O/A 6-6-89

IN THE SUPREME COURT OF FLORIDA

ROGER MARRERO, M.D.

Petitioner,

vs.

DEPARTMENT OF PROFESSIONAL REGULATION, FLORIDA STATE BOARD OF MEDICINE,

Respondent.
_____/

CASE NO. 73,392

PETITIONER'S REPLY BRIEF ON THE MERITS

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

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PRELIMINARY STATEMENT

Petitioner reasserts every point it makes in its original brief on the merits. The points raised herein are issues raised by the Respondent's brief.

ARGUMENT

I.

Respondent Board is asserting factual inconsistencies and is premising argument on a faulty factual premise.

Respondent is not playing fairly. The Respondent has made factually inconsistent arguments. On the one hand, Respondent argues that it has denied the license application, while at other times convenient to its argument it argues that there has been no denial-- the Board might approve the license if the Petitioner comes back before it. On pages 5, 17, 28 and 35 of Respondent's brief, the Respondent asserts that it denied Petitioner's license; while on pages 8, 9, and 30, Respondent asserts that it has not yet denied Petitioner's license. In fact, the Board voted to deny the license. (R-23)

Respondent's entire argument is based on a false factual premise. Petitioner withdrew his ex parte license application from before the Board on January 30, 1986. He did not ask to withdraw as Respondent alleges (Respondent's brief at p. 16). As

such, Respondent's statement begs the question since the withdrawal was a fait accompli and there was no matter on which the Board needed to act. Thereafter, the Board had no application of Dr. Roger Marrero pending before it. Yet, the Board found that because he withdrew his application (and did not therefore appear), that he is not a qualified physician and, therefore, his nonapplication is denied.

II.

Respondent acted without colorable authority in that it had no necessarily implied powers to act.

Respondent cannot deny a license to one who is no longer before it, simply because that person is no longer before it. Neither Dr. Marrero, the Chief Justice, nor undersigned counsel are unqualified, nor are we applicants.

Respondent also says that if it ever has the opportunity to issue the Notice of Intent to Deny, then the Petitioner will have an opportunity to seek a hearing. Such Notice would be in derogation of the Board's already completed action. The Board denied the license [on an application not before them] at its February 8, meeting (R-23). It did not vote to send a notice of intent to deny. Respondent should have never attempted to deny a license on which there was no pending application. The Board

no longer had jurisdiction to act and to reserve continuing jurisdiction, so Petitioner had to seek injunctive relief.[1]

The First DCA did decide on the jurisdiction as it reversed and remanded the cause back to the Board for the Board to take further action. This further action amounts to an exercise of jurisdiction on a matter not before it. Any further action by the Board that would then allow Petitioner a right to an administrative remedy is all in clear excess of its delegated necessarily implied or express authority and jurisdiction. But Respondent Board had no jurisdiction after the withdrawal of January 30, 1987. Therefore, any further actions by the Respondent are in clear excess of its jurisdiction. Romar Int'l Inc. v. Jim Rathman Chevrolet/Cadillac, Inc., 420 So.2d 346 (Fla. 5th DCA 1982).

Respondent asserts that the power to retain jurisdiction is necessarily implied from their primary purpose to protect the public - the public being citizens of Florida as well as all

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1 Respondent improperly cites Lambert v. Rogers, 454 So.2d 672 (Fla. 5th DCA 1984) for the proposition that the injunction should not have been granted where there was no reasonable difference of opinion to the validity of the agency action. Lambert does not say this. In fact, Respondent says the Florida Supreme Court decided this case, when in fact, this is a Fifth DCA decision. However, the instant case is distinguishable from Lambert because the issue pending before the Board was not the same issue as before the Court.

other people outside the State of Florida (Respondent's brief at 19). Does the Respondent also contend that this duty extends to protect the people of all nations and continents? Respondent asserts that a 1986 Legislative change from "sole" purpose to "primary" purpose in s. 458.301 evidenced a desire for the Florida Board to be concerned with more than just whether a doctor is competent to practice in this state. This language modification is insignificant. Respondent is just attempting to find a way to show that it must protect everyone because it knows that the citizens of Florida are in no way affected by this license withdrawal. Respondent seems to conceive of itself as a grand marshall in charge of saving the world from one who might want to practice medicine anywhere -- in this case, a physician who is duly licensed in good standing and currently practicing medicine in the State of Pennsylvania.

A much more logical explanation of the legislative change from "sole" purpose to "primary" puropse in s. 458.301 is that there are numerous matters covered within Chapter 458 which specifically do not directly relate to "minimum requirements for safe practice." Examples might be the exclusion provisions of s. 458.303, definition of Board of Medicine in s. 458.307, itemized patient billing in s. 458.323, subpoena of records in s. 458.343, etc. The legislative intent is evident. Twice in the brief provisions of s. 458.301 do you find the phrase "in this state." Obviously, this is because the legislative branch of government

recognizes that the jurisdiction of the Respondent Board ends at the state line.

While Florida may seek information from other states where an applicant is licensed, it does so only after the doctor has submitted an application. Florida does not report license denials to every other state until such time as each state might inquire. The Board reports only disciplinary actions on a regular basis (not license denials as Respondent asserts in its brief at p. 19) to the Federation of State Medical Boards and the American Medical Association. The citizens of the State of Pennsylvania, the "public" that Respondent is most likely concerned with, are protected by their own Board of Medicine which regulates the licensed physicians of that state. If Petitioner is not competent in that state, it is for that state to supervise and discipline him.

