

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 FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Administrative Law Court err by failing to find that the Board's imposition of a non-statutory sanction, dependent upon the discretion of the Georgia Board, is in violation of S.C. Code Ann. § 40-1-110 (1) and in excess of the statutory authority of the agency?
- II. Did the Administrative Law Court err by failing to find that the Board's imposition of a subsequent sanction, after a consent order and dependent upon the discretion of the Georgia Board, is made upon unlawful procedure and affected by an error of law?
- III. Did the Administrative Law Court err by failing to find that the Board's imposition of a subsequent sanction, after a consent order and dependent upon the discretion of the Georgia Board, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?
- IV. Did the Administrative Law Court err by failing to find that the Board's imposition of a sanction, after a consent order and dependent upon the discretion of the Georgia Board, is arbitrary, capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion?

STATEMENT OF THE CASE

Appellant, licensed as a dentist in Georgia, South Carolina and New York, at various times, has been subject to disciplinary action in all three states based upon his misdemeanor conviction for filing false claims with the South Carolina Medicaid program. [R. p. 2]. No patient harm was ever alleged. On December 7, 2002, pursuant to a Consent Order entered into between Appellant and Respondent, Appellant admitted various violations of the Dental Practice Act and that those violations constituted misconduct as alleged by the South Carolina State Board of Dentistry, Respondent (hereinafter, “the Board” or Respondent). Respondent, among other provisions, imposed upon Appellant a fine of \$25,000.00; required Appellant to complete a pre-approved ethics course; suspended his license for six (6) years, immediately stayed; and placed his license in a probationary status for six (6) years. [R. p. 22]. The Consent Order took effect immediately upon receipt by Appellant or his counsel. [R. p. 24]. Before Appellant’s license probation expired, he was granted a Pardon for his misdemeanor conviction by order of the South Carolina Board of Parole and Pardon Services. [R. p. 140].

Appellant was licensed as a dentist in the State of Georgia on December 28, 2001. [R. p. 12]. Upon notice of the matters pending in South Carolina, the State of Georgia, Georgia Board of Dentistry (hereinafter, “Georgia Board”), initiated its own investigation and prosecution. The Georgia Board entered into a Public Consent Order with Appellant on September 12, 2003. [R. p. 12]. Appellant was placed under stayed suspension. [R. p. 16]. Thereafter, the Georgia Board revoked Appellant’s Georgia license. Appellant appealed the revocation of the Georgia Board to the Bibb County (Georgia) Superior Court. On or about September 15, 2009, the Bibb County Superior Court reversed the Georgia Board’s decision

to revoke Appellant's license and remanded the case to the Georgia Board [R. p. 128]. The Georgia Board then issued an Amended Final Decision on October 9, 2009 which suspended Appellant's Georgia license indefinitely. [R. p. 128]. After litigating these matters over several years in Georgia, Appellant ultimately surrendered his Georgia license on April 9, 2010. [R. p 131; R. p. 118, lines 1-20].

On or about April 6, 2010, Appellant asked Respondent to reinstate his South Carolina dental license because of his compliance with and completion of the requirements imposed by the South Carolina Consent Order as well as his expressed desire and intention to return to practice in South Carolina. [R. p. 133]. At a hearing on July 16, 2010, Appellant informed Respondent that he had surrendered his Georgia license. [R. p. 116, lines 17-25]. 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]. Appellant expressed his desire to return to South Carolina to practice dentistry. [R. p. 94, line 24 - p. 95, line 15; p. 101, lines 5-9]. Following this hearing, Respondent issued its Order on July 29, 2010 [R. p 10] which assumed the existence of a licensing relationship and provided that Appellant

... 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.

[R. p. 8 and p. 10]. Respondent's Order of July 29, 2010 thus added a further requirement which Appellant was required to satisfy before Respondent would permit him to practice dentistry in South Carolina. Appellant did not appeal this Order. [R. p. 10].

On July 15, 2011, Appellant again came before Respondent pursuant to his application to have his South Carolina license reinstated. Appellant again asked that his

license be reinstated because of his compliance with and completion of the requirements imposed by the Consent Order as well as his expressed desire and intention to return to practice in South Carolina. Appellant provided documentary evidence satisfactory to the Board that his inactive license from New York was and is in good standing. [R. p. 8 and p. 127]. Appellant supplied a copy of a letter from the Georgia Secretary of State which indicated that Appellant's license status was "Suspended" and also reminded the Board that, on or about April 9, 2010, he had surrendered his license to practice dentistry in the state of Georgia [R. p. 131] in lieu of petitioning for reinstatement. [R. p. 58, lines 2-17]. 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].

