D/a 6-6-89

IN THE SUPREME COURT OF FLORIDA

ROGER MARRERO, M.D.,

Petitioner,

vs.

CASE NO. 73,392

DEPARTMENT OF PROFESSIONAL REGULATION, FLORIDA STATE BOARD OF MEDICINE,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

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STATEMENT OF THE CASE AND FACTS

Petitioner filed an application for licensure as a medical doctor in the State of Florida dated January 29, 1986, and received by the Board of Medical Examiners (Board) on February 3, 1986.

The record reflects that in the course of his personal appearance before the Board in August of 1986, it was indicated that the Board had received several evaluations of training with respect to the Petitioner; two from 1983 to 1984 characterized by the Executive Director of the Board as "less-than-favorable," and the evaluation from his then most recent training recommending him as "qualified and competent." (R-84, 85) Petitioner indicated his willingness to respond to any questions that the Board might wish to put to him. (R-85) The Board noted at that time that Petitioner's CV shows an excellent record, and he was characterized by another Board member as "obviously a super achiever." (R-94)

At that time, Petitioner agreed to waive the Board's ruling on his application until the Board's next meeting. (R-98) The Board indicated that it would request further information from Petitioner's last residency training.

At the Board's next meeting in October, Petitioner was represented by counsel, who explained that Petitioner was practicing medicine in Pennsylvania and was unable to be present at the meeting due to scheduling problems, as he had

been working at that job for only two weeks (R-105). Counsel for Petitioner asked whether he could answer any of the Board's questions relating to Petitioner's application; in the alternative, he suggested that Petitioner might be in a better position to arrange to attend the December meeting without jeopardizing the job he was currently holding. (R-107)

As of January 30, 1987, Petitioner had received no indication as to the date and location of the next meeting. This gave rise to more difficulties regarding Petitioner's being able to leave his present job and come to Florida. Therefore, by letter dated January 30, 1987, Petitioner respectfully withdrew his application from consideration.

A follow up letter from his counsel, dated February 3, 1987, indicated that the matter of Petitioner's application be removed from the agenda of the upcoming Board meeting, and indicated that when Petitioner's professional obligations would permit him to do so, he would consider resubmitting his application anew. (R-117)

At a meeting of the Board of Medicine on February 8, 1987, when asked by a Board member whether Petitioner's record would be available if he were to reapply in the future, counsel to the Board replied that records of everything that had transpired would be available to the Board if it so desired. (R-123) Nonetheless, the Board ignored the withdrawal and carried a motion to deny the application and

retain jurisdiction until the next meeting in April in case Petitioner could show and answer the Board's questions.

Prior to the entry of an order reflecting the Board's action and prior to the April meeting, this action for injunctive relief was filed.

After a hearing held on March 25, 1987, the trial court granted a preliminary injunction enjoining Respondent from refusing to allow the Petitioner to withdraw his application for licensure, from requiring him to appear, and from otherwise taking action on his application for licensure. (R-35-36) Subsequently, Respondent filed a Motion to Dismiss (R-57-58) and a Memorandum of Law in Opposition to Injunctive Relief and in Support of Motion to Dismiss (R-66-138). Petitioner filed a Response to the Motion to Dismiss (R-61-65) and two memoranda of Law in Support of Injunctive Relief (R-27-34, 144-152). Respondent filed a Reply to the Response to Motion to Dismiss. (R-139-143) After another hearing which was held on May 28, 1987, the trial court issued a final order permanently enjoining the Respondent from acting on the aforesaid application and allowing Petitioner to withdraw his application without prejudice to apply for licensure in the future. (R-326-328).

Respondent herein filed an appeal in the First District Court of Appeal on September 21, 1987 (First DCA). Subsequently, both parties filed their initial and reply and

answer briefs. The First DCA issued an opinion on September 15, 1988, reversing and remanding the case back to the Respondent Board. The Petitioner filed a Motion for Rehearing and the Respondent filed a Response to Petitioner's Motion for Rehearing. The First DCA, in acting on the motion for rehearing, withdrew its opinion of September 15, 1988, and entered an opinion on November 18, 1988, clarifying its position, cited as Fla. State Board of Medicine v. Marrero, 536 So.2d 1094 (Fla. 1st DCA 1988). It is from the First DCA's opinion that this appeal was filed.

Notice of Intent to Invoke Discretionary Jurisdiction was filed on December 5, 1988. Petitioner filed in the First DCA a Motion for Stay pending appeal which was denied on December 8, 1988. Petitioner then filed a Motion for Review of the First DCA order denying stay pending appeal, which was granted by this Honorable Court on December 20, 1988.

SUMMARY OF ARGUMENT

Petitioner has an absolute right to withdraw without court approval his voluntarily submitted application for licensure. Having done so, the Board was without jurisdiction to enter an order denying his application or to vote to retain jurisdiction until the April meeting. Petitioner was not subject to the jurisdiction of the Board until he submitted his application, hence, his withdrawal divests the agency of jurisdiction. Several Florida cases have so held. The Florida Rules of Civil Procedure and the common law have held that a plaintiff has a right to take a voluntary dismissal up to the time the trier of fact retires to deliberate. In this case, the Board was still gathering information and had not begun deliberations. Hence, Petitioner was within his absolute right to withdraw his application and terminate jurisdiction over this matter. The Petitioner is not subject to the Board's disciplinary jurisdiction, so the Board has no cause to discipline Petitioner.

