

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Lower Court Case No. 11-ALJ-11-0453-AP
Appellate Tracking Number ~~2012-212267~~

2013-002068

RECEIVED

OCT 31 2013

S.C. Supreme Court

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

Petitioner,

v.

South Carolina Department of Labor, Licensing
And Regulation, State Board of Dentistry,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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82

INDEX

Certificate of Counsel1

Question Presented1

Statement of the Case2

Argument6

I. Was the South Carolina Dental Board's requirement that an applicant for licensing (e.g. Petitioner) prove good standing in another jurisdiction an improper delegation of authority?

II. Was the South Carolina Dental Board's established condition precedent to licensure an arbitrary and/or capricious action, unrelated to the protection of the public interest?

Conclusion13

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing on the merits issue was made and finally ruled on by the Court of Appeals on August 27, 2013. By order of this court dated October 2, 2013, Petitioner was granted additional time by which to file this petition.

QUESTIONS PRESENTED

- I. Was the South Carolina Dental Board's requirement that an applicant for licensing (e.g. Petitioner) prove good standing in another jurisdiction an improper delegation of authority?

- II. Was the South Carolina Dental Board's established condition precedent to licensure an arbitrary and/or capricious action, unrelated to the protection of the public interest?

STATEMENT OF THE CASE

Pursuant to Rule 242, SCACR, Petitioner Edward Trimmier moves for an order granting a writ of certiorari to the Court of Appeals regarding the decisions of the Court of Appeals on July 3, 2013 (rehearing denied, August 27, 2013) in *Trimmier, DMD, vs. South Carolina Department of Labor Licensing and Regulation, State Board of Dentistry*, (Opinion No. 5154).

Petitioner is a dentist, who was licensed in South Carolina, Georgia, and New York. In 2002, charges were initiated against Dr. Trimmier, alleging he filed false claims with the South Carolina Medicaid program. There was never an allegation of patient harm, but he was ultimately convicted of a misdemeanor on March 22, 2002. Dr. Trimmier was ultimately pardoned for his conviction in 2007.

In 2002, however, the South Carolina Board of Dentistry (the Board) initiated disciplinary action against Dr. Trimmier. On December 7, 2002, he and the Board reached a consent order in which Dr. Trimmier admitted to misconduct, agreed to pay a civil penalty of \$25,000 and agreed to complete eight hours of Board-approved ethical training and education. The Board also suspended Dr. Trimmier's license for a period of six years, but stayed the suspension to probation pending payment of the penalty and completion of the training. Dr. Trimmier complied with the terms of the consent order, but when his license was due for renewal in 2003, Dr. Trimmier allowed it to lapse since he had moved outside the state by that time.

Concurrently with the South Carolina Board's investigation in 2002, the licensing authorities both in New York and Georgia opened reciprocal disciplinary proceedings. The Georgia Board of Dentistry (the Georgia Board) revoked Dr. Trimmier's license. Dr.

Trimmier appealed, and on September 15, 2009, the Georgia Circuit Court reversed the Georgia Board's revocation of Dr. Trimmier's license and remanded the case to the Georgia Board for less severe sanction. (Amended Final Decision filed October 16, 2010). Upon remand, the Georgia Board suspended Dr. Trimmier's license indefinitely, but provided that he would be eligible to petition the Georgia Board for lifting of the suspension and restoration of his license after two years, beginning in October 2009.

After years of litigating these matters in Georgia, and with his family's desire to return to South Carolina, Dr. Trimmier elected not to wait until the conclusion of that two-year period prior to petition. On April 9, 2010, Dr. Trimmier voluntarily surrendered his Georgia license. (Voluntary Surrender filed April 14, 2010; Transcript from Reinstatement Hearing held on July 16, 2010, p. 31, ll. 1-20). That same month, Dr. Trimmier began reinstatement proceedings before the South Carolina Dental Board.

Dr. Trimmier appeared before the Board on July 16, 2010, at which time Dr. Trimmier confirmed he had complied with the terms of the 2002 consent order signed with the Board, acknowledged he had allowed his license in South Carolina to lapse, and confirmed he was seeking reinstatement of his right to practice dentistry in South Carolina. He also notified the Board that he had surrendered his license to practice in Georgia and that his license in New York was inactive. (Transcript from Reinstatement Hearing held on July 16, 2010, p. 29, ll. 17-25). He was candid with the Board, and informed them that his Georgia license was still under suspension at the time of its surrender. (Transcript from Reinstatement Hearing held on July 16, 2010, p. 25, l. 18 - p. 30, l. 20). After the hearing, the Board issued an order stating that Dr. Trimmier

... may be issued a license to practice dentistry in this state subject to the following terms and conditions: 1. Applicant must provide documentary evidence

satisfactory to the Board that his license and/or certificates from Georgia, New York and any other states of licensure are in good standing, whether active or inactive.