On or about July 28, 2011, Respondent issued its Order On The Applicant's Motion For Reinstatement (Public). [R. p. 8]. Although this third order stated that Appellant satisfied the Board that his New York license is in good standing, it also stated that Appellant "did not provide similar documentation concerning his former Georgia license." Respondent's Order granted Appellant's request for reinstatement of his South Carolina license to practice dentistry, "subject to the following condition:"

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.

[R. p. 8]. Appellant timely appealed to the Administrative Law Court which issued its Order on March 22, 2012 [R. p. 2]. The Administrative Law Court reaffirmed its March Order by Order Denying Motion for Rehearing [R. p.1] issued on May 15, 2012. Appellant filed his

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT ERRED BY FAILING TO FIND THAT THE BOARD'S IMPOSITION OF A NON-STATUTORY SANCTION, DEPENDENT UPON THE DISCRETION OF THE GEORGIA BOARD, IS IN VIOLATION OF S.C. CODE ANN. § 40-1-110 (1) AND IN EXCESS OF THE STATUTORY AUTHORITY OF THE AGENCY.

In South Carolina, S.C. Code Ann. § 1-23-380 governs the circumstances in which an appellate body may reverse or modify an agency decision. That section sets forth, in relevant part:

(B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or 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.

In 2002, Appellant entered into a Consent Order with the Board and admitted various violations of the Dental Practice Act. These acts were financial in nature and did not involve patient harm. The Consent Order did not make a finding that Appellant was not, or is not, competent to practice dentistry or lacks appropriate education and training. The Consent Order imposed various sanctions, none of which referenced Appellant's licensure in the State

of Georgia or made Appellant's South Carolina license dependent upon his licensure in Georgia. Thereafter, Appellant entered into a Public Consent Order in Georgia and was disciplined by the Georgia Board. After a successful appeal of sanctions imposed by the Georgia Board, Appellant ultimately surrendered his Georgia license in 2010.

At a hearing on July 16, 2010, at which Appellant applied for reinstatement to practice in South Carolina, Appellant informed Respondent that he had surrendered his Georgia license. Respondent then issued an order which made issuance of a license to practice dentistry in this state dependent upon "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." Appellant testified candidly in the hearing on July 16, 2010 that his license was under suspension when he surrendered it.

At a hearing on July 15, 2011, Appellant again came before Respondent asking that his license be reinstated because of his compliance with and completion of the requirements imposed by the Consent Order. Appellant satisfied the Board that his New York license was active and in good standing. The Board rejected Appellant's position that he had no "active or inactive" license in Georgia and, therefore, need not show that it was in good standing. 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.

By the Order of July 28, 2011, the Board ordered that Appellant's "motion to have his license reinstated is granted" While the Board granted Appellant's request for reinstatement, Respondent issued an order which made that grant dependent upon "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.” This requirement effectively served to negate the ostensible outcome of the order granting Appellant’s request for reinstatement. The Board explicitly made Appellant’s licensure in South Carolina dependent upon a determination by the Georgia Board. The Board has essentially delegated to the Georgia Board of Dentistry the authority to determine whether or not Appellant should be allowed to practice dentistry in South Carolina. This delegation of authority is impermissible and without statutory authority. In another case involving delegation of authority, our Supreme Court found this to be impermissible:

DHEC's practice has been to delegate to the counties the authority to determine consistency through the counties' issuance of LOCs [“letters of consistency”]. We conclude this delegation of authority is impermissible. S.C. Code Ann. § 44-96-290(F) does not give a county veto authority over decisions made by DHEC. There is no statutory authority providing a county's consistency determination is determinative of the ultimate permitting decision. Although Section 44-96-290(F) requires a proposed facility comply with local standards, it does not designate the county as the final arbiter on whether the proposed facility complies with its local zoning, land use, and other ordinances. In this case, DHEC withdrew its initial decision to issue the permit in error because it based its decision solely on Newberry County's withdrawal of the LOC. The SWPMA authorizes DHEC to "issue, deny, revoke or modify permits, registrations, or orders under such conditions as the department may prescribe . . . for the operation of solid waste management facilities." S.C. Code Ann. § 44-96-260(2) (2002). DHEC, not the county, is charged with ensuring such facilities meet the requirements for permitting.

....

We reverse the decision of the circuit court because substantial rights of SRRI have been prejudiced. The finding of the circuit court the revocation of the consistency determination compelled denial of the permit is affected by 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). There is no statutory authority providing that the decisions or discretion of another state's licensing body is determinative of the ultimate licensing decision delegated to the Board.

