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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Opinion No. 5154, S.C. Ct. App. Filed July 3, 2013

Supreme Court Appellate Case No. 2013-002068

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

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does This Case Meet the Standards for This Court's Review?
2. Was the South Carolina Dental Board's Requirement That Petitioner Prove Good Standing In Another Jurisdiction an Improper Delegation of Authority to the Licensing Board in That Other Jurisdiction?
3. Were the South Carolina Dental Board's Conditions for Re-licensure an Arbitrary and/or Capricious Action, Unrelated to the Protection of the Public Interest?

COUNTER-STATEMENT OF THE CASE

Edward Trimmier, DMD ("Petitioner" or "Dr. Trimmier"), is or has been licensed in three states. He has been disciplined in all three; Georgia, New York, and South Carolina. He had been the subject of disciplinary action in South Carolina arising out of his conviction in 2002 for filing false claims with the South Carolina Medicaid program and for publishing a misleading advertisement suggesting he was a specialist in pediatric dentistry and failing to properly supervise auxiliary personnel. (R. 22-24, 27) In 2003, the Georgia Board of Dentistry (the Georgia Board) suspended his license for six years with it being actively suspended for the first ninety days, and on probation thereafter. (R.15) This sanction was the result of the Georgia Board's discovery that Petitioner submitted an application for a sedation permit that falsely indicated he had never been convicted of a crime. (R.14, ¶5) Thereafter, the Georgia Board again disciplined Petitioner for performing a procedure on a patient in 2004 while sedated after the probationary sedation permit he had received lapsed. (R.94)

The Georgia Board of Dentistry ("Georgia Board") placed Dr. Trimmier on indefinite suspension by order dated October 9, 2009, but stated that he could petition the

Georgia Board to end the suspension after two years. (R. 129-130) That two year period would have ended approximately November 9, 2011. However, Dr. Trimmier chose to surrender his Georgia license on April 14, 2010, which provided that reinstatement would be in the discretion of the Georgia Board. (R.129) About a week earlier, Dr. Trimmier signed his application for reinstatement in South Carolina. (R. 136). The South Carolina Board of Dentistry (the "Board") received the application on April 13, 2010. (R.133) Petitioner applied for reinstatement of his lapsed South Carolina license more than eighteen months before he would have been eligible to ask the Georgia Board to end his indefinite suspension.

Dr. Trimmier appeared before the Board on July 16, 2010, and July 15, 2011. (R. 8, 10) On both occasions, the Board granted his license application subject to conditions. (R. 8-11) The July 29, 2010, Order resulting from his first appearance required Petitioner to provide documentary evidence that his licenses from Georgia, New York, and any other states are in good standing, whether active or inactive. (R. 11) At that time, Petitioner's New York license was in probationary status. (R. 28) The probationary status of Petitioner's New York license ended on February 21, 2011. (R. 71)

After his probationary status in New York ended, Dr. Trimmier made a second appearance before the Board. The July 28, 2011 order resulting from his second appearance conditioned re-licensure upon "*receipt of 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.*" (R. 8-9)

Petitioner appealed and the decision of the Board was affirmed in its entirety by the Administrative Law Court and the South Carolina Court of Appeals. On November 6, 2013, this Court directed Respondent to file a response to the Petition for Writ of Certiorari ("Petition") within 30 days.

ARGUMENT

I. This Case Is Inappropriate for Review by This Court

A. This Case Involves No Factors Favoring Review by Writ of *Certiorari*

Rule 242, SCACR provides that issuance of a writ of certiorari is discretionary and that *certiorari* is granted only for special and important reasons. Rule 242(b), SCACR provides five specific considerations, as a clear indication to petitioners of the character of important and special reasons that should exist in order for a writ of certiorari to be granted. Respondent respectfully contends that none of those five circumstances exist in this case. This case does not present a novel question of law. It did not warrant dissent in the Court of Appeals. The decision of the Court of Appeals is not in conflict with a prior decision of the Supreme Court. There are no substantial constitutional issues directly involved, and there is no federal question in which the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Petitioner has not identified any extraordinary factors, issues or facts of the magnitude of the five identified in Rule 242, SCACR to justify this Court's review of this case. This case certainly does not present exceptional circumstances meeting the high standard under which this Court will accept matters on a common law extraordinary writ of *certiorari*. See *State v. Issac*, 405 S.C. 177, 185,747 S.E. 2d 677, 681, fn. 6 (2013).

Petitioner contends this Court should grant *certiorari* to decide this case because the decisions he seeks to appeal have prejudiced his substantial rights and because he raises novel questions regarding the limits on a State agency's delegation of authority. (Petition at p. 5) Petitioner has argued only one of the reasons which the Court has identified in that rule, i.e., a novel question of law, and, as discussed below, the novel issue Petitioner claims does not exist. The Petition makes two basic arguments-- an alleged improper delegation of authority and that the Board's alleged condition precedent was arbitrary and capricious. Both these arguments were addressed fully by the Administrative Law Court and the Court of Appeals and neither falls into any of the five categories of reasons the rule specifies for possible consideration.

B. There is No Novel Issue of Law

This case does not present any novel issues of law. Petitioner contends that the Board's insistence on requiring evidence of good standing in Georgia is a *de facto* unauthorized delegation by the Board of its discretionary powers to the Georgia licensing board. The Board was authorized by statute to deny outright Petitioner's application because of his Georgia disciplinary history, so its decision to instead require proof of good standing elsewhere as a condition cannot be an unauthorized delegation to another state's board.

It is well established that South Carolina professional and occupational licensing boards may deny a license to someone whose license in another jurisdiction has been suspended or otherwise disciplined. S.C. Code Ann. 40-1-130 (2011)[1] states:

[1] During its 2011 Session, the General Assembly adopted as official Volume 14, which includes all of title 40, current through the 2009 Session. The 2010 and 2011 cumulative supplement was not submitted for adoption as official. However, there were no amendments to Chapter 1 of Title 40 in 2010.

> A board may 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 respective board.

S.C. Code Ann 40-1-110(1) (b) (2011) provides that a board may discipline an individual who "has had a license to practice a regulated profession or occupation in another state or jurisdiction canceled, revoked, or suspended, or who has otherwise been disciplined. . . ."

C. The Board's Order Is Not an Appealable Order

By contending that substantial rights are relevant to whether to hear the appeal, Petitioner has apparently conflated the scope of appellate review mandated by the Administrative Procedure Act ("APA") for administrative licensing decisions with the scope of appellate review for intermediate orders in civil actions under S.C. Code Ann.§ 14–3–330(2). Appeals in administrative agency matters are governed solely by the APA, not by S.C. Code Ann. § 14–3–330(2), the general appealability statute. *Bone v. U.S. Food Service* 404 S.C. 67, 75, 744 S.E.2d 552, 557 (2013). Section 14-3-330(2) permits review of an intermediate order affecting a substantial right if the order in effect determines the action and prevents a judgment from which an appeal might be taken. That is not the situation here, as Respondent has appealed to both the Administrative Law Court and the Court of Appeals.

Under the APA, a party is not entitled to judicial review until he has exhausted all administrative remedies available within the agency and has been aggrieved by a final decision in a contested case. S.C. Code Ann. § 1–23–380(A) (Supp.2012). Under the APA, a "preliminary, procedural, or intermediate agency action or ruling is immediately reviewable only if review of the final agency decision would not provide an adequate remedy." S.C. Code Ann. § 1–23–380(A)(Supp 2012). *Bone* at 404 S.C. 74, 744 S.E.2d

556 (2013). Here, Petitioner has an adequate remedy by returning to the Board, providing it with the documentation it requested regarding the specific facts underlying the Georgia Board's 2009 order, and requesting a decision either denying the reinstatement or granting it with other conditions.

The Board order from which Petitioner appealed was not a final order, an argument the Board unsuccessfully raised before the Administrative Law Court. Here, neither the State Board of Dentistry nor the Court of Appeals has issued a final order regarding the merits of Petitioner's eligibility for re-licensure. The Board's order granted the application for re-licensure, *conditioned* upon Petitioner providing supporting evidence for statements he made regarding his licensure disciplinary status in Georgia in the application hearing before the Board. Rather than providing that evidence, Petitioner instead deprived the Board of jurisdiction to issue a final order by appealing the intermediate order. An agency decision which does not decide the merits of a contested case ... is not a final agency decision subject to judicial review...." *S.C. Baptist Hosp. v. S.C. Dep't of Health & Envt'l Control,* 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987) "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Bone*, at 404 S.C. 75, 744 S.E. 2d 557. The Board Order from which Petitioner appeals does not meet that final judgment requirement.

D. The Two Issue Rule Should Preclude a Grant of *Certiorari*

The two-issue rule should also preclude this Court's grant of *certiorari*. When a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds. This is because the unappealed ground will become the law

of the case. *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012).

