IN THE SUPREME COURT OF FLORIDA

WILLIAM N. TAYLOR, M.D.,

Petitioner,

v. Case No. 69,343

DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF MEDICAL EXAMINERS,

Respondent.

_____/

FILED
SID J. WHITE
DEC 10 1993
CLERK, SUPREME COURT
By _____
Deputy Clerk

On Review Of A Certified Question
Of Great Public Importance From
The First District Court of Appeal

REPLY BRIEF OF PETITIONER WILLIAM N. TAYLOR, M.D.

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SUMMARY OF THE ARGUMENT

DPR's contention that the Amended Final Order was not itself appealable because it had nunc pro tunc effect is meritless. While courts have inherent power to enter orders nunc pro tunc, that authority is properly exercised only when it is determined that such action is necessary to promote the ends of justice and to prevent prejudice to those not at fault. In this case, there was no intent by the Board to make the Amended Final Order nunc pro tunc, and it is clear that such treatment would actually cause an injustice to Dr. Taylor for errors that were not his fault.

DPR also contends that Dr. Taylor's written request to correct the erroneous order and to extend the time for appeal cannot be treated as a motion to alter or amend that would suspend rendition, because it was not filed within ten days of the order. The record reflects, however, that Dr. Taylor did not receive the order until 17 days after its entry, and that he immediately sent his request for relief to the Board by certified mail on the next business day. Again, the law does not mandate a perversion of the rules to punish a litigant for a delay that is not his fault.

There is no rational basis for differentiating between a motion to correct an order and a motion to alter or amend an order for purposes of suspending rendition. To deprive Dr. Taylor of the right to appeal under these circumstances would be manifestly unfair, and would violate concepts of due process and equal protection.

ARGUMENT

In its Answer Brief, DPR concedes that an administrative agency has inherent authority to correct clerical errors or mistakes in its orders, but nonetheless contends that dismissal of Dr. Taylor's appeal from the Amended Final Order of the Board is proper because (a) the Amended Final Order, having only corrected a clerical error rather than a substantive provision, was effective nunc pro tunc and thus did not represent a new order from which the period for appeal commenced; (b) Dr. Taylor's request for correction of the erroneous order, even if treated as a motion to alter or amend that would suspend rendition, was untimely since it was not filed within ten days after entry of the order; and (c) the fact that Dr. Taylor was representing himself without the assistance of trained legal counsel does not justify an exception to the doctrine of administrative finality. Each of these arguments is demonstrably meritless under the circumstances of the present case.

In support of its contention that the correction of a clerical error operates nunc pro tunc and thus does not toll the time for taking an appeal, DPR relies principally upon Bartlett & Sons Co. v. Pan-American Studios, Inc., 144 Fla. 531, 198 So. 195 (1940). Even a cursory reading of the Bartlett decision reveals that DPR's reliance is misplaced, however, because in that case the aggrieved party did not move to correct the error until eight months after the original final decree was rendered, which was two months after the period for taking an appeal had expired. As

the Court there noted, the trial judge had already lost jurisdiction of the case before the motion was filed. Here, there is no dispute that Dr. Taylor submitted his written request for correction to the Board within the thirty-day appeal period.

(In an effort to portray Dr. Taylor as being dilatory, DPR states that he "received a Final Order dated (and rendered) June 26, 1985," and that "[s]eventeen days later he wrote (rather than telephoned) the Board offices asking that the correct number be inserted. . . ." Answer Brief at 3. As the district court pointed out, however, Dr. Taylor did not receive the June 26 order until July 13 because it was sent to a different address. Upon receiving the order, Dr. Taylor wrote the letter requesting correction on the same day (July 13, a Saturday) and sent it to the Board by certified mail on the next business day (July 15, 1985, a Monday).

As for DPR's offhanded suggestion that Dr. Taylor should have requested the correction by telephone rather than in writing, it should be noted that not only are motions required to be "made in writing unless made during a hearing or trial," Fla.R.Civ.P. 1.100(b), but even a lay person could not reasonably be expected to rely upon a telephone message to activate a bureaucratic apparatus that had already demonstrated something less than careful attention to detail. In any event, DPR does not suggest any reason why Dr. Taylor would want to delay, since there was no stay pending review and the disciplinary sanctions were already in effect.)

Dr. Taylor does not dispute the fact that a court has inherent power, in its discretion, to enter orders or judgments nunc pro tunc, so as to relate back to a prior ruling or action which was ineffectual at the time due to some error or omission. See, e.g., Florida Development Co. v. Polk County National Bank, 76 Fla. 619, 80 So. 560, 561-62 (1919) (On Petition for Rehearing); Becker v. King, 307 So.2d 855, 858-59 (Fla. 4th DCA), cert. dism., 317 So.2d 76 (Fla. 1975); see also Fawcett v. Weaver, 121 Fla. 245, 163 So. 561, 562 (1935). That a court can correct clerical errors effective nunc pro tunc, however, does not mean that it must do so; nor does it mean that the entry of a subsequent amendatory or corrective judgment automatically operates nunc pro tunc, as DPR suggests.