Respondent cites Boedy v. DPR, Board of Medical Examiners, 433 So.2d 544 (Fla. 1st DCA 1983) for the proposition that the applicant should not be allowed to withdraw because evidence will be lost. In response, Petitioner asserts that Boedy dealt with a licensee who attempted to forego disciplinary proceedings by placing his license on inactive status. Here, Petitioner is not a licensee, only an alleged or former applicant. Also, the memory to be eradicated in Boedy was a particular event or wrongdoing. Here, Petitioner has committed no wrongdoing.

The applicant must prove his competence; he must come forward with the evidence. However, if the Board wishes to do so, it may declare that anyone has not met the burden of proving himself competent, but it cannot then act to deny him a license where there is no application then pending. The Board is not granted rights parens patriae over the person simply because it feels that person is somehow incompetent without a pending application.

Additionally, the applicant must simply be competent at the time he makes application. The Board cannot deny him a license for events which occurred in the past if they are not relevant to his competence at the time he applies. In Nest v. DPR, Board of Medical Examiners, 490 So.2d 987 (Fla. 1st DCA 1986), the applicant was an impaired practitioner who had surrendered his license in New York and later applied for licensure in Florida. The applicant presented two physicians who said that he was now competent to practice. The Board of Medicine denied his application. On appeal, the hearing officer found that it was an abuse of discretion to deny when the applicant had demonstrated his ability to safely practice. While the competence of the applicant may have been questionable at one time, it was not questionable at the time he applied for Florida licensure, and it was at that time that competence must be proved. So even if Marrero would come back at a later date, it would be his competence then that must be proven. If by some outside chance

he were found to be competent in 1987, his competence in, say, 1990, the time when he made application, would be the issue, and other evidence would be irrelevant for this purpose. Additionally if one Board is capable of a "proper" investigation, any future Board would be equally capable and if Petitioner is truly incompetent, there would be an abundance of evidence, and no fading will have taken place. Any loss of evidence would be through the sheer negligence of the Board itself.

Additional cases which Respondent cites Astral Liquors, Inc. v. State Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, 463 So.2d 1130 (Fla. 1985) and Couch v. Turlington, 465 So.2d 557 (Fla. 1st DCA 1985) relate to a licensee who seeks to avoid disciplinary action. Respondent says these cases stand for the implied power of the agency to act regarding a licensee. Petitioner contends these cases are inapposite since Petitioner had not yet been issued a license. Petitioner would concede that had he been issued a license, the Board had the jurisdiction to refuse to allow a licensee to skirt disciplinary proceedings.

Petitioner would analogize the necessarily implied power of the agency in the instances like Boedy, Astral Liquors and Couch, where the parties are existing licensees to a dissolution of marriage. In the first place, one would only seek a dissolution after there had been a vaild marriage. The spouse in the

dissolution has an interest in the matter, but so does the court since the court has the responsibility of protecting the interests of the State in granting the dissolution. Compare this with the "breach of a promise to marry," a concept which has been outlawed in this state. There is no valid marriage. There is no spouse with an interest which must be protected. The Court has no interest, either. In the instant case, the Respondent seems to be "suing" on a breach of promise. The Petitioner does not wish to be considered for licensure in this state. There is no application pending before the Board. There is no interest to be protected. Thus, Respondent's implied power goes so far as is indispensible to carrying out its duty to protect the public. There is no public to be protected when an ex parte application is withdrawn, for no licensure looms.

Petitioner does not contend that the Florida Rules of Civil Procedure are expressly made applicable to the Board of Medicine. However, Petitioner does argue that the Board has failed to adopt procedural rules governing this type of situation. In the absence of this, Petitioner contends that we should look to the Florida Rules of Civil Procedure for guidance. As the rules are a codification of the common law rules, we can look to see what the general procedure in this matter is. Respondent argues that since the Florida Rules of Civil Procedure do not apply, we should look to the Federal Rules of Civil Procedure. Why Respondent would have us look to the federal rules before looking

to our own state's rules for guidance is beyond Petitioner. However, Respondent cites Jones v. SEC, 298 U.S. 1 (1936), for the general rule "that plaintiff can enter a voluntary dismissal unless the defendant will suffer legal harm and that legal harm must be some plain legal prejudice other than the mere prospect of a second lawsuit." (Respondent's brief at p. 13) Respondent would then have us believe that it will be prejudiced because evidence may be lost. But it is not Respondent who must prove that Petitioner is competent. It is Petitioner who must prove that Petitioner is competent. If evidence is lost, it will harm the Petitioner, not the Board.

Respondent cites Callan v. Board of County Commissioners of Lee County, 438 So.2d 432 (Fla. 1st DCA 1983), as a precedent where an applicant was not allowed to withdraw his application for development approval. Petitioner distinguishes this case on the basis that while at the time the applicant in Callan attempted to withdraw, there had already been a ruling on the merits which had been reversed and remanded. This is different from the instant cause in that there has been no initial ruling on the merits in this case. At the time Petitioner withdrew, this case had neither gone up on appeal nor been sent back down to the Board to reconsider its findings.

Respondent also cites to Jones v. SEC that the applicant ought to be able to absolutely withdraw if he is the only person concerned with the licensure privileges. Respondent urges that

it would obtain a different result from the applicant in Jones v. SEC because the Petitioner herein is not the only person affected by the Petitioner's nonapplication to practice medicine in Florida. Petitioner asserts that there is NO possibility of harm to the public when he withdraws. How can any other person be affected by a doctor who cannot practice medicine in this state?

In Jones v. SEC, the U.S. Supreme Court said, regarding an ex parte application for a license (to use the mails):

> We are unable to see how any right of the general public can be affected by the withdrawal of such an application before it has gone into effect . . . . The conclusion seems inevitable that an abandonment of the application was of no concern to anyone except the registrant. