THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

RECEIVED
DEC 17 2013
S.C. Supreme Court

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

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

Petitioner,

v.

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

Respondent.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Pursuant to Rule 242(g), SCACR, Petitioner hereby files this Reply in response to the Return to the Petition for Writ of Certiorari filed by the South Carolina Department of Labor, Licensing and Regular, Board of Dentistry ("Board"). In so doing, Petitioner reiterates that sufficient cause and ability exists for this Court to justify grant of certiorari to review the Court of Appeals decision, and therefore the same is respectfully requested again.

Petitioner addresses specific issues raised by the Respondent in its Return as follows:

I. THIS MATTER AND THE ISSUES PRESENTED WARRANT, AND ARE APPROPRIATE FOR, REVIEW BY THIS COURT.

Although Petitioner devoted the majority of its petition to the substantive legal and factual issues that need to be addressed by this Court after the proposed issuance of a writ of certiorari, Petitioner also devoted a portion of the petition to the justification for possible grant of cert. Respondent nevertheless raises several arguments in an attempt to refute the existence of proper grounds for a grant of cert. Each will be addressed in turn.

A. Rule 242 does not preclude review by this Court.

As Respondent acknowledges, the authority of this Court includes the ability to issue a writ of certiorari to review a final decision of the Court of Appeals. Respondent cites specifically to Rule 242(b), SCACR and its "considerations governing review." (Return to Pet. p. 3). Petitioner believes at least one of the listed considerations, cases involving novel issues of law, is directly applicable to this matter as discussed *infra*. In

addition, however, Rule 242 specifically states the considerations listed are "neither controlling nor fully measuring the Supreme Court's discretion or power to grant review." In so many words then, this Court has the authority to make this matter right, and for the reasons set forth more fully in the Petition and *infra*, Petitioner respectfully submits the facts and legal issues involved in this matter justify exercise of that authority even beyond Petitioner's comfortable expression of an applicable general consideration from Rule 242, SCACR.

B. The issue of the appropriateness of the nature and breadth of delegation of authority by the Dental Board is a novel issue worthy of guidance from this Court.

The Board specifically questions whether Petitioner has raised a novel issue of law, a specific consideration governing review in such petitions for certiorari identified in Rule 242, SCACR. The Board makes several references to statutory provisions that are relevant, but Petitioner submits not dispositive of the issues regarding their joint or several allocation of authority, or dispositive of issues regarding their purported exercise by the Board.

The Board first references the ability of the Board to deny authorization to practice to an applicant "who has committed an act that would be grounds for disciplinary action" in South Carolina, even if it occurred in another jurisdiction. S.C.Code § 40-1-130. First, the Board claims to have granted the application, albeit subject to a condition, not denied an application as authorized by this statute. Secondly, Petitioner is not seeking to limit the factual inquiry of the Board to only matters occurring in South Carolina. Instead, he is merely seeking to limit the South Carolina entity to which he has applied, the Board, from improperly delegating veto power over its decision to another

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jurisdiction. The cited statute protects the Board from having to be willfully blind to relevant facts for its own consideration, not require (or allow) ceding power to foreign jurisdictions for ultimate determinations of fitness to practice in South Carolina.

In further support of its order, the Board cites statutory authority that grants the Board authority to "cancel, fine, suspend, revoke, or restrict the authorization to practice of an individual" who has had their license in another jurisdiction "canceled, revoked, or suspended or who has otherwise been disciplined." S.C.Code § 40-1-110. In essence, this statute merely precludes any argument that reciprocal discipline by this Board may somehow be violative of prohibitions on double jeopardy contained within the Fifth Amendment, and repeats the gist of § 40-1-130, that facts are relevant for this Board notwithstanding their previous consideration or action thereon by a foreign jurisdiction. Although the same facts may be acted upon in different jurisdictions, this statute is not justification for the Board's delegation of authority to act upon any facts of common interests between the Board and other jurisdictions.

Likewise with similar language contained in S.C. Code § 40-15-170 that the Board cites. Revocation of a license "by another state for cause [ ] shall, in the discretion of the board, constitute grounds for revocation" of a SC license. Id. In other words, the fact that one has had a license revoked elsewhere is sufficient basis for potential reciprocal action by the Board. But this statute still places ultimate authority in the Board to make the decision, after giving it access and full use to whatever facts it may acquire. It does not allow the Board to cede that decision making obligation by openly conditioning its action upon the action of others.

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The Board is not using any of the cited statutory authority to avoid a duplicative factual development. The Board is clearly attempted to avoid its mandated obligation to consider and decide, which it almost accomplished by its "grant" of licensure, only to impose an unresolvable[1] hurdle solely and exclusively via the discretionary act of another jurisdiction.