Florida courts, including this Court, have repeatedly emphasized that the very purpose of authorizing courts to correct errors nunc pro tunc is to promote the ends of justice and prevent prejudice to those who are not at fault. As this Court observed in Florida Development Co., supra:

> The general principle is that, whenever delay in entering a judgment is caused by the action of the court, judgment nunc pro tunc will be allowed as of the time when the party would otherwise have been entitled to it if justice requires it. . . .
>
> . . . The failure to enter the proper judgment was the fault of the court's clerk and was not attributable to the negligence or laches of the plaintiff, and the court had the power to order a nunc pro tunc entry of the judgment. The interest of no third party appears to be affected thereby, and the ends of justice required the entry to be made.

80 So. at 562 (emphasis added).

Likewise, in Fiehe v. R. E. Householder Co., 98 Fla. 627, 125 So. 2, 9 (1929) (On Rehearing), this Court declared that "[t]he prevention of such anomalous and unjust situations . . . is the foundation of the doctrine of nunc pro tunc," and held that the entry of a nunc pro tunc order was permissible where the plaintiff "is not shown to have been prejudiced in respect to either her personal or property rights." Implicit in the above-quoted language from this Court's decisions in Florida Development Co. and Fiehe is the converse principle that it would be improper for a court to act nunc pro tunc if the effect would be unjust or prejudicial to any party. As the Fourth District has explained:

> Under the maxim, "Actus curiae neminem gravabit" ["an act of the court should prejudice no one"], courts from very ancient times have exercised the inherent power of entering judgments nunc pro tunc in order that the rights of a litigant, who is himself not at fault, should not be impaired or lost.

Becker v. King, 307 So.2d 855, 858 (Fla. 4th DCA), cert. dism., 317 So.2d 76 (Fla. 1975) (emphasis added).

To give retrospective effect to the Amended Final Order entered by the Board in this case would be a manifest perversion of the principles on which the power to act nunc pro tunc is founded. In each of the cases discussed above, as well as those cited by DPR, it is clear that the corrective order was deliberately and expressly made nunc pro tunc for the purpose of preventing an unjust, unfair, or unintended result. Here, by

contrast, there is no evidence that the Board ever determined or intended to make its Amended Final Order effective nunc pro tunc, and -- more importantly -- there is no basis for any contention that it could properly have done so "in the interests of justice."

On the contrary, the only result of giving the Amended Final Order nunc pro tunc effect would be to render Dr. Taylor's appeal untimely and subject to dismissal -- a result which the divided district court reached with undisguised reluctance, and which even the majority opinion below characterized as "unduly harsh." Despite DPR's attempt to cast blame for the delay on Dr. Taylor, the record reflects no facts to support the contention that the "ends of justice" are served by depriving him of the right to appeal. Indeed, the Board itself apparently agreed with Dr. Taylor's request that an amended order should be entered and that his time for appeal should be measured from the date of rendition of the Amended Final Order.

The patent injustice of DPR's position is readily apparent from a review of the facts as set forth in the district court's majority opinion:

> On June 26, 1985, after having held an evidentiary hearing, the Board of Medical Examiners filed its order which found Dr. Taylor guilty of professional misconduct, suspended his license to practice medicine, and stayed the suspension pending Dr. Taylor's satisfactorily serving five years' probation. The record reflects that at the conclusion of the hearing the Board of Medical Examiners stated that it agreed to impose only three years' probation. A certified copy of the June 26 written order, signed by the chairman of the Board, was sent to Dr. Taylor at a Sarasota

> address, but Dr. Taylor did not receive a copy until July 13, at a Palm Harbor address. The order advised Dr. Taylor of his right to appeal within thirty days. Dr. Taylor was not represented by counsel, and on July 15 he sent a letter to the Board by certified mail which stated that the final order contained "an important error . . . with regards to the length of probationary period." After referring to the discussion of the three-year probation that occurred at the end of the hearing, the letter requested that the Board respond "by correcting the Final Order and then filing the corrected FINAL ORDER. I hope to receive this corrected FINAL ORDER and I am requesting to reserve my period of appeal until I receive it."
>
> Approximately three weeks later, on August 8, 1985, the Board filed an "Amended Final Order" correcting the length of the probationary period to three years and incorporating all other provisions of its original final order. It advised Dr. Taylor of his right to appeal "within thirty (30) days of the date this order is filed." A copy was furnished to Dr. Taylor, and thereafter, on September 6, 1985, he filed a notice of appeal from the "Amended Final Order of the Board of Medical Examiners rendered August 8, 1985."