(Order on the Applicant's Motion for Reinstatement (Public) dated July 28, 2011 and Order dated July 29, 2010).

After procuring documentation setting forth the status of his license from the Georgia and New York authorities and submitting those materials to the Board, Dr. Trimmier appeared for a second hearing on July 15, 2011. At that time, he provided documentary evidence that his inactive license from New York was in good standing. He also supplied the Board with a copy of a letter from the Georgia Secretary of State, which indicated that his license "suspended" at the time he had surrendered his license to practice dentistry (e.g. not in good standing). That communication was consistent with Dr. Trimmier's statement regarding its status at the time of surrender. (Transcript from Reinstatement Hearing held on July 16, 2010, p. 25, l. 18 – p. 30, l. 20).

Thereafter, the Board issued another order, again granting Dr. Trimmier's request for reinstatement, but again with a contingency: before his South Carolina license would be usable, Dr. Trimmer had to prove that his Georgia license was in good standing, even though the record clearly established that it was not.

Dr. Trimmier appealed this nonsensical decision to the Administrative Law Court (ALC), which affirmed the order and subsequently denied Dr. Trimmier's motion for reconsideration.

Dr. Trimmier then appealed to the Court of Appeals, arguing that the Board and ALC effectively imposed upon him a requirement that he seek reinstatement in Georgia before his license in South Carolina would be granted and that such requirement

constitutes an arbitrary decision rendered by an abuse of discretion. The Court of Appeals did not address all arguments made by Dr. Trimmier, and affirmed the ALC.

It is respectfully asserted that this Court should issue a writ of certiorari to review the decision of the Court of Appeals because of the following:

- A. The decisions of the Court of Appeals and the Board have prejudiced substantial rights of the Petitioner; and
- B. Appellant raises novel questions about the limits on the delegation of authority by a State Agency under the laws of this State.



ARGUMENT

- I. Was the South Carolina Dental Board's requirement that an applicant for licensing (e.g. Petitioner) prove good standing in another jurisdiction an improper delegation of authority?

"The right of a person to engage in a lawful profession, trade, or occupation of choice is clearly protected by both the Constitution of the United States and the Constitution of the State of South Carolina. The State cannot abridge this right except as a reasonable exercise of its police powers when it is clearly found that abridgement is necessary for the preservation of the health, safety, and welfare of the public." S.C. Code § 40-1-10(A).

Among the limited police powers granted to the Board is the power to license dentists to engage in the practice of dentistry in South Carolina and to regulate the discipline and licensure thereof under procedures and practices established by state statute. The Board has only such authority as expressly granted to it by statute and such implied authority as is reasonably necessary to enable it to carry out its statutory obligations.

The code discusses when the Board can delegate its authority: a board may elect to delegate to the department the authority to deny an authorization to practice to an applicant who has committed an act that would be grounds for disciplinary action under this article or the licensing act of the board, who has failed to comply with a final order of a board, or who has failed to demonstrate the basic qualifications or standards for practice authorization contained in the board's licensing act. S.C. Code § 40-1-10(F). "...All power is derived from the people, and all magistrates and officers of government are their agents, and at all times accountable to them. And these agents have not a general

authority to avoid their official responsibility by relegating their duties to their assignees” Joytime Distributors v. State, 338 S.C. 634, 643, 528 S.E.2d 647 (1999) (quoting Opinion of the Justices (Tax Plan Referendum), 725 A.2d at 1087 (N.H.1999)). On information and belief, the Board lacks the statutory authority to delegate the police power of the State to a foreign jurisdiction.

Petitioner Dr. Trimmier concedes that the Board has the discretion in determining whether to re-issue him a license, such that “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.” S.C.Code §40-15-170 (emphasis added). But, Dr. Trimmier would show that the application of this section against the Board’s actions in this matter is an error because there was no discretionary action taken by the board. Effectively, the Board wholly turned over to the Georgia Board the final decision making authority over Dr. Trimmier’s petition.

