

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 2012-212267

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

v.

South Carolina Department of Labor, Licensing and Regulation, South Carolina State
Board of DentistryRespondent

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

1. WAS THE BOARD WITHIN ITS DISCRETION TO GRANT APPELLANT'S LICENSE SUBJECT ONLY TO RECEIVING FURTHER DOCUMENTATION FROM GEORGIA WHEN HE SURRENDERED HIS GEORGIA LICENSE WHILE UNDER SUSPENSION AND APPEARED BEFORE THE SOUTH CAROLINA BOARD EIGHTEEN MONTHS BEFORE HE WAS ELIGIBLE FOR REINSTATEMENT IN GEORGIA?

STATEMENT OF THE CASE

Edward Trimmier, DMD, is or has been licensed in three states. He has been disciplined in all three; Georgia, New York and South Carolina. The Georgia Dental Board, having placed Appellant on indefinite suspension by order dated October 9, 2009, stated that he could petition the Board to end the suspension after two years. This would have been approximately October 9, 2011.

Dr. Trimmier chose to surrender his Georgia license on April 14, 2010, and apply for reinstatement of his lapsed South Carolina license eighteen months before he would have been eligible to ask the Georgia Dental Board to end his indefinite suspension.

Dr. Trimmier appeared before the South Carolina Board on July 29, 2010 and July 28, 2011. On both occasions, the South Carolina Dental Board granted his license application subject only to *'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).

Dr. Trimmier appealed and the decision of the Board was affirmed in its entirety by the Administrative Law Court.

ARGUMENT

I. Pursuant to Appellate Practice Rule 208(b) (2) and 220(e), Respondent first argues and so moves that this appeal should be dismissed, and the decision of the Administrative Law Court affirmed, based upon the holding of the Administrative Law Court below and in accordance with the Board's and the ALC's decision that the Dental Practice Act permits re-licensure at the discretion of the Board after a period of six years.

S.C. Code Ann. §40-15-170, provides in pertinent part that re-licensure of a dentist in this state after an absence of over six years is at the discretion of the Board.

S.C. Code 40-15-170 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. The time spent in active service by any person in the armed forces or public health service of the United States or with the Veterans' Administration is not construed as absence from or failure to practice in the State. 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 is properly subject to the requirements of Section 170 for purposes of licensure. He was first licensed in South Carolina in 1999, was disciplined by Consent Agreement in 2002, and allowed his license to lapse on March 1, 2003. The record in this case indicates that Appellant maintained a Georgia address from March 2003 to May 2010 (R. 56). Further, he was employed in Georgia from March 2003 to March 2007 and from March 2007 to October 2009 in Marietta and Atlanta, Georgia, respectively.

This court, according to its rules, may affirm the decision of the ALC for this or any other ground appearing in the record. The ALC properly found that Dr. Trimmier has been absent for six years and as such this fact is adequate grounds to affirm the ALC's decision absent a showing that there has been an abuse of discretion or that the statute permitting same is invalid.

II. This appeal should be dismissed because the S.C. Dental Board granted Appellant's application for licensure. It acted within its discretion in requiring additional information from Georgia prior to final approval of the license application. Appellant provided documentation satisfactory to the Board from the State of New York and is rightfully being asked to do the same for the State of Georgia.

Contrary to Appellant's argument, the decision of the Board as affirmed in full by the ALC is not the imposition of a non-statutory sanction. It is not the imposition of any sanction at all. Although he had been disciplined before in South Carolina prior to his application for reinstatement, Appellant was not disciplined by the Board in any fashion in this case. The plain language of the Board order(s) in this matter clearly demonstrates that the proceedings before the Board were application hearings. Additional discipline was not considered nor imposed.

Appellant has failed to do what both the Georgia Dental Board and the South Carolina Dental Board may reasonably require, specifically, that he follow their orders. Appellant has not presented any evidence to the Board concerning his efforts to petition the Georgia Board or to obtain information from them clarifying whether they would end his suspension if asked to do so. As such, the Appellant has not carried his burden. He has provided evidence from New York but not Georgia and thus the record in this case is incomplete. It does not contain enough information for the board to make a decision that protects the public.

Section 40-15-170 of the Dental Practice Act provides that re-licensure of a dentist in this state after an absence of over six years is at the discretion of the Board. Dr. Trimmier falls into this category. He was first licensed in 1999 in South Carolina. In 2002, he was disciplined by consent agreement by the S.C. Dental Board for filing false claims for reimbursement, misleading advertising and failure to properly assign his auxiliary personnel. (R. 22) He did not renew his license in 2003 and he reapplied for licensure in 2010. (R. 133)

S.C. Code 40-15-170 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. The time spent in active service by any person in the armed forces or public health service of the United States or with the Veterans' Administration is not construed as absence from or failure to practice in the State. 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)

Also, Sections 70 and 130 of Title 40, Chapter 1 of the S.C. Code of Laws clearly provide the power and duty behind the Board's decision in this case.