493 So.2d at 499 (emphasis added).

Certain points merit emphasis here in response to DPR's arguments. Dr. Taylor did not simply wait until 17 days after the original final order was entered to initiate corrective action; he wrote the letter requesting a corrected order and tolling of the appeal period on the same day he received the erroneous order, and sent it to the Board by certified mail on the next business day. Certainly, it is not Dr. Taylor's fault that the June 26 order contained a significant error, or that it did not reach him until July 15. Perhaps Dr. Taylor could have expedited the process by telephoning the Board about the problem, as

DPR suggests, but it is highly unlikely that the Board would have acted on the matter before its next regularly scheduled meeting in any event.

On the other hand, it might just as easily be asked why the Board, after receiving Dr. Taylor's letter, did not immediately advise him by telephone that his request to toll the time for appeal until entry of the Amended Final Order would not be effective. The Board knew that Dr. Taylor was not represented by counsel, and it was apparent from the letter (a) that he intended to appeal the Board's order (which rejected the Hearing Officer's recommendation to dismiss the complaint against him); and (b) that he was acting on the belief that the time for appeal could be tolled until entry of the Amended Final Order. Instead of correcting Dr. Taylor's misunderstanding, the Board took action which it undoubtedly perceived would constitute a granting of his request -- it entered an Amended Final Order which specifically stated that an appeal could be taken "within thirty (30) days of the date this order is filed." Significantly, there is nothing in that order to suggest that it had, or was intended to have, nunc pro tunc effct.

The only fault that can be attributed to Dr. Taylor is his failure to employ trained legal counsel until after the Amended Final Order was entered. In this regard, DPR urges that this Court should not "engraft exceptions" to the "doctrine of administrative finality" where litigants are representing themselves. That contention, however, rests on the unwarranted assumptions that the doctrine of administrative finality clearly

requires the Amended Final Order to be given nunc pro tunc effect, and that any lawyer would have recognized the problem so as to advise Dr. Taylor to proceed differently under these circumstances. The fact that this issue is before the Court today on a certified question from a divided district court is sufficient in itself to refute DPR's position.

Petitioner respectfully submits that the real question to be resolved is whether the doctrine of administrative finality would be so offended or damaged by the relief sought here as to justify a deprivation of Dr. Taylor's right to appeal. Since DPR concedes that an administrative agency has the inherent authority to correct clerical errors in its orders, the only remaining issue is whether a motion to correct an erroneous order, if filed within ten days after receipt of the order and within thirty days after its entry, should operate to suspend rendition until disposition of the motion.

On this point, DPR has offered no explanation of how the doctrine of finality would suffer any more by suspending rendition for a motion to correct an order than it does by suspending rendition for a motion to alter or amend an order. The motion to correct serves the same fundamental purpose as a motion to alter or amend -- i.e., to ensure that the order appealed correctly reflects the final determination or judgment of the lower tribunal. Given the absence of any rational basis for the differential treatment of these motions, the fact that such differential treatment can result in a loss of the right to appeal is far more

offensive to concepts of due process and equal protection than it is to the notion of administrative finality.

While DPR argues that Dr. Taylor's letter could not be treated as a timely motion to alter or amend because it was not filed within ten days after entry of the final order as required by Rule 1.530(g), the critical fact is that it was filed within ten days after Dr. Taylor received belated delivery of the order. Florida courts have consistently protected the appellate rights of parties whose untimely filings are caused by delays in receiving notice of orders through no fault of their own. See, e.g., Town of Hialeah Gardens v. Hendry, 376 So.2d 1162 (Fla. 1979); Pentecostal Holiness Church, Inc. v. Reed, 257 So.2d 1 (Fla. 1972); Williams v. Roundtree, 464 So.2d 1293 (Fla. 1st DCA 1985); Gordon v. Green, 382 So.2d 1344 (Fla. 5th DCA 1980).

In sum, DPR has asserted grounds on which this Court might uphold the dismissal of Dr. Taylor's appeal, but it has offered no real reason or justification for doing so. The power to enter orders nunc pro tunc is designed to promote the ends of justice, not to defeat them. The rules of court and the doctrine of administrative finality are designed to ensure fair and orderly proceedings, not to create traps for the unwary. When an agency makes mistakes, the system should operate to assist a diligent litigant in correcting the errors, not to victimize him or deprive him of valuable constitutional rights. For these reasons, the position taken by DPR should be rejected.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully submits that district court's decision should be quashed and this case remanded with directions to reinstate Dr. Taylor's appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to H. REYNOLDS SAMPSON, ESQ., and WILLIAM FURLOW, ESQ., Department of Professional Regulation, 130 North Monroe Street, Tallahassee, Florida 32301, this 10th day of December, 1986.

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