The Court of Appeals held that “Trimmier's own testimony provides substantial evidence supporting the Board's decision to condition his relicensure on proof of good standing in Georgia. According to Dr. Trimmier, "everything was good" with the Georgia Board when he surrendered his license.” (Order, July 3, 2013). Not only did the court take that part of the testimony out of context, but, also, the court (and the Board, it seems) failed to understand the impossibility of the condition it imposed. As Trimmier testified at the hearing before the Board, his license in Georgia is nonexistent, and just before it became non-existent, it was under suspension as the result of a concluded disciplinary matter¹. There is no way to show he has, or had, a license in good-standing in Georgia

¹ Transcript from Board hearing 7-15-11, Pg. 18

prior to its relinquishment. What the Board did in this matter, effectively, was make a finding that Dr. Trimmier could have his license back in South Carolina *if* he also got it back in Georgia.

By way of analogy, Dr. Trimmier references the case of York County v. South Carolina Dept. of Health and Environmental Control. Section 44-96-290(F) of the South Carolina Code requires DHEC to determine that the proposed landfill is consistent with the county's solid waste management plan, and other applicable local ordinances, before it may issue a permit for a landfill in a particular county. C&D Management in York County filed an application for a landfill based on a DHEC approved waste management plan. While the application was pending, the County issued an "emergency ordinance" in effort to declare the C&D project was inconsistent with the pre-approved plan. DHEC determined that only it had the authority to determine whether a project was consistent with an approved plan and issued the permit anyway. The Court agreed that DHEC was correct to issue the permit because "DHEC could not defer to the County's declaration of inconsistency, as doing so would amount to an improper delegation of DHEC's exclusive authority over permitting decisions for solid waste management facilities." York County

DR. JONES: Let me ask you this, Dr. Trimmier, if you decided to practice in Atlanta, if you decided to go back to Georgia to practice, what would be required for you to set up practice -- or be licensed in Georgia?

Dr. Trimmier: Same thing here, apply for reinstatement.

MR. de HOLCZER: Yes, sir. He has no active license in Georgia for it to be in good standing or not good standing. He is not practicing in Georgia. He has no license in Georgia.

Transcript from Board hearing 7-15-11, pg. 22

MR. SAXON: Is it fair to say that he chose voluntary surrender rather than submit to possible disciplinary action?

MR. de HOLCZER: No, sir. Because he had already been -- . . . disciplined in Georgia. He had already submitted to discipline in Georgia, that had all been resolved. It was a question of whether or not he wanted to continue to practice in Georgia and he decided he did not want to do that.

v. South Carolina Dept. of Health and Environmental Control, 397 S.C. 217, 723 S.E.2d 255 (Ct. App. 2012).

This delegation to the Georgia Board of Dentistry of the authority to determine whether or not Dr. Trimmier should be allowed to practice dentistry in South Carolina is without statutory authority, prejudices the substantial due process rights of Dr. Trimmier, and if deemed the law of this state, other licensees. The Court's upholding of the Board's decision in the matter constitutes an error of law. Southeast Resource Recovery, Inc. v. South Carolina Department of Health & Environmental Control, 358 S.C. 402, 595 S.E.2d 468 (2004).

- II. Was the South Carolina Dental Board's established condition precedent to licensure an arbitrary and/or capricious action, unrelated to the protection of the public interest?

The Court of Appeals determined that Dr. Trimmier's petition for reinstatement was not a continuation of the 2002 disciplinary matter, and that the Board's requirement falls within the scope of Section 40-15-170 of the South Carolina Code, which speaks to the general authority of the Board to revoke or grant licensure. In evaluating the language of the statute, though, the court mashes the separate parts together, whereas Dr. Trimmier would show that the burdens of proof for revocation and licensure as set forth in that section are separate.

The second part of Section 40-15-170, which is the most pertinent section to this case, speaks to the authority of the Board to consider applications for licensing after the license was allowed to lapse. It sets forth that "[t]he 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.” (emphasis added). The courts’ applications of the first part of Section 40-15-170 to the matter in support of their rulings were flawed because both the ALC and Court of Appeals seemed to rest their decision, in part, on the argument that Section 40-15-170 provides that “[i]f 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.” Dr. Trimmier conceded 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, but the courts overlook the fact that Dr. Trimmier’s Georgia license was suspended and surrendered: it was not revoked.