S.C. Code 40-1-70. Powers and duties of boards.

The powers and duties of regulatory boards include, but are not limited to:

- (1) determining the eligibility of applicants for examination and licensure;*
- (2) examining applicants for licensure including, but not limited to:*
 - (a) prescribing the subjects, character, and manner of licensing examinations;*
 - (b) preparing, administering, and grading the examination or assisting in the selection of a contractor for the preparation, administration, or grading of the examination;*
- (3) establishing criteria for issuing, renewing, and reactivating the authorizations to practice of qualified applicants, including the issuance of active or permanent, temporary, limited, and inactive licenses, or other categories as may be created;*
- (4) adopting a code of professional ethics appropriate to the profession or occupation which it licenses or regulates;*
- (5) evaluating and approving continuing education course hours and programs;*
- (6) conducting hearings on alleged violations of this article and regulations promulgated under this article;*
- (7) resolving consumer complaints, where appropriate and possible;*
- (8) disciplining persons licensed under this article in a manner provided for in this article;*
- (9) promulgating regulations which have been submitted to the director, at least thirty days in advance of filing with Legislative Council as required by Section 1-23-30. (emphasis added)*

S.C. Code 40-1-130. Board's authority to sanction.

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. A board must deny authorization to practice to an applicant who has failed to demonstrate the qualifications or standards for licensure contained in the respective board's licensing act. The applicant shall demonstrate to the satisfaction of the board that the applicant meets all the requirements for the issuance of a license. (emphasis added)

Appellant speculates in his brief regarding what may or may not satisfy the Board at a later date, and argues that since Appellant has no Georgia license, his premature and voluntary surrender in lieu of a petition to the Georgia Board should be rewarded by the South Carolina Dental Board by a grant of complete licensure upon the theory that the surrender means not only that he does not have a Georgia license now, but that he never had one. (Appellant's Brief, p.5)

While this argument is without any merit, Appellant is correct in stating that South Carolina does not by law have reciprocity with Georgia for dental licensure; however, the Dental Practice Act provides at Section 40-15-140 that an applicant who holds a license or certificate from any jurisdiction shall certify that he has not violated any of the provisions of the Dental Practice Act governing his prior license or practice or operation.

The South Carolina Court of Appeals held in SCDOR v. Club Rio, 392 S.C. 636, 709 S.E.2d 690 (2011) that a surrender of an alcoholic beverage license does not deprive the licensing authority of jurisdiction. In *Club Rio*, the club's surrender of its rights under the [alcoholic beverage] license did not deprive the tribunal of jurisdiction to consider the DOR revocation proceedings. Although the Dental Board is not engaged in a revocation or other disciplinary proceeding here, *Club Rio* is instructive because of Appellant's argument here that his voluntary surrender means that he does not have a Georgia dental license and that, therefore, licensure in South Carolina should proceed without reference to his Georgia license status. Similar rationale and public protection concerns led the *Club Rio* court to conclude that this argument, if accepted, would have permitted the club owner to avoid being banned from receiving a new beer and wine permit in the future.

S.C. Code 40-15-140. Examination of applicants for licenses or registration; issuance of licenses or certificates; reexamination.

It is the duty of the Board to examine (or cause to be examined) all qualified applicants for a license to practice dentistry or dental hygiene or who desire to be registered as dental technicians in this State. No examination is required to be registered as an orthodontic technician. Prior to admittance to the examination or the registration of an orthodontic technician, each applicant shall produce evidence satisfactory to the Board

that he possesses good moral character. If the Board refuses an applicant admission to the examination or registration as an orthodontic technician because of unsuitable moral character the Board shall notify the applicant in writing and set forth in detail the reason supporting the Board's decision. An applicant who holds a license or certificate from any jurisdiction shall certify that he has not violated any of the provisions of the Dental Practice Act governing his prior license or practice or operation. (emphasis added)

Despite Section 140's statutory requirement of good standing in other states, Appellant seemingly is arguing that the surrender of his Georgia license precludes the South Carolina Board from asking anything further from him with regard to Georgia. If this were true, all applicants with licenses in other states or applicants for licensure by credentials under Section 275 of the Dental Practice Act could merely surrender their other state licenses temporarily while applying in South Carolina to avoid South Carolina's consideration of disciplinary actions in other states.