Additionally, the Board concedes it has no express authority to permit or deny the Petitioner's withdrawal. It is relying on its purported implied authority. However, a state agency is limited to the power which is expressly granted it. Any time the agency acts outside that delegated authority, it is acting illegally, as it has done here.

Nor is the asserted power to refuse an applicant the right to withdraw an application indispensible to the authority to grant or deny applications for licensure.

While the general principle is that administrative remedies must be exhausted prior to resorting to the courts, an exception lies where the remedy would be too little or too late. The lack of jurisdiction is a widely recognized exception to the exhaustion of administrative remedies doctrine. Here, Petitioner has offered persuasive grounds in alleging the Board's lack of jurisdiction. Any remedy offered through the administrative forum would not put Petitioner back in the position he was in before the improper actions of the Board. The Board was without jurisdiction. Exhaustive, expensively, administrative remedies cannot vest the Board with jurisdiction and is, stricto sensu, irrelevant to Board jurisdiction vel non. Any subsequent actions would also be without jurisdiction. The First DCA indicated that Petitioner could petition for a declaratory statement from the agency if the only question was the Board's jurisdiction. A declaratory statement is not proper in this situation because the Board has already committed a wrong. There is no "potential" action remaining, hence the purpose and availability of a declaratory statement no longer stands. Petitioner will just end up back before the courts. Respondent Board has acted arbitrarily and capriciously and therefore Petitioner must not wait to exhaust his administrative

remedies. His license has been denied not based on any of the Petitioner's qualifications but rather on the fact that he didn't show up. The Petitioner will be hurt by this action since it will cause other states and hospitals, and employers, etc. to question the Petitioner's qualifications, when, in fact, Petitioner is a highly-qualified physician. Any administrative remedy would be wholly inadequate in this case, therefore, Petitioner was correct in seeking equitable relief.

The equitable relief granted by the trial court was entirely proper because there was a clear legal right. An adequate remedy is unavailable at law. Petitioner will suffer irreparable harm and the public interests are not compromised. Absent a showing that the trial court abused its discretion in granting the injunction, the appellate court should not have disturbed the injunction. There has been no such showing of clear abuse of discretion. The injunction should remain standing.

ARGUMENT

I

THE FIRST DCA ERRED WHEN IT FOUND THAT THE BOARD OF MEDICINE RETAINED JURISDICTION OVER THIS MATTER AFTER THE PETITIONER VOLUNTARILY WITHDREW HIS LICENSURE APPLICATION.

The court below wrongfully reversed and remanded the Circuit Court's permanent injunction of the Board of Medicine from acting further on Petitioner's licensure application since Petitioner had voluntarily withdrawn his application and thereby divested the agency of further jurisdiction to deny withdrawal or to deny the application.

a. Petitioner has an absolute right to withdraw his voluntarily submitted licensure application analogous to the right of a civil plaintiff to take a voluntary dismissal.

The right of the Petitioner to withdraw his application is analogous to the unqualified right of a plaintiff to voluntarily dismiss a complaint in a civil action. In actions in the lower tribunals, Respondents have also likened this proceeding to the plaintiff's right of dismissal in civil cases. Rule 1.420(a)(1), Fla. R. Civ. P., states, in pertinent part:

> An action may be dismissed by the plaintiff <u>without order of court</u> (i) before trial by serving, or during trial by stating on the record, a notice of dismissal at any time before a hearing on motion for summary judgment, or if none is served or if the motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court for decision. [emphasis added]

The Federal Rules of Civil Procedure also provide that an action may be dismissed by the plaintiff without an order of the court by filing a notice or stipulation of dismissal. Fed. R. Civ. P. 41(a)(2). [The purpose of the rule is to facilitate voluntary dismissals, but to limit them to early stages of the proceedings. The Second Circuit emphasized the advanced stage of the proceedings in Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir.), cert. den. 345 U.S. 964 (1953), in denying a dismissal where the court had already had several days of argument and testimony and a 420-page record.] In Jones v. S.E.C., 298 U.S. 1 (1936), the Petitioner was granted injunctive relief prohibiting the commission from refusing to allow Jones' formal withdrawal of his application for registration, notwithstanding the fact that the commission had fixed a time for hearing on some concerns it had about misstatements and omissions of facts in Jones' registration statement and had notified Jones that he was ordered to appear. The United States Supreme Court upheld Jones' unilateral right to withdraw his application regardless of a Commission rule which stated "Any registration statement or amendment thereto may be withdrawn on the request of the registrant if the Commission consents thereto," and likened an individual's perogative to voluntarily withdraw an application to a constitutional right or privilege, wherein an individual's constitutional rights would be upheld over the government

becoming an autocracy. The Court says that the plaintiff possessed this unqualified right to dismiss "unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter." Id. at 19. But the Court added that, at least absent a statute to the contrary, an agency's power to refuse to dismiss a proceeding on the motion of the one who initiated it cannot be greater than that of a court as elucidated in this fundamental principle of the judicial process. In the case at bar there is no such regulation which gives the Board the right to allow withdrawal and the Board in no way will be prejudiced by the Petitioner's absolute withdrawal of his application, since the sole purpose of the Board in regards to its licensure procedures is to ensure public safety and adequate medical services to the citizens of Florida. For the Petitioner to ever practice in Florida, he must again face the jurisdiction of the Board and just again prove with equal force that he is entitled to practice medicine in the State of Florida. The public will not be endangered where the Petitioner withdraws his licensure application. In fact, only the Petitioner is concerned with the Board's refusal to permit his withdrawal. It affects no other citizen, an issue recognized by the court in Jones v. S.E.C.