While the Board may "cancel, fine, suspend, revoke, or restrict the authorization to practice of 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;" the Board has not explicitly done so here. S.C. Code Ann. § 40-1-110 (1996). The Board's original sanctions were imposed and have been satisfied. Instead, the Board has placed an unreasonable requirement on Appellant which is not provided for under the statutory scheme: The requirement that Appellant engage with the Georgia Board on his former licensure in Georgia. Having surrendered his Georgia license while it was suspended, Appellant cannot engage with the Georgia Board to have his suspension lifted since he currently has no Georgia license. Appellant has no professional relationship with Georgia and no Georgia licensure, either active or inactive.

Appellant argues that the sanction imposed is unnecessary for the protection of the public, is unsupported by substantial evidence, is punitive, arbitrary and capricious. "When making this determination, the Board must insure that the sanction imposed is consonant with the purpose of these proceedings." Wilson v. State Board of Medical Exam'rs, 305 S.C. 194, 406 S.E.2d 345, 346 (1991). Any sanctions imposed should not just seek to discipline the physician but also to protect the health, and welfare of the people. Id.

In the present case, Appellant entered into a Consent Order with Respondent. That Order did not require that "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.” This requirement at issue in this matter was only imposed after the Consent Order and was imposed on a record which shows that Appellant surrendered his Georgia license while it was under suspension. In other words, Respondent created a condition which either inadvertently frustrates Appellant or which is calculated to frustrate Appellant. [R. p. 117, lines 1-19].

Furthermore, this requirement, this further sanction, is not reasonably related to any demonstration or proof of Appellant’s competency to practice dentistry in South Carolina. At no point in these proceedings has Appellant’s competency or proficiency been at issue. Respondent has not shown how the public is protected by this further sanction. Lack of licensure in another jurisdiction is not, in itself, an indication that a practitioner lacks competency or proficiency. Appellant provided documentary evidence satisfactory to the Board that his inactive license from New York is in good standing. [R. p. 8]. New York has not imposed upon Appellant the additional requirement imposed by Respondent.

II. THE ADMINISTRATIVE LAW COURT ERRED BY FAILING TO FIND THAT THE BOARD’S IMPOSITION OF A SUBSEQUENT SANCTION, AFTER A CONSENT ORDER AND DEPENDENT UPON THE DISCRETION OF THE GEORGIA BOARD, IS MADE UPON UNLAWFUL PROCEDURE AND AFFECTED BY AN ERROR OF LAW.

Rather than repeat in full the arguments offered in the other sub-parts herein, Appellant alleges that said arguments, and the record as a whole, clearly point to the a sanction made upon an unlawful procedure and affected by an error of law. Should this Honorable Court deem otherwise, said sub-parts are incorporated into this sub-part as though fully reiterated verbatim.

The South Carolina State Board of Dentistry has supervision of the practice of

dentistry in this state. S.C. Code Ann. § 40-15-10. The Board “may cancel, fine, suspend, revoke, or restrict the authorization to practice of 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” S.C. Code Ann. § 40-1-110 (1) (b). In this case, the Board has already disciplined Appellant by consent, and he has satisfied the conditions imposed by the Board by consent in that discipline. The subsequent requirement imposed by the Board is essentially an “ex post facto” requirement and was imposed in a manner that violates substantive and procedural due process and fundamental fairness. SCDOR, et al. v. Sandalwood Social Club, d/b/a Spinners Resort and Marina, 5014 (S.C.Ct.App. 8-1-2012); Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 636 S.E.2d 598 (2006).

The additional requirement imposed by the Board violates substantive due process and was imposed in a manner that violates substantive due process and fundamental fairness.

Our courts have unequivocally found a license to practice medicine to be property.

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, 1; S.C. Const. art. I, 3. In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. A “legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.” We have held that the standard for reviewing all substantive due process challenges to state statutes, including economic and social welfare legislation, is whether the statute bears a reasonable relationship to any legitimate interest of government. “The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of the fairness of the procedures used to implement them.” “The right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause [of the Fourteenth Amendment]. The liberty interest at stake is the individual's freedom to practice his or her chosen profession; the property interest is the specific

employment." "It cannot be doubted that a man's trade or profession is his property." Likewise, the practices of medicine and physical therapy by properly licensed individuals undoubtedly are cognizable property interests rooted in state law. We conclude Section 40-45-110(A) does not violate Appellants' substantive due process rights. While Appellants possess a property right to practice their profession when duly licensed by their respective governing bodies, their exercise of that right is subject to the Legislature's police power to enact statutes and regulations aimed at enhancing the public welfare in the practice of medicine and related professions. The statute prohibiting employment relationships between physicians and physical therapists bears a reasonable relationship to a legitimate interest of government, and the Legislature has not engaged in an arbitrary or wrongful act in enacting the statute.

Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 483-484, 636 S.E.2d 598 (2006) (citations omitted). In this case, the additional requirement imposed by Respondent does not bear a reasonable relationship to a legitimate interest of government.

The additional requirement imposed by the Board violates procedural due process and was imposed in a manner that violates procedural due process and fundamental fairness.

The requirements of procedural due process, usually deemed to apply in a contested case or hearing which affects an individual's property or liberty interest, generally include adequate notice, the opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review. Procedural due process requirements are not technical; no particular form of procedure is necessary. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur. Appellants' argument is without merit because their right to procedural due process was not violated. The hearing at issue was not a contested case involving an individual licensee, but was a regularly scheduled meeting at which the Board discussed an issue of statutory interpretation and Board policy.

Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 484-485, 636 S.E.2d 598 (2006) (citations omitted). Unlike the case in Sloan, the hearing at issue was a contested case

involving an individual licensee and the additional requirement was imposed by the Board after the Consent Order. Consent Orders in disciplinary matters are similar to plea agreements in criminal cases in that they are offered at the discretion of the licensing board and in that they economically expedite the disposition of contested licensing matters.

It is generally recognized that immunity agreements and plea agreements are to be construed in accordance with general contract principles. Accordingly, this court should not read terms or conditions into the contract that the parties did not intend. The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully.

State v. Compton, 366 S.C. 671, 677-678, 623 S.E.2d 661 (Ct.App. 2005) (citations omitted).

Appellant waived his rights upon the acceptance of the terms offered by the Board in the Consent Order.

The Board is now imposing a requirement on Appellant which is not provided for under the statutory scheme. Moreover, compliance with the requirement is outside Appellant's control, as Appellant cannot compel the Georgia Board to act. This delegation to the Georgia Board of Dentistry of the authority to determine whether or not Appellant should be allowed to practice dentistry in South Carolina is without statutory authority, prejudices the substantial due process rights of Appellant and 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).

III. THE ADMINISTRATIVE LAW COURT ERRED BY FAILING TO FIND THAT THE BOARD'S IMPOSITION OF A SUBSEQUENT SANCTION, AFTER A CONSENT ORDER AND DEPENDENT UPON THE DISCRETION OF THE GEORGIA BOARD, IS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD.

Rather than repeat in full the arguments offered in the other sub-parts herein, Appellant alleges that said arguments, and the record as a whole, clearly show that the Board's decision is erroneous in view of the reliable, probative and substantial evidence on the whole record. Should this Honorable Court deem otherwise, said sub-parts are incorporated into this sub-part as though fully reiterated verbatim.

As set forth above, this case is before the Administrative Law Court as an appeal of an agency action pursuant to S.C. Code Ann. § 1-23-600 (2012) of the Administrative Procedures Act (APA) upon appeal from a Final Order of a licensing board or commission. As such, the Administrative Law Judge sits in an appellate capacity under the APA rather than as an independent finder of fact. In South Carolina, the provisions of the APA -- specifically S.C. Code Ann. § 1-23-380(5) -- govern the circumstances in which an appellant body may reverse or modify an agency decision.

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (Ct. App. 1984). The well-settled case law in this state has also interpreted "substantial evidence" to mean that a decision will not be set aside simply because reasonable minds may differ on a judgment. Lark v. Bi-Lo, 276 S.C. 130, 276, S.E.2n 304 (1981). Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995).

In the case at hand, there is absolutely no evidence in the record that Appellant is a danger to the health, safety, and welfare of the public or that obtaining licensure in Georgia

would protect the public. The Board's further sanction is not reasonably related to any demonstration or proof of Appellant's competency to practice dentistry in South Carolina. At no point in these proceedings has Appellant's competency or proficiency been at issue. Respondent has not shown how the health, safety, and welfare of the public is protected by this further sanction. Lack of licensure in another jurisdiction is not, in itself, an indication that a practitioner lacks competency or proficiency.

The Board may be expected to argue that Appellant is claiming his voluntary surrender of his Georgia license deprives the Board of jurisdiction. SCDOR v. Club Rio, 392 S.C. 636, 709 S.E.2d 690 (Ct. App. 2011). This argument misstates Appellant's position and is without evidentiary foundation. Appellant entered into a Consent Order with the Board and admitted various violations of the practice act and that those violations constituted misconduct as alleged by the Board. Upon notice of the matters pending in South Carolina, the Georgia Board initiated its own investigation and prosecution and entered into a Public Consent Order with Appellant on September 12, 2003. [R. p. 12]. Appellant has entered into Consent Orders in both states admitting his trespasses and submitting himself to discipline. It is only now, when Respondent seeks to impose an additional sanction on him, and one with which it is impossible for him to comply, that he seeks relief. While it is true that Appellant's voluntary surrender of a license does not deprive the licensing authority of jurisdiction, that principle was established in a case in which the voluntarily surrendered license was a South Carolina license and the licensing authority was a South Carolina political subdivision responsible for issuing the license. In this case, the license is a Georgia license over which the Board has no jurisdiction.