C. Order is immediately appealable because it is final in nature and effect.

The Board contends that this appeal should be dismissed because Petitioner seeks review of an order that the Board alleges is not a "final" order. (Return to Pet. p. 6) 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 § 1-23-380. However, Petitioner contends that the ruling at issue is not "preliminary, procedural or intermediate" and thus is immediately appealable. See SC Baptist Hosp. v. S.C. Dep't of Health & Envt'l Control, 291 SC 267, 270, 353 S.E.2d 277, 279 (1987)

The issue before the Board of Dentistry was whether to grant or deny Petitioner's application for relicensure. The Board claims that it initially granted[2] that application, albeit with a condition. (R. 13-14). Petitioner sought reconsideration, and further hearing was held on the matter. Nevertheless, essentially the same order "granting" the

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[1] Elsewhere in this reply and in the petition, Petitioner has explained the nature of the stated condition as not actually a condition that may be fulfilled absent Petitioner's return to a foreign jurisdiction and institution of new proceedings seeking admission in that jurisdiction.

[2] It is somewhat Orwellian doublespeak to describe this order affecting Petitioner as a "granting" of relicensure, since it does not in fact allow him to resume his practice. It is a denial, both in immediate effect since it did not authorize him to resume practice, but in long term effect because of the inherent impossibility of complying with the stated condition, as Petitioner repeatedly explained to the Board during discussion of his status in Georgia at the two separate before the Board.

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application was made again, and again subject to a condition. (R. 11-12). By its own terms the order indicates decision on the ultimate issue, not a stay of proceedings prior to receipt of more evidence. The mere existence of this "condition" seems to be the Board's basis for claiming the order is "preliminary, procedural or intermediate" and that Petitioner has not exhausted his administrative remedies prior to pursuing this appeal. (Return to Pet. p. 5-6). However, the order is in substance and effect a final order on the ultimate issue.

The first reason for that assertion is that the "condition" as stated is not properly characterized as a mere procedural step to initiate further inquiry, but instead an order "leaving nothing to be done but to enforce by execution what has been determined." See Bone v. US Food Service, 404 S.C. 67, 75, 744 S.E.2d 552, 557 (2013)(defining the nature of a "final" order capable of review). The order essentially says "do X and you will receive admission", not "do X and then we'll then consider the ultimate issue again." The claimed discretion to be exercised is whether the documentation is sufficient proof of the executed condition, not discretion exercised as to the ultimate issue of fitness of Petitioner himself.

Secondly, as discussed in more detail in the Petition itself and *infra*, the included condition presupposes delegation of the Board's authority to another jurisdiction, a delegation that Petitioner contends is unlawful. The Board should not be able to shield its decisions from review when engaged in unlawful conduct, nor be empowered to compel applicants to participate in such illegality prior to the review of an authority able to correct such unlawful conduct. Requiring Petitioner to submit to the Board's unlawful act is equivalent to requiring Petitioner to directly engage in an unlawful act, and legislative

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limitations curtailing immediate reviews in certain situations should not be misused to promote illegal actions.

Third, the Board seems to assert that in all cases in which any condition is imposed, such order is absolutely intermediate per se. In this instant case, however, the facts show that the Board is demanding impossibility – requiring Petitioner to submit evidence of a status in the past that was not in fact his status at the relevant time. He might as well have been tasked with delivering a unicorn carcass. Impossible options are no option at all, even if stated in open ended terms, and operates as a full and final decision in the matter, which in turn allows for instant review.

Additionally, taken to its logical extent, the "order has a condition and is thus per se intermediate" rule would result in the inability to review any Board decision or ruling. The Board would need only to add a "condition" to every denial order. As such, every "denial" would simply be presented as approval, subject to the condition "that the applicant meet the criteria for approval and then be approved by the Board." Just as Petitioner's order does, such phrasing would be relied upon to imprison an applicant in supposed, permanent limbo, unable to seek review of the decision because of the Board's interpretation of "intermediate."

D. Petitioner is of the requisite high professional fitness and moral character.

The Board argues in favor of the two-issue rule as a barrier to this petitioner. However, the Board's order stated that Petitioner was to be admitted subject to provision of certain information. (R. p. 11-12). As stated in the Petition and this pleading, that condition is fraught with issues. Nevertheless, the nature of the order, claiming to grant relicensure upon that mere administrative condition/action, inherently includes Board

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acceptance of Petitioner as having made the requisite factual showing to convince the Board that he possessed the requisite "high professional fitness and moral character" to be relicensed pursuant to S.C.Code Ann. § 40-15-170 requires. That finding is in Petitioner's favor, and thus not something he must have brought up on appeal for standing to argue before this Court. Ironically, the Board has instead articulated the manner in which it, not Petitioner, is precluded by the two-issue rule from now disputing Petitioner's high professional fitness and moral character.