In Fears v. Lunsford, 314 So.2d 578 (Fla. 1975), this Court held that a plaintiff's right to take a voluntary dismissal is absolute. "Moreover, the trial court has no discretion in granting or denying such a dismissal by the

plaintiff." State Dept. of Natural Resources v. Hudson Pulp and Paper Corp., 363 So.2d 822, 827 (Fla. 1st DCA 1978). "Further, [t]he effect of a voluntary dismissal is to remove completely from the court's consideration the power to enter an order, equivalent in all respects to a deprivation of 'jurisdiction.'" Romar Int'l, Inc. v. Jim Rathman Chevrolet/Cadillac, Inc., 420 So.2d 346, 347 (Fla. 5th DCA 1982) (quoting Randle-Eastern Ambulance Service v. Vasta, 360 So.2d 68 (Fla. 1978). See also, Bevan v. D'Alessandro, 395 So.2d 1285 (Fla. 2d DCA 1981) (where the court held that the trial court was without jurisdiction to hear appellee's motion to dismiss after appellant's voluntary dismissal.) In Hudson Pulp, the Department of Natural Resources (DNR) filed a complaint to invoke its eminent domain power but subsequently filed and served a notice of voluntary dismissal. The respondent then filed a motion to strike the notice of dismissal and the judge thereafter entered an order against DNR. "The order further recited that jurisdiction was retained for the purpose of empaneling a jury to determine the issue of full compensation as to [Respondent's] ownership interest." Hudson Pulp, 363 So.2d at 825. An appeal was then filed. The First District Court of Appeal said that the lower court was without authority to grant or deny a dismissal. In Romar Int'l, the appellees moved for and were granted attorney's fees after the appellant gave notice of a voluntary dismissal prior to the taking of a deposition. The Fifth District Court of Appeal held

that the trial court was without jurisdiction in a matter after appellant took a voluntary dismissal and that it could not, therefore, enter any order in the matter. For the trial court to act, it would have to exercise a jurisdiction of which it was no longer possessed. Romar Int'l, 420 So.2d at 347-48.

In the case at bar, the Board noted that it would retain jurisdiction over the matter in case Petitioner showed up at the next Board meeting after having not been able to show at a few prior meetings. The Board was without the authority to retain jurisdiction over the matter. Additionally, it could not enter an order denying the Petitioner's application for licensure because to do so would require that the Board exercise jurisdiction over a matter no longer within its jurisdiction.

There is a very narrow exception to the general rule that the plaintiff has an absolute right to a voluntary dismissal without court order. Where a fraud is attempted by the voluntary dismissal, the court may strike the dismissal and reinstate the matter. Select Builders of Fla., Inc. v. Wong, 367 So.2d 1089 (Fla. 3d DCA 1979). In Select Builders, the court respected the exception where the plaintiff had received affirmative relief to which he was not entitled and sought to avoid correction of the trial court's error by taking a voluntary dismissal.

In the case at bar, Petitioner has received no affirmative relief from the Board. He has acknowledged that when and if he

applies to the Board again, he must go through the entire licensing procedure. Petitioner has in no way been granted any relief which would make a reappearance before the Board for licensure more successful than had he continued with the original application and not taken a voluntary withdrawal. Petitioner attempted no fraud on Respondent Board when he withdrew his application.

b. At least five DCA cases dealing with administrative law have held that once a petitioner withdraws his application, the agency is divested of jurisdiction to proceed.

Several administrative law cases have held consistent with the law in civil actions that once a plaintiff takes a voluntary dismissal or voluntary withdrawal, the agency is divested of jurisdiction to proceed.

The First DCA in Orange County v. Debra, Inc., 451 So.2d 868, 869 (Fla. 1st DCA 1983), held that "the withdrawal of [a] petition divested the agency of further jurisdiction to proceed." In Debra, Debra, Inc. petitioned the Florida Land and Water Adjudicatory Commission (FLWAC) for a rule establishing a Community Development District, but withdrew its petition prior to a ruling thereon. A public hearing on the matter had already taken place with a resulting recommendation that further hearings be held before any action was taken on the petition. Before the agency could act on the recommendations, Debra, Inc. withdrew its petition. The FLWAC denied Orange

County's motion that the FLWAC should enter a final order denying the petition. The appellate court said:

> We affirm the action of the FLWAC in allowing Debra, Inc. to withdraw its petition and hold that it properly declined to issue an order denying Debra, Inc.'s petition, as the withdrawal of the petition divested the agency of further jurisdiction to proceed. [emphasis added]

Id. at 869.

Further, the court said:

> [O]nly the filing of a qualifying petition gives the agency jurisdiction to proceed. It is well established that an agency has no jurisdiction to proceed beyond that granted it by statute; it has no inherent rulemaking authority . . . . Therefore, withdrawal of a . . . petition short of ruling thereon would deprive the FLWAC of jurisdiction to proceed to a final decision on the petition. . . .
>
> This is an unnecessary waste of time and effort which can be avoided if a petitioner is simply allowed to withdraw his petition prior to a ruling thereon if he no longer wants to seek a . . . rule.

Id. at 870.