At no time has the Dental Board in South Carolina required Dr. Trimmier to petition for and be granted licensure in Georgia. (Appellant's Brief, p. 5) They have merely requested that he comply with both the Georgia and South Carolina orders by obtaining from the Georgia Board additional documentation that 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 if he wishes to pursue re-licensure in South Carolina.

The Appellant has created his own "bureaucratic paradox" (Appellant's Brief, p.6) here by surrendering a suspended license. He has not, as requested by the Board, 'provided documentation that his Georgia license either was in good standing at the time of the voluntary surrender and/or that there were no disciplinary or other impediments, pending or otherwise, against his license at that time'. (R. 8)

This Court has held in an analogous situation, Michael A. Paulin vs. SCDLLR, 07-ALJ-11-0447-AP (2007), that a surrender of a professional license does not deprive it of jurisdiction. S.C. Code Ann. §§ 40-1-150 and 40-2-150 provide that voluntary surrender of one's license "does not preclude the board from taking disciplinary action against the

licensee,” including revocation. S.C. Code Ann. §§ 40-1-150 & 40-2-150 (2001 & Supp. 2006). S.C. Code Ann. §§ 40-1-110(h) and 40-2-110(A) (1) provide that the Board may revoke Paulin’s license based on his felony conviction. That felony is a crime of moral turpitude. State v. McFarlane, 279 S.C. 327, 332, 306 S.E.2d 611, 614 (1983) (“[C]riminal sexual conduct with a minor in any degree is a crime of moral turpitude.”). S.C. Code Ann. § 40-1-115 gives the Board jurisdiction over actions of current and former licensees and over any action that arises during the licensure period. S.C. Code Ann. §§ 40-1-115 (2001 & Supp. 2006). The conduct underlying the guilty plea and resultant felony conviction occurred while Paulin was an active licensed accountant. Other jurisdictions have similarly rejected the argument that voluntary relinquishment of a license deprives the Board of disciplinary jurisdiction. See, e.g., Cross v. Colo. State Bd. of Dental Exam’rs, 552 P.2d 38 (Colo. App. 1976); Gilpin v. Bd. of Nursing, 837 P.2d 1342 (Mont. 1992), overruled on other grounds; Erickson v. State ex. rel. Bd. of Med. Exam’rs, 938 P.2d 625 (Mont. 1997); Gares v. N.M. Bd. of Psychologist Exam’rs, 798 P.2d 190 (N.M. 1990); Gaddy v. Okla. State Bd. of Osteopathy, 554 P.2d 1375 (Okla. 1976); Delozier v. State, 631 A.2d 228 (Vt. 1993).

At both hearings, Board weighed the testimony and evidence presented and rendered a decision which should not be disturbed on appeal. It is clearly within the Board’s discretion to require the information mandated by Section 140 of the Dental Practice Act before final approval of an application.

The Dental Board’s decision and the decision of the ALC is well-supported by the evidence and should be affirmed. An Administrative Law Judge may not substitute his judgment for that of the agency unless the agency’s determination is affected by error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. S.C. Code Ann. § 1-23-380(A) (6) (Supp. 2001); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

An exercise of discretion by an administrative agency should not be disturbed unless there is an abuse of discretion evidenced by a showing that the action of the agency was

arbitrary or unlawful. 73A C.J.S. Public Administrative Law and Procedure § 223a (1983). An administrative sanction cannot be said to be unduly harsh if it is within the Board's authority to impose. *South Carolina Bd. of Examiners in Optometry v. Cohen*, 256 S.C. 13, 180 S.E.2d 650 (1971).

This tribunal should not substitute its judgment for that of the Board unless the Board's action was influenced or controlled by some erroneous view of the law, was without substantial evidence to support it, or amounted to a manifest abuse of discretion. *State v. White*, 218 S.C. 130, 61 S.E.2d 754 (1950).

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *Joint Legislative Comm. v. Huff, et al.*, 320 S.C. 241, 464 S.E.2d 324 (1995). See also *Glover by Cauthen v. Suitt Constr. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995) (primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in language used construed in light of intended purpose). All rules of statutory construction are subservient to the one that legislative intent must prevail if it reasonably can be discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994). The determination of legislative intent is a matter of law. *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 459 S.E.2d 841 (1995).

CONCLUSION

For all of the foregoing reasons, this appeal should be dismissed with prejudice and without oral argument.

January 22, 2013

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sheridan H. Spoon", is written over a horizontal line.

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