters arising or occurring in the State of Georgia. There is no evidence that the Board has considered the underlying facts of matters in Georgia and, if it has done so, it has not argued in this appeal or otherwise demonstrated in the record

that it has done so. The record bears evidence that the Board has not inquired into the procedure or facts underlying any matters in Georgia.

The consideration of the Georgia matters is confined to merely rejecting what Appellant has offered by way of “written evidence to the Board . . . that shows his Georgia license either was in good standing at the time of his voluntary surrender and/or that there were no disciplinary or other impediments, pending or otherwise, against his license at that time.” Having received all the public orders of the Georgia Board, the Board has not shown how or why what it has received is unsatisfactory to these purposes. The Board has not offered clear guidance as to exactly what would constitute “satisfactory” written evidence. The imposition of a vague requirement with undefined standards (“written evidence to the Board which is satisfactory, in the Board’s discretion”) is arbitrary and capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion. “The mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised.” Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). An agency’s findings may “not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it.” Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

II. Unlawful Procedure

Appellant's argument that the Board should disregard his Georgia license because he voluntarily surrendered that license was based, in part, upon the contractual argument which the Court has rejected by stating his application for licensure in 2010 was not a continuation of the 2002 consent agreement. This is only a part of Appellant's argument and the Court has misinterpreted or overlooked arguments made by Appellant. The Court of Appeals summarizes Appellant's argument that the Board's decision was made upon unlawful procedure because it delegated the Board's decision making authority to Georgia. The Court cites Section 40-15-170 of the South Carolina Code (2011) which provides:

If an individual's license to practice dentistry or dental hygiene is revoked by another state for cause this shall, in the discretion of the board, constitute grounds for revocation of his South Carolina license. The license of a dentist or dental hygienist who does not either reside or practice in South Carolina for a period of six successive years is considered inactive. . . . Relicensing after an absence of over six years may be made at the discretion of the board upon proof of high professional fitness and moral character.

Appellant concedes that, pursuant to Section 40-15-170, the Board may revoke a license based solely on the revocation of a dentist's license in another State. Of course, Appellant's Georgia license was suspended and surrendered, not revoked; and the South Carolina Board did not revoke Appellant's license but ostensibly granted it, although upon grounds impossible for Appellant to satisfy. Appellant concedes further that, the Board is permitted discretion in determining whether to issue a license and may require the candidate to demonstrate "high professional fitness and moral character." S.C. Code Ann. § 40-15-170. The Board has not made a finding that Appellant lacks high

professional fitness and moral character or required that Appellant demonstrate high professional fitness and moral character. The Board arbitrarily predicates its evaluation of Appellant's professional fitness and moral character upon the actions of the Georgia Board.

In this case, the Board has ordered that, "The Applicant shall provide written evidence to the Board which is satisfactory, in the Board's discretion, that shows his Georgia license either was in good standing at the time of his voluntary surrender and/or that there were no disciplinary or other impediments, pending or otherwise, against his license at that time." The Board has not charged Appellant with lacking high professional fitness and moral character. The Board has not asked or invited Appellant to supply documentation or evidence that he has high professional fitness and moral character. The Board has not afforded Appellant an opportunity to demonstrate high professional fitness and moral character. The Board has access to Georgia documentation provided by Appellant, through online publication and through agency reciprocity and knows that Appellant has no power or authority to compel Georgia to supply additional documentation. Appellant cannot prove a negative: that ". . . [Appellant] was not currently facing any new or additional charges before the Georgia Board."

The Board has recognized that, because Appellant had surrendered his license in Georgia, he would have to start anew the licensing process in Georgia if he were to return to the practice of dentistry in Georgia. [R. p. 58, lines 8-11]. Under these particular circumstances, the Board has imposed an unlawful procedure – requiring Appellant to

start anew the licensing process in Georgia – and made a decision to withhold approval of Appellant’s license upon this unlawful procedure. The Board should give Appellant clear, objective criteria, within Appellant’s power to accomplish, which affords Appellant an actual, not ephemeral, opportunity to satisfy the Board and regain his license. Vague instruction, subjective criteria, and requiring Appellant to do something he has no power to do (force Georgia to respond to the Board) constitutes unlawful procedure and cannot satisfy the due process requirements demanded by our laws and constitutions. A board’s decision to impose a sanction must be consonant with the purpose of its proceedings. Wilson v. State Bd. of Med. Exam’rs, 305 S.C. 194, 406 S.E.2d 345 (1991). The Board must meticulously weigh the public interest and need for the continued services of qualified medical professionals against the countervailing concern that society be protected from professional ineptitude. Id. See also Huber v. State Board of Physical Therapy Examiners, 316 S.C. 24, 446 S.E.2d 433 (1994).