The case at bar is similar to Debra. The Petitioner was not subject to the jurisdiction of the Board until such time as he submitted his application for licensure. His withdrawal of his application short of a ruling thereon deprived the Board of the jurisdiction to proceed since it is only upon his pending application that the Board has jurisdiction. In this case, there had been some questions asked of Petitioner, to which he had provided answers. He was to appear back before the Board, but before he had been notified of when and where the meeting was to

be held, the Petitioner voluntarily withdrew his application. In Debra, there had also been an appearance at a public hearing, yet the agency was divested of jurisdiction. The court did not find that the finder-of-fact had completely gathered its information or that it had retired to deliberate, and allowed a voluntary dismissal. In fact in the case at bar, the Respondent Board had not yet made a factual determination as to the application. Counsel for the Respondent Board stated in "Defendant's Memorandum of Law in Opposition to Injunctive Relief and In Support of Motion to Dismiss "(R-74) filed in the Circuit Court action on April 22, 1987: "it should be emphasized, the Board has not determined that Dr. Marrero is not competent to practice in Florida." Additionally, at the hearing for the injunctive relief, The Board's counsel said, "I would like to point out the Board has not stated that it's going to deny his license if he appears and presents the information." (R-43)

Since the decision in Debra, at least four other decisions have been consistent therewith. The First DCA in Humana of Florida, Inc. v. Dept. of Health and Rehabilitative Services, 500 So.2d 186 (Fla. 1st DCA), rev. den., 506 So.2d 1041 (1986), cites Debra for the proposition that "where a petition is [voluntarily] withdrawn, agency jurisdiction ceases to exist." Id. at 187. Humana involved a petition by Halifax Hospital for a formal hearing to challenge granting of a certificate of need by the Department of Health and Rehabilitative Services (HRS)

for construction of an ambulatory-surgical center. Halifax Hospital subsequently filed a voluntary dismissal. The Division of Administrative Hearings (DOAH) cancelled the hearing and closed the file "concluding that Halifax Hospital had an absolute right to dismiss its action, and that exercise of that right terminated the proceeding." Id. at 187. Thus, the intervenor, the petitioner in the case, no longer had any rights in the proceeding.

RHPC, Inc. v. Dept. of Health and Rehabilitative Services, 509 So.2d 1267 (Fla. 1st DCA 1987), also held that the voluntary dismissal of a petition divests the agency of jurisdiction to proceed. In RHPC, the petitioner, RHPC, had voluntarily dismissed its certificate of need application. RHPC later sought to reinstate the application. The Court said:

> HRS was without jurisdiction to reinstate the application once [RHPC] had filed its voluntary notice of dismissal. . . .
>
> The voluntary dismissal of the [certificate of need] appeal by [RHPC] terminated the jurisdiction of HRS to consider further any issue relating to the [certificate of need] application."

RHPC also cites Humana for the proposition that the agency is without jurisdiction where the petitioner was withdrawn.

The Petitioner in the case at bar is not attempting to dismiss his cause only to later ask that his application be reinstated. If he ever so choses to become a Florida licensed physician, he will be reapplying from the beginning. He will have to again come forth with the evidence to prove he is a

competent physician.

Rudloe v. Florida Dept. of Environmental Regulation, 517 So.2d 731 (Fla. 1st DCA 1987), involves a situation where the petitioner petitioned for a formal hearing after notice was published that the Department of Environmental Regulation (DER) intended to issue a permit to dredge a channel. Four months later, the petitioner filed a notice of voluntary dismissal of his petition. The hearing officer entered an order to close the file. The appellants in the case were seeking to intervene but were denied intervention since the matter was no longer within the agency's jurisdiction. The 1st DCA cited Humana and RHPC when it said that DER properly denied the intervention to the appellants because the "court held that where a petition is withdrawn, agency jurisdiction ceases to exist." Rudloe, 517 So.2d at 732.

Finally, the Fifth DCA in Middlebrooks v. St. Johns River Water Management District, 529 So.2d 1167 (Fla. 5th DCA 1988), expressly analogized the situation of a voluntary withdrawal of an application in an administrative proceeding with the absolute right of the civil plaintiff to take a voluntary dismissal up to the time that the proceedings go to the finder of fact for deliberation. In Middlebrooks, Middlebrooks, a recreational facility owner, applied to the District for a consumptive use permit. After going to a full formal hearing, receiving the recommended order of the hearing officer, and filing exceptions

to the recommended order, Middlebrooks withdrew his application the very same day that he was to present oral argument to the District. The District ignored the withdrawal and rendered a final order. The Fifth DCA said that Fla.R.Civ.P. 1.420(a)(1), cited supra, p. 8, controlled this issue. The court said that the finder of fact had already deliberated and had returned a tentative verdict, and therefore, Middlebrooks' withdrawal came too late. Middlebrooks knew the likely outcome of the case was not in his favor. Petitioner did not know the outcome of the case had he reappeared. Even the Board's counsel said the Board had not yet voted to deny the application, thus no tentative verdict had been rendered. (supra, p. 15)

In Middlebrooks, the District had adopted the Florida Rules of Civil Procedure in their administrative proceedings. In the case at bar, the Board of Medicine has not adopted the Florida Rules of Civil Procedure and in not doing so, has left a gap in its procedure. The Board is authorized by 458.309, Florida Statutes, to make any rules necessary to carry out its duties, yet it has failed to cover this procedural matter. Accordingly, we must look to the Florida Rules of Civil Procedure, which are a codification of the common law, for guidance, which is what the preceding administrative law cases have done in finding that the petitioner has an absolute right to withdraw his petition, thereby divesting the agency of further jurisdiction.

c. The Board has no express or implied authority to permit or deny Petitioner's withdrawal of his application.