Reasoning, the applicable part of Section 40-15-170 requires the Board to grant licensure upon a finding that the applicant is morally and professionally fit to practice. Even though this was not a continuation of the 2002 matter, the 2002 Consent Order with the Board is relevant to the matter because it was considered during both hearings on Dr. Trimmier’s petition for reinstatement. Obviously, some factual determination was made by the Board in 2002 that Dr. Trimmier was of sufficient character and fitness to be allowed to practice since his license was put on probation. When he appeared before the Board in 2010 and 2011, there was no evidence presented to show any further or other misconduct or unfitness outside the matters that led to the discipline in South Carolina (and reciprocal discipline in Georgia). Dr. Trimmier presented the Board with recommendations of his moral character and professional fitness (Transcript p. 8, 7/15/2011), and the Board did not make a finding² that Dr. Trimmier lacks high

² (See generally, “A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and

7/15/2011), and the Board did not make a finding² that Dr. Trimmier lacks high professional fitness and moral character. "Proof of high professional fitness and moral character" is the standard Dr. Trimmier must meet in order to be licensed by the Board, and there was no determination that he was lacking in any such respect. Consequently, based on the same facts it had in 2002 and in 2010, under which the Board allowed him to practice dentistry previously, the Board now will not let Dr. Trimmier practice unless Georgia gives some indication that he would be allowed to practice in that state. This kind of flip-flop is capricious.

The July 2011 Order by the Board required "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 impediments, pending or otherwise, against his license at the time."

During the evidentiary phase of Dr. Trimmier's reinstatement request, he provided documentary evidence to the South Carolina Board that he surrendered his ability to practice dentistry in Georgia in April 2010. He provided documentation and testimony which established that when he surrendered his license, it was under indefinite suspension, but that he would be able to apply for reinstatement in Georgia after October 2011. After hearing this evidence, the Board issued an order granting Dr. Trimmier's request to be issued a license to practice in South Carolina, thus impliedly finding him of the requisite moral character and professionalism. But, the South Carolina Board added

² (See generally, "A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated." S.C.Code § 1-23-350).

In other words, when the Board issued the July 2011 order, there was no question that Dr. Trimmier's license in Georgia was suspended (e.g. not in good standing) at the time it was surrendered. So, what possible documentation could the Board be seeking from Georgia to show that Dr. Trimmier was in good standing? Dr. Trimmier believes the Dental Board effectively ruled that, in order to be licensed in South Carolina, Dr. Trimmer must first obtain a license in Georgia. This requirement does not rationally relate to protection of the public's interest, and the Court of Appeals erred in glossing over this consequence of the Board's holding.

Dr. Trimmier has no license, active or inactive, in Georgia, so it is impossible to provide evidence to the South Carolina Board that his Georgia license is in good standing, unless Dr. Trimmier first applies for, and achieves, reinstatement of his Georgia license. While he accepts the Board's power to grant or deny his request for licensing and to discipline him as a licensee, Dr. Trimmier has argued that such action must be for the protection of the public and not merely punitive, and must be consonant with the statutory powers of the Board. Petitioner would show that requiring a candidate to seek licensing in a foreign jurisdiction is not a lawful procedure toward satisfying that requirement.

In individual cases, the limited statutory powers of the Board are subject to judicial review by the courts of the State to protect the rights of the licensees and prospective licensees against arbitrary and capricious actions of the Board. (See, South Carolina Code (Supp. 2012), § 1-23-380(5)). The Board issued its Order on July 29, 2010, which said that Dr. Trimmier may be issued a license to practice dentistry in this state once he provided documentary evidence, "satisfactory to the Board," that his

licenses from Georgia and New York are in good standing, “whether active or inactive.” The Court of Appeals summarized that “Appellant now argues that he has no license in Georgia, whether active or inactive, and therefore need not show that it is in good standing.”

Both the Court of Appeals and the ALC erred because the Board’s order of July 2011 was erroneous in view of the reliable, probative, and substantial evidence on the whole record and was characterized by abuse of discretion, or a clearly unwarranted *refusal* to exercise discretion.

CONCLUSION

South Carolina Code (Supp. 2012), § 1-23-380(5) states that the court may “reverse or modify the decision [of the agency] if substantial rights of the appellant have been prejudiced” because the decision is:

- (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.

S.C. Code § 1-23-380(5) (Supp. 2012).