III. Substantial Evidence

Appellant argues the Board erred because substantial evidence in the record demonstrates he cannot comply with the condition imposed, but the Court has misinterpreted or overlooked an argument made by Appellant: Appellant also argues that there is no substantial evidence supporting the imposition of the requirement that, because Appellant has surrendered his license in Georgia, he start anew the licensing process in Georgia as if he were to return to the practice of dentistry in Georgia. [R. p. 58, lines 8-11]. Appellant also argues that there is no substantial evidence supporting the

imposition of the requirement that he provide additional unspecified “written evidence to the Board which is satisfactory, in the Board’s discretion, that shows his Georgia license either was in good standing at the time of his voluntary surrender and/or that there were no disciplinary or other impediments, pending or otherwise, against his license at that time.” The record is clear that Appellant was under suspension when he surrendered his license. Appellant has been candid about this and the Board has received this information without rebuttal. [R. p. 58, lines 2 - 17; R. p. 116, lines 17 - 25; R. p. 128; R. p. 131; R. p. 118, lines 1 - 20] Appellant testified in the hearing on July 16, 2010 that his license was under suspension when he surrendered it. [R. pp. 112 - 117, lines 1 - 20].

There is no evidence in this record which substantially supports the argument that Appellant can, under these circumstances (surrender under suspension) obtain documentation evidencing he has complied with the sanctions imposed against him in Georgia and is eligible to apply for reinstatement there. There is only evidence that the Board has rejected the sum and substance of the extensive material in the record regarding the Georgia Board. While it is true that Appellant can actually apply for reinstatement in Georgia (with no guarantee that he would be reinstated), Appellant has been clear that he does not wish to practice in Georgia. [R. p. 94, line 24 - p. 95, line 15; p. 101, lines 5 - 9]. The Board recognized that, because Appellant had surrendered his license in Georgia, he would have to start anew the licensing process in Georgia if he were to return to the practice of dentistry in Georgia. [R. p. 58, lines 8 - 11]. Such a requirement is not rationally related to the protection of the public in South Carolina. There is no substantial evidence in the record to support this requirement. Furthermore, it

is in excess of the statutory authority of the Board to require that Appellant seek reinstatement in Georgia.

IV. Arbitrary and Capricious

"A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Deese v. S.C. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985). The Court held that the determination by the Board to condition Trimmier's licensure upon sufficient proof of good standing in Georgia rationally relates to a protection of the public's interest and is neither arbitrary nor capricious. The Court has misinterpreted or overlooked an argument made by Appellant. The determination by the Board to reject the extensive Georgia material and to effectively condition Appellant's licensure upon Appellant's provision of unspecified information outside the reach of Appellant is arbitrary, capricious and violates fundamental fairness. The Board has not requested any information or held any inquiry about the facts giving rise to Appellant's discipline in Georgia; rather, the Board is conditioning Appellant's licensure upon the provision of unspecified documentation related to Georgia's disposition of his Georgia license – which, as has been shown, was surrendered under suspension. Furthermore, the Board's decision, requiring that Appellant start anew the licensing process in Georgia, is arbitrary, capricious and violates fundamental fairness.

The Board concedes that Appellant has satisfied the State of New York [R. p. 8 and p. 127] as to his discipline in Georgia and South Carolina and knows that Appellant engaged in extensive, expensive litigation in Georgia, and even prevailed in Georgia's courts against the Georgia Board [R. p 131; R. p. 118, lines 1 - 20]. Rather than exercise its own discretion with regard to the underlying charges in Georgia, the Board is interposing the discretion of the Georgia Board as an impediment to Appellant's relicensure. It is entirely within the discretion of the Georgia Board whether or not it will supply additional information to the South Carolina Board. Rather than conducting any impartial, independent inquiry of the underlying charges in Georgia and then drawing its own conclusions, the Board has arbitrarily and capriciously erected an impediment to Appellant's relicensure. The Board disingenuously argues that it has granted Appellant his license although it effectively denies Appellant his license based upon vague and subjective criteria and the exercise, or non-exercise, of discretion by the Georgia Board.

CONCLUSION

For the reasons detailed above, the Appellant, Edward P. Trimmier, D.M.D., respectfully requests this Honorable Court for an Order granting a Rehearing to address those arguments of Appellant which have been misinterpreted or overlooked.

RESPECTFULLY SUBMITTED,



Paul D. de Holczer (SC Bar #6905)
deHolczer Law PC
1911 Barnwell Street, Suite C
Columbia, South Carolina 29201-2605
(803) 708-3242 / (803) 708-3765 Fax
PauldeHolczer@gmail.com
Attorney for Appellant

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PROOF OF SERVICE


I, the undersigned Christopher P. Whitehead, Esquire, on behalf of deHolczer Law PC, attorney for the Appellant in the above-captioned matter, do hereby certify that a copy of the following has been served upon opposing counsel and/or parties by placing same with the U.S. Postal Service, postage prepaid, at Columbia, South Carolina, this 17th day of July, 2013.

Served: Sheridan H. Spoon, Esquire
LLR Office of General Counsel
Post Office Box 11329
Columbia, SC 29211 1329

Document(s): Appellant's Petition for Rehearing

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Christopher P. Whitehead