Respondent has conceded in the actions below that the Board has no statutory authority expressly authorizing it to deny the withdrawal. Petitioner did not ask that he be allowed to withdraw; he simply withdrew. Furthermore, there is no Board rule with respect to giving notice to an applicant that the Board retains the right to refuse to allow withdrawal of an application once some minimal action has been taken on the application.

The Respondent therefore is resting its argument on the implied authority granted it by Chapter 458, Fla. Stat., the Medical Practice Act, to ensure that every practicing physician meets minimum safety standards. The Circuit Court correctly held that the Board was without implied authority to deny withdrawal of Petitioner's application.

The basic principle in Florida is that administrative agencies exercise their authority only to the extent that authority has been delegated to them by the Legislature. In DER v. Falls Chase Special Taxing District, 424 So.2d 787, 793 (Fla. 1st DCA 1982), rev. denied, 436 So.2d 98 (Fla. 1983), the First DCA said:

> An agency has only such power as expressly or by necessary implication is granted by legislative jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. When acting outside the scope of its

> delegated authority, an agency acts illegally and is subject to the jurisdiction of the courts when necessary to prevent encroachment on the rights of individuals. [emphasis added]

See, also, Gardinier, Inc. v. Fla. Dept. of Pollution Control, 300 So.2d 75 (Fla. 1st DCA 1974). Therefore, the Board is without authority to deny Petitioner's withdrawal of his license application or to take any action after withdrawal by Petitioner.

The Board in entering an order denying Petitioner's application, acted clearly in excess of its delegated powers and without colorable authority, thus forcing Petitioner to seek an injunction in the circuit court.

The Board's statutory authority to grant or to deny one's application for licensure does not necessarily implicate a power to (a) deny an application already withdrawn, or (b) deny one the right to withdraw an already withdrawn application -- both of which "powers" were herein enjoined by the Circuit Court.

For an agency to exercise a putative power (absent an express delegation of such power to the agency), it must be by necessary implication. No such condition obtains herein. When Dr. Marrero withdrew his application, the Board's express authority to license qualified applicants or to refuse to license unqualified applicants (so as to prevent a threat to public safety) was in no respect affected. The Board's primary purpose will not be furthered by this alleged implied authority, therefore, this is not a necessary implication. Thus, the

Circuit Court correctly reasoned, using the Falls Chase, rationale, that the Board had no power regarding Marrero once he was no longer an applicant.

Respondent will contend that it has implied authority because several Florida cases have held that the licensee may not be permitted to surrender or inactivate his license where he is doing so in an attempt to evade impending disciplinary proceedings. These cases do not apply to the Petitioner because he has not yet been licensed and, therefore, is not subject to discipline under Chapter 458, Fla. Stat. (1987).

In Boedy v. DPR, Board of Medical Examiners, 433 So.2d 544 (Fla. 1st DCA 1983), the court denied the doctor the right to inactivate his license and thus avoid discipline by the Board because evidence might disappear. In this case, the Petitioner will be the one who must come forth with the evidence that he is a competent physician, thus leaving the Board at no disadvantage.

In Astral Liquors, Inc. v. DBR, Div. of Alcoholic Beverages and Tobacco, 463 So.2d 1130 (Fla. 1985), the licensee, against whom an administrative complaint was already pending, could not transfer his license to another business before final action could be taken. Also, in Couch v. Turlington, 465 So.2d 557 (Fla. 1st DCA 1985), a teacher was not allowed to surrender his teaching certificate in an attempt to escape jurisdiction of the Education Practices Commission in acting on a complaint filed

against him.

Each of the above-noted cases is materially different from this case since Petitioner has not yet been issued a license to practice nor is he trying to escape disciplinary proceedings, as the Board is without jurisdiction to discipline as long as he has yet to be licensed. The distinction between explicit and implied statutory authority for the agency to act as it did in these cases simply has no bearing on this argument.

II.

THE APPELLATE COURT ERRED IN FINDING THAT THE PETITIONER FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

Judicial deference to administrative remedies encompasses a wealth of precedent in Florida. See, Falls Chase, 424 So.2d at 794; State ex. rel. Dept. of General Services v. Willis, 344 So.2d 580 (Fla. 1st DCA 1977). The general principle that the court may not be called upon to review agency action until administrative remedies have been exhausted has a caveat; that caveat being that the pertinent administrative remedies be available and be adequate to redress the grievance in question. Chapter 120.68(1), Fla. Stat. (1987), says in pertinent part, "A preliminary, procedural, or intermediate agency action or ruling, including any order of a hearing officer, is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

a. Any administrative remedy would be inadequate, thus engaging the exception to the exhaustion of administrative remedies doctrine.

A challenge to an agency's jurisdiction on persuasive grounds is a widely recognized exception to the exhaustion of administrative remedies doctrine. Falls Chase, 424 So.2d at 794.