Unlike the matter in Club Rio, Appellant acknowledges this argument does not

preclude the Board from disciplining Appellant in this matter. As stated above, Appellant acknowledges the Board “may cancel, fine, suspend, revoke, or restrict the authorization to practice of 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” S.C. Code Ann. § 40-1-110 (1) (b). Respondent issued its Order on July 29, 2010 [R. p. 10] which provided that Appellant

. . . 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.

[R. p. 8; p. 10]. Appellant did not appeal this additional sanction. 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. The gravamen of Appellant’s argument is that if he is bound by this additional requirement because he did not appeal it, then it must be strictly construed against the Board and Appellant must be deemed to have satisfied this requirement.

Respondent’s order granting Appellant’s request for reinstatement of his South Carolina license to practice dentistry made that reinstatement subject to a different condition:

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.

[R. p. 8]. Appellant has appealed this order and this condition because, while he accepts the Board’s power to discipline him, he argues that discipline must be for the protection of the

public and not merely punitive, consonant with the statutory powers of the Board and not imposed in such

a way that violates due process. The discipline the Board seeks to impose now is unjust, violates due process, is merely punitive, arbitrary, capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion.

IV. THE ADMINISTRATIVE LAW COURT ERRED BY FAILING TO FIND THAT THE BOARD'S IMPOSITION OF A SANCTION DEPENDENT UPON THE DISCRETION OF THE GEORGIA BOARD IS ARBITRARY, CAPRICIOUS AND CHARACTERIZED BY A ABUSE OF DISCRETION OR CLEARLY UNWARRANTED EXERCISE OF DISCRETION.

Rather than repeat in full the arguments offered in the other sub-parts herein, Appellant alleges that said arguments, and the record as a whole, clearly show the Board's imposition of an additional sanction, dependent upon the discretion of the Georgia Board, is arbitrary, capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion. Should this Honorable Court deem otherwise, said sub-parts are incorporated into this sub-part as though fully reiterated verbatim.

In this case, Appellant consented to the Board's disciplinary action and specific sanctions or requirements as conditions to licensure. He complied with these requirements. Upon notice of the matters pending in South Carolina, the Georgia Board initiated its own investigation and prosecution and the Board is disciplining Appellant based upon Georgia's prosecution. Upon Appellant's application for reinstatement, and apparently as an afterthought, Respondent added a new requirement.

The imposition of this further sanction, after a consent order and without any finding

that this sanction is necessary or advances the mission or purpose of the Board, is punitive, arbitrary, capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion. Although Appellant could have continued with litigation and appeals to the Georgia Board, once he surrendered his license this particular requirement became impossible for the Appellant to perform. Even if Appellant had the financial resources to engage the Georgia Board for more years than he already has, Appellant has no power to compel the Georgia Board to act in any particular way.

CONCLUSION

Respondent imposed a requirement upon Appellant which either inadvertently frustrates Appellant or which is calculated to frustrate Appellant. In either case, the creation of this requirement, and the conditions under which the requirement was created, cannot be said to be just and non-punitive. Respondent is effectively denying Appellant licensure in South Carolina not for the protection of the public, but because of the imposition of what is, in effect, a punitive “ex post facto” requirement or interpretation of its own order. Respondent does not show how this particular requirement, not provided for by statute, protects the public or is preferable to that discipline prescribed by statute. For the reasons stated above, Respondent’s grant of Appellant’s motion for reinstatement should be modified to delete the offending requirement. In the alternative, the matter should be remanded for Respondent to reinstate Appellant’s license subject to such conditions as are prescribed by statute and appropriate to protect the public.

Respectfully submitted,



Paul D. de Holczer (SC Bar #6905)

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November 7, 2012

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

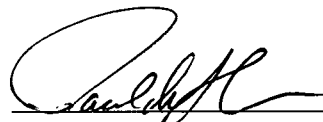
Edward P. Trimmier, D.M.D. Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Brief complies with Rule 211(b).



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CERTIFICATE OF COMPLIANCE

The undersigned certifies that Appellant's Final Brief complies with Supreme Court
Order of August 13, 2007.



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