The South Carolina Supreme Court may undertake review of the questions and issues presented to the lower court in its own appellate capacity, pursuant to Rule 242, SCACR and the South Carolina Constitution, Article V, Section 5. The South Carolina Constitution sets out four types of appellate jurisdiction for this Court, including that the Supreme Court “shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe. (S.C. Const. art. V, § 5).

The Supreme Court's power to exercise general appellate review also lies in common law. In City of Columbia v. S.C. Public Service Commission, 242 S.C. 528, 131 S.E.2d 705 (1963), the Court explained the attributes of the common law writ of certiorari:

At common law the writ of certiorari is used for two purposes: (1) As an appellate proceeding for the re-examination of some action of an inferior tribunal. (2) As an auxiliary process to enable the Court to obtain further information with respect to some matter already before it for adjudication.

While certiorari has been said to be original in nature, it has also been said to be appellate. It may be said, indeed, to have characteristics of both. For example, to the extent that it involves the review of the proceedings of an inferior court, certiorari is an appellate proceeding, but to the extent that the subject matter of the proceeding brought before the appellate court will not be reinvestigated, tried, or determined on the merits as on appeal or writ of error, it is an original proceeding.

242 S.C. at 534, 131 S.E.2d at 708 (internal citations omitted).

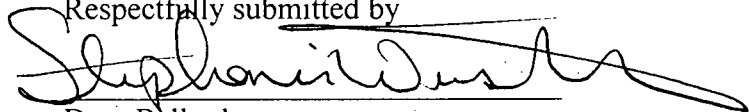
When reviewing the decision of an inferior tribunal "on certiorari" or "on appeal," the writ is said to be appellate in nature. *Id.* ("An appeal is a review by a superior court of some proceeding held in an inferior tribunal. The method of review may be called appeal or certiorari and be classified as an appellate proceeding...."); Rowe v. City of W. Columbia, 334 S.C. 400, 404, 513 S.E.2d 379, 381 (Ct.App.1999) (" [W]hen a court is reviewing some proceeding held in a lower tribunal, the proceeding is an appellate proceeding, regardless of the title given the proceedings by the reviewing court."). (see generally, Lewis v. Lewis, 392 S.C. 381, 398, 709 SE2d 650 (2011)(See also, S.C.Code Ann. § 1-23-380(A)(6)(d) (2005) (court may reverse or modify decision if substantial rights of appellant have been prejudiced because administrative findings, inferences, conclusions or decisions are affected by other error of law).

The answers to the questions presented by Petitioner Dr. Trimmier to the Court of Appeals, and now to this Court, will affect substantive rights of, not only this Petitioner, but also of other members of the profession. The issues presented to the Court of Appeals were:

- A. The Court has misinterpreted or overlooked arguments made by Appellant in support of the allegation that the South Carolina State Board of Dentistry acted in violation of Section 40-1-110(1).
- B. The Court has misinterpreted or overlooked arguments made by Appellant in support of the allegation that the South Carolina State Board of Dentistry acted upon unlawful procedure affected by an error of law.
- C. The Court has misinterpreted or overlooked arguments made by Appellant in support of the allegation that the actions of the South Carolina State Board of Dentistry are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.
- D. The Court has misinterpreted or overlooked arguments made by Appellant in support of the allegation that the actions of the South Carolina State Board of Dentistry are arbitrary, capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Attached hereto are the briefs, which were filed with, and argued orally before, the Court of Appeals. Based on the foregoing, Petitioner prays for an order granting the petition for a writ of certiorari, after which this Court considers undertaking *de novo* review of these questions, should it decide not to remand to the Court of Appeals, or refers the matter back to the Board for clarification of its order.

Respectfully submitted by



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October 31, 2013

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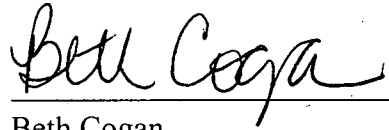
PETITION FOR WRIT OF CERTIORARI

I, Beth Cogan, an employee of Desa Ballard, PA d/b/a Ballard Watson Weissenstein, do hereby certify that I have this date, served one (1) copy of the **Petition for Writ of Certiorari** in the above-captioned matter on the following people by placing the same document in the United States Mail, with sufficient first-class postage affixed and addressed as follows:

**Honorable Jenny Abbot Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211**

**Kenneth P. Woodington, Esquire
Post Office Box 8568
Columbia, South Carolina 29202**

[signature follows]



Beth Cogan
Paralegal

October 31, 2013