Petitioner contends that the Respondent Board acted without colorable authority when it purported to deny the withdrawal of Petitioner's licensure application. Petitioner has provided abundant support for its assertion (see, RHPC, Rudloe, Debra,

Middlebrooks and Humana, supra) thus challenging the Board's jurisdiction on persuasive grounds. The Falls Chase court has said that, "[w]hen an agency acts without colorable statutory authority that is clearly in excess of its delegated powers, a party is not required to exhaust administrative remedies before seeking judicial relief." (emphasis in original) Falls Chase, 424 So.2d at 796. As stated previously, the Board conceded in the proceedings below that it was without express authority to deny Petitioner's application withdrawal. The Respondent Board is acting on what it considers implied authority, yet an agency is limited to authority which has been expressly granted it. Without express authority, the agency has acted beyond its jurisdiction and without colorable authority, and any administrative remedy would be inadequate since the agency would continue to lack jurisdiction throughout the entire administrative remedies process.

The First DCA, in Willis, held that "some agency errors may be so egregious or devastating that the promised administrative remedy is too little or too late. In that case equitable power of a circuit court must intervene." Willis, 344 So.2d at 590.

The Board would like Petitioner to wait until a final agency order of denial of his application for a medical license and then appeal that decision through the judicial process. But by that time, the agency's action has in fact become devastating to the physician as it affects his capacity to earn a

livelihood. He must report an adverse decision, i.e. denial, by the Board of Medicine on every subsequent professional application he makes. His professional competence -- his ability to practice medicine without a cloud over his credentials -- can never be restored. Certainly this is a prime example of a situation in which the administrative remedy would be inadequate and too late; the person whose substantial interests are affected can never be put back in the position he was in before making the application he was not allowed to withdraw.

The injunction prayed for in Johnson Service Co. v. Fla. Electrical Contractor's Licensing Board, 347 So.2d 808 (Fla. 1st DCA 1977), cert. den., 355 So.2d 515 (1978), was denied because the complaint lacked sufficiency in its allegations, containing only "a bald allegation that the board acted arbitrarily." The court, holding that the usual administrative remedy was available in licensing disputes, went on to say that the injunctive remedy could be available when the agency utterly failed to examine the applicant's qualifications or otherwise acted arbitrarily and capriciously.

The Court should find that the Board acted arbitrarily and capriciously in the case at bar since the denial of Petitioner's application was in response to his failure to be able to appear at the Board meeting. The Board said if he did not show, his license would be denied. The Board did not base its decision upon Petitioner's qualifications and ability to safely practice

medicine in the State of Florida, the legislative intent in vesting the Board with licensing authority, as counsel for the Board said that the Board had not yet made a determination to deny. (cited supra, p. 15)

Neither Willis nor Johnson Service should be interpreted as requiring the Court to refrain from exercising jurisdiction in this case. Rather, we are dealing with a situation here in which it is not only entirely proper but essential for the Court to exercise jurisdiction. Falls Chase expressly stated that a challenge based on lack of agency jurisdiction is a widely recognized exception to the exhaustion of administrative remedies doctrine.

Again, there is nothing speculative in the nature of the Petitioner's complaint that his remedy through administrative channels would be inadequate. Unlike the licensee in Couch v. Turlington, supra, the Petitioner does not at the present time face any charges of misconduct which would subject him to discipline; in any event, he is not currently licensed in Florida so as to be subject to this Board's disciplinary action. In Couch v. Turlington, the court said that the course of administrative action was appropriate since Couch's professional record at the time he attempted to surrender his license was besmirched with charges of criminally indecent assault upon elementary school children and would not be prejudiced to a more appreciable extent than it already was. In the Petitioner's case, it would be entirely outside the province of

the Board to penalize him for having made application for a license to practice here when he has done absolutely nothing to invoke the Board's disciplinary jurisdiction.

If Petitioner wanted to exhaust his administrative remedies, he could wait for a denial then seek a 120.57(1), Fla. Stat. (1987) formal hearing. But this would only go to the facts of the denial. The hearing would, in no way, address the Board's lack of jurisdiction over the matter.

There are, in fine, no administrative proceedings (to exhaust) re voluntary withdrawal as fait accompli. Thus, exhaustion is not required.

b. A declaratory statement is not an appropriate remedy where the issue challenged is the Board's jurisdiction and the matter is already before another tribunal.

The First DCA in its opinion in the proceedings below said that "if the only issue is one of law as to whether the action taken is reasonably implied from those powers specifically delegated, [Petitioner] could petition the agency for a declaratory statement pursuant to Section 120.565, Fla. Stat. (1987), directing the agency to issue a declaratory statement in order to get the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only." (Marrero, 536 So.2d at 1095) Petitioner does challenge the exercise of jurisdiction without authority to do so. But, Petitioner contends that the use of the declaratory statement (the administrative method according to the First

DCA) as the means of doing so in the administrative tribunal is not proper and, therefore, his only remedy lies outside of the administrative remedy. Dept. of Health & Rehabilitative Services v. Professional Firefighters of Florida, Inc., 366 So.2d 1276 (Fla. 1st DCA 1979), relying on former Rule 28-4.05, F.A.C., (now Rule 28-4.005, F.A.C.), sets forth the following regarding a declaratory statement:

> A declaratory statement is a means for determining the rights of parties when a controversy, or when doubt concerning the applicability of any statutory provision, rule or order has arisen before any wrong has actually been committed. [emphasis added]

Id. at 1277. See, also, Department of Health and Rehabilitative Services v. Barr, 359 So.2d 503 (Fla. 1st DCA 1978).