Petitioner concedes that because he had neither practiced nor lived in this state for more than six years, the Board's discretion to relicense him pursuant to S. C. Code Ann. §40-15-170 (2011) was upon proof of high professional fitness and moral character. (Petition at page 7) This was one of the grounds upon which the Court of Appeals upheld the Board's decision:

> 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. Requiring Trimmier to provide documentation he was not currently facing any new or additional charges before the Georgia Board was well within the Board's discretion in light of Trimmier's past failures to comply with various requirements of the practice of dentistry. Furthermore, sections 40–15–140 and –170 specifically contemplate the Board's consideration of a license applicant's standing in other states. Any argument the Board should disregard Trimmier's license in Georgia because he voluntarily surrendered it is completely without merit.

(Court of Appeals Opinion, p. 6).

Petitioner tries to circumvent this issue by claiming the Board never made a finding of fact on the issue of Petitioner's professional fitness and moral character. That argument merely supports the Board's contention that its order is not final. Petitioner can hardly claim to have submitted proof of "high professional fitness and moral character" sufficient for it to be an abuse of discretion for the Board to refuse to relicense him. He had been the subject of disciplinary action in South Carolina arising out of his conviction in 2002 for filing false claims with the South Carolina Medicaid program and for publishing a misleading advertisement suggesting he was a specialist in pediatric dentistry and failing to properly supervise auxiliary personnel. In 2003, the Georgia Board suspended his license for six years with it being actively suspended for the first

ninety days, and on probation thereafter. This sanction was the result of the Georgia Board's discovery that Petitioner submitted an application for a sedation permit that falsely indicated he had never been convicted of a crime. Thereafter, the Georgia Board again disciplined Petitioner for performing a procedure on a patient while sedated after the probationary sedation permit he had received lapsed.

II. The Board's Conditions for Re-licensure Did Not Constitute An Improper Delegation of Authority to the Georgia Board

Petitioner contends the only way he can meet the conditions of the Board's order is to seek reinstatement in Georgia, and that therefore the Board improperly delegated its authority to the Georgia Board. Nothing in the record from the proceedings below exists to indicate that the board 'delegated' its authority to another board. The Board did require further information from Petitioner, to provide support for his claim that he was eligible for reinstatement in Georgia even though he had surrendered his license. The Board sought information from Petitioner on the specific facts underlying the later Georgia disciplinary charges because of the harsh action taken by Georgia. (R. 121-125). Petitioner appeared at the second hearing with the requested information from New York, but not from Georgia. (R. 30-32, 44-45).

Here, the Board affirmatively exercised its discretion by not granting an unconditional denial of Petitioner's application. The Board's flexibility in licensing decisions will be impaired if this Court determines that notwithstanding the express authority in S.C. Code Ann. §§40-1-110(1) (b) and 40-1-130 (2011), and the broad discretion granted by S.C. Code Ann. §40-15-170 (2011), the Board lacks the ability to

grant reinstatement conditioned upon an applicant's good standing in another jurisdiction. The likely result will be licensing decisions that are harsher to applicants.

III. The Board's Conditions for Re-licensure Were Neither Arbitrary nor Capricious

It is well established that when a Board's acts are permitted by statute, the actions are not arbitrary and capricious, even if the actions are harsh. In *Deese v. South Carolina State Bd. of Dentistry,* 286 S.C. 182, 185, 332 S.E.2d, 539, 541 (Ct. App.1985), the Court of Appeals rejected a similar argument, holding that "[s]ince the sanctions were within those established by law, Deese's contention that they were arbitrary and capricious is without merit." A similar conclusion was reached in *South Carolina Board of Examiners in Optometry v. Cohen*, 256 S.C. 13,180 S.E.2d 650 (1971). Here, Petitioner does not dispute that the South Carolina Board had the discretion not to reinstate him. Under S.C. Code Ann. §40-1-130 (2011), Petitioner's prior disciplinary history in South Carolina alone is sufficient grounds for the Board to deny Petitioner's reinstatement application, regardless of his disciplinary history in Georgia. Therefore, the Board's conditional grant of relicensure cannot be either arbitrary or capricious.

Notably, had Petitioner actually applied for reinstatement in Georgia after his two-year suspension had elapsed rather than surrendering his license six months into the suspension, the Georgia order provides Petitioner would have been on probation in Georgia. (R. 129) Petitioner apparently sought to avoid that probation by surrendering his license. Petitioner could therefore only have reasonably expected the South Carolina Board would impose some conditions if the South Carolina Board, in its discretion, determined it was appropriate to reinstate him at all.

CONCLUSION

For the reasons stated above, Respondent would respectfully ask the Petition for Certiorari be denied.

December ____, 2013

Respectfully submitted,

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CONCLUSION

For the reasons stated above, Respondent would respectfully ask the Petition for Certiorari be denied.

December 4, 2013

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