II. BOARD ABUSED ITS DISCRETION BY FAILING TO EXERCISE DISCRETION AND IMPROPERLY DELEGATING AUTHORITY.

It is true that the Board could have simply denied relicensure to Petitioner, in which case it would have been a more clear application of the Board's discretion to approve or deny an applicant[3]. The Board frequently repeatedly invokes its statutorily granted discretion in licensing matters, as referenced *supra* in Petitioner's discussion of the novelty of the issues presented. The Board also claims to have exercised that discretion when issuing its order, even though the order does nothing more than amount to at best a forum change, requiring Petitioner to seek the good graces of Georgia to automatically gain unencumbered admission to licensure in South Carolina. (Return to Pet. p. 7-9). However, the Board instead merely claimed an act of discretion, while unlawfully passing upon exercise of that discretion by farming out the decision to Georgia, in a manner no less improper, even if less noticeable, than if the order had stated Petitioner's admission was contingent on satisfying the deacons at a nearby church as to Petitioner's moral character.

[3] Based on the record available to the Board, however, Petitioner would have rightfully viewed such a result as unwarranted and untenable legally.

The Board characterizes the condition imposed upon Petitioner as merely the action of the Board to "require further information." (Return to Pet. p. 8). That is inaccurate, as Petitioner had already provided the requested information regarding his status in Georgia during two separate hearings prior to the Board's appealed order. The Board responded to the information by effectively requiring Petitioner seek readmission in Georgia, with satisfactory results in that process acting as a condition satisfaction under the terms of the order.

The failure to exercise discretion is an abuse of discretion. Cf. Arrow Bonding Co. v. Warren, 399 S.C. 603, 610, 732 S.E.2d 622, 625 (2012)(trial court's failure to exercise discretion). "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." Id., quoting Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 155, 399 S.E.2d 439, 441 (1990). The Board's characterization of its action is unavailing, as "the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised." State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (sentencing judge did not exercise discretion based upon erroneous view of the law).

III. THE BOARD'S DECISION WAS MORE THAN MERELY HARSH, IT WAS ARBITRARY AND CAPRICIOUS.

A decision is arbitrary "if it is without a rational basis [or] is based alone on one's will and not upon any course of reasoning and exercise of judgment." Deese v. S. Carolina State Bd. of Dentistry, 286 S.C. 182, 184, 332 S.E.2d 539, 541 (Ct. App. 1985). As explained above, the illogical nature of the "grant with condition" satisfies the definition of arbitrary in that the action was taken without a "course of reasoning". The

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fact that the decision was not actually a full decision, but instead a grant subject to the discretionary veto of a foreign jurisdiction, reveals that the decision was without an actual "exercise of judgment" and thus arbitrary for that reason also.

The Board contends that is ruling was not arbitrary and capricious merely because the Board could have merely denied the application in its entirety, and thus acted with regard to Petitioner to an extent that was lesser than its full authority. As a preliminary consideration, the notion that any and all action taken that is arguably better than the worst possible result is therefore automatically lawful is very flawed. The government may impose the death penalty, but that fact does not preclude the possibility of a "lesser" imposed sentence that nevertheless violates the Eight Amendment prohibition against cruel and unusual punishments.

And as stated above, the "grant" of Petitioner's application was not only effectively the same as a denial as it relates to Petitioner, but it was worse than an outright denial. First because presumably the Board would have acknowledged an outright denial was subject to review for appropriateness, but further, the condition imposed relied upon an impossibility that contravened the clear evidence before the Board as to Petitioner's status as of the relevant date to which the condition supposedly related.

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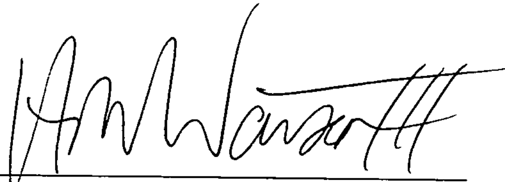
CONCLUSION

Based on the initial petition and foregoing response to the Return filed by the Board, Petitioner respectfully renews his prayer for an order issuing a writ of certiorari.

Respectfully submitted by



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

CERTIFICATE OF SERVICE

I, Beth K. Cogan, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on December 16, by Facsimile and United States Mail, with sufficient first-class postage affixed, I served a copy of the **Reply to Return to Petition for Writ of Certiorari** in the above-captioned case on the following, addressed as follows:

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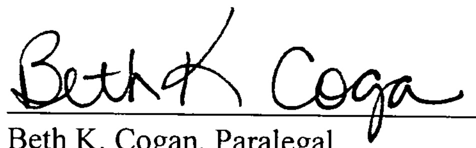

Beth K. Cogan, Paralegal

December 16, 2013
West Columbia, South Carolina