The rule now reads, in part,

> The potential impact upon petitioner's interest must be alleged in order for petitioner to show the existence of a controversy, question or doubt. [emphasis added]

Both the former and present Rule 28-4.005, F.A.C., indicate that the declaratory statement is only proper before an action or wrong has occurred. In this case, the Board has already committed the wrong by purporting to deny Petitioner's withdrawal of his application. A declaratory statement issued now would simply catapult the case back into the appellate courts, where we now stand.

Several cases have held that a declaratory statement issued while other proceedings are being litigated in either the judicial or administrative forum is an abuse of authority. See, Couch v. State, 377 So.2d 32 (Fla. 1st DCA 1979). In Lawyers

Professional Liability Insurance Co. v. Shand Morahan & Co., Inc., 394 So.2d 238 (Fla. 1st DCA 1981), the court held that the Department of Insurance abused its discretion in refusing to suspend its own proceeding for a declaratory statement pending the outcome of federal action between the parties on the same issues. Likewise, where an action is pending in circuit court on the same issues, the agency should decline to render the declaratory statement. Suntide Condominium Association v. Division of Florida Land Sales, Condominiums, and Mobile Homes, Department of Business Regulation, 504 So.2d 1343 (Fla. 1st DCA 1987). The First DCA in Fox v. State Board of Osteopathic Medical Examiners, 395 So.2d 192 (Fla. 1st DCA 1981) held that where the same issues were pending both before the Division of Administrative Hearings and the District Court of Appeal, the Board was correct in denying the petition for a declaratory statement. Moreover, the Second District Court of Appeal in Eastern Airlines Inc. v. Hillsborough County Aviation Authority, 454 So.2d 1076, 1079 (Fla. 2d DCA 1984), said "forcing the authority to resort to an administrative proceeding pursuant to section 120.565 during the ongoing proceeding in the circuit court . . . would be, to say the least, an expensive, inefficient, and awkward proposition for all involved."

Based on the facts that a wrong had already been committed and the proceeding had gone before the Circuit Court, it would be improper to force Petitioner now to seek a declaratory

statement. He would just end up where he is now, before a judicial tribunal, only after having incurred great expense and time. Nor, under current law, ought the Board to grant a petition for such a statement.

III.

THE APPELLATE COURT ERRED IN FINDING THAT THE INJUNCTIVE RELIEF GRANTED BY THE TRIAL COURT WAS IMPROPER.

An injunction is the proper remedy as a general rule "where irreparable harm will otherwise result, the party has a clear legal right thereto, and such party has no adequate remedy at law." Wilson v. Sandstrom, 317 So.2d 732, 736 (Fla. 1975), cert. den., sub nom., Alder v. Sandstrom, 423 U.S. 1053 (1976). Wilson recognized the public interest as a fourth consideration. Wide judicial discretion rests in the trial court in granting, denying, dissolving, or modifying injunction and an appellate court should not interfere where no abuse of that discretion has been made to appear. See, Lane v. Clein, 137 So.2d 15 (Fla. 3d DCA 1962).

a. Likelihood of Irreparable Harm and the Unavailability of an Adequate Remedy at Law

In its opinion in Stoner v. South Peninsular Zoning Commission, 75 So.2d 831 (Fla. 1954), this Court said that the injunctive process in question was being requested in an attempt to thwart a political right (i.e. to create a municipal corporation), and concluded that it was improper for a court of equity to entertain the petitioners' prayer for injunctive relief for this purpose. This Court held that those adversely affected did have an adequate remedy at law, and stated furthermore that "[m]ere general allegations of irreparable injury are not sufficient" for an injunction to issue. Contrast

the present case, where the Petitioner has made specific allegations as to the kind of harm he will suffer as a result of the Board's action and how that harm will affect him in an irreparable way such that a remedy at law would be inadequate. Having to report and defend the Board's adverse action to other state licensing boards, insurance carriers, hospitals or other institutions where he might apply for employment and/or staff privileges would impose severe constraints on the Petitioner's ability to pursue his chosen profession in a way less harmful only than if he were to be affirmatively and permanently denied the right to practice medicine at all. The irreparability of this harm is in no sense speculative, but would without doubt be a detriment to his career for which no compensation would suffice. The injury is not a "remote possibility," as contemplated by Coral Springs v. Florida National Properties, Inc., 340 So.2d 1271 (Fla. 4th DCA 1976), but is "so imminent and probable as reasonably to demand protective action by the court." This Petitioner has pleaded facts to show that he is entitled to the injunctive remedy in equity.

b. A clear legal right

As has been argued above, Petitioner possesses a very clear legal right to withdraw his application voluntarily, as it was voluntarily submitted, and without the submission, there would have been no jurisdiction over Petitioner. Indeed, this right, the Jones v. S.E.C. Court, supra, suggested rises to a level of

constitutional dimensions. City of Miami Beach v. Dor Rich, Inc., 289 So.2d 52 (Fla. 3d DCA 1974), cert. den., 291 So.2d 586 (1974), held that granting an injunction to restrain the city from enforcing a valid zoning ordinance was "tantamount to the issuance of a judicial license to the appellees to operate illegally" where the appellee's right to operate an apartment hotel was not only very doubtful but contrary to law in view of the prior decisions of that court. Id. at 53.

Petitioner submits that there exists here no substantial dispute as to the legal rights involved, as shown by the lack of Board authority and the cases supporting the right to a voluntary withdrawal of an application, and that, therefore, the injunction was properly granted in his favor.

c. The harm likely to result to petitioner outweighs any contemplated harm to Respondent and the granting of the injunction will not disserve public interest

The Wilson court said a court may properly refuse to grant an injunction where the rationale for not issuing the injunction is "the detriment to the paramount public interest." Wilson, 317 So.2d at 736. There is no public interest gone awry by allowing Petitioner to withdraw his application. The citizens are not in danger because the doctor is not engaging in the practice of medicine in this state. [Indeed, if Floridians were endangered by Dr. Marrero's non-practice, then (a) the Board would be bound to license him albeit involuntarily; and (b) he could not have an application denied, as a matter of law.]

However, the injury to the Petitioner is great. There is no certainty that Petitioner is going to reapply in Florida; all he is asking is that his absolute right to withdraw without prejudice the application he voluntarily submitted be upheld as is clearly appropriate, so he does not suffer the injury which would likely result were the Board permitted to continue to act without jurisdiction and deny his application. The Board has made no persuasive argument in the proceedings below that there would be any injury to the public, much less any significant injury to the public if this application is simply withdrawn from its consideration.

Two U.S. Supreme Court cases indicate situations where the public interest outweighs the right to an injunction.

In Virginian Railway v. Federation, 300 U.S. 515 (1937), the court was concerned with one of the most crucial public concerns of that time: the peaceable settlement of labor controversies. The type of dispute in question in that case might seriously have impaired the ability of an interstate rail carrier to perform its service to the public, and the court compelled performance of the arbitration agreement. In Yakus v. U.S., 321 U.S. 414 (1944), the court upheld congressional postponement of injunctions restraining the operation of price regulations, to protect the national economy from the disruptive influences of inflation in time of war. As to the award of injunctions by courts of equity, the Court stated:

> [T]he award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.

Id. at 440.

In Jones v. S.E.C., 298 U.S. at 22, the court held that withdrawal of an ex parte application for a license to use the mails could not affect any right of the general public.

Certainly, the case at bar is far from those kinds of situations involving great harm to the public. Like Jones v. S.E.C., the withdrawal of the petition could not affect any right of the general public. However, if Petitioner is denied a license in Florida, other states may deny him privileges, as well, such that this action severely handicaps his right to enjoy whatever profession he choses. And if Petitioner does choose to reapply to Florida, he will again have to show that he can safely treat the citizenry of Florida. The harm to Petitioner clearly outweighs any purely speculative public interest.

d. There was no showing that the circuit court judge abused his discretion in entering the injunction.

The Circuit Court is empowered by Florida Constitution, Article 5, s. 5(b) and Article 5, s. 20(c)(3), to issue injunctions in administrative actions where there is no adequate remedy in the administrative forum. Willis, supra, said that the equitable power of the circuit court must intervene if the

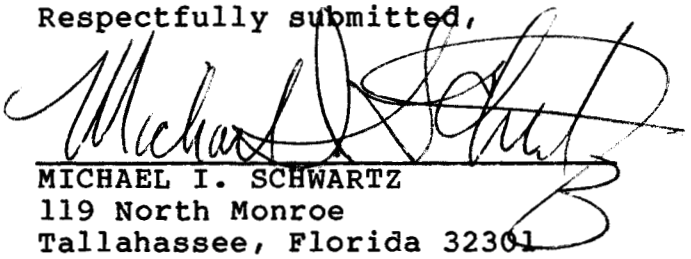
agency errors are so egregious or devastating that the promised administrative remedy is too little or too late. The Circuit Court, in using its considerable discretion, found that the administrative remedy was too little and too late and entered the injunction. This injunction must not be disturbed because there has been no clear showing of the Circuit Court Judge's abuse of discretion. The court in Florida Land Co. v. Orange County, 418 So.2d 370 (Fla. 5th DCA 1987), would not disturb the trial court's finding where the parties had not shown that the trial court had abused its discretion in not issuing an injunction. There has not been any indication that the trial court abused its discretion such that the First DCA should not have disturbed the injunction.

CONCLUSION

Petitioner submits that the District Court of Appeal erred when it reversed and remanded the case back to the Respondent Board to exhaust administrative remedies because there is no adequate remedy available to Petitioner in the administrative forum as the matter is no longer within the Board's jurisdiction since Petitioner withdrew his application. The First District Court of Appeal also erred when it disturbed the permanent injunction entered by the trial court absent any showing of clear abuse of the Circuit Court's discretion.

Therefore, Petitioner respectfully urges this Honorable Court to reinstate the permanent injunction granted in favor of the Petitioner and against the Respondent by the court below.

Respectfully submitted,



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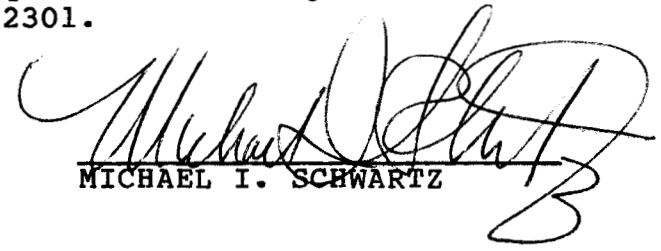
I HEREBY CERTIFY that a true copy of the foregoing brief has been hand delivered this 17th day of March, 1989, to M. Catherine Lannon, Esquire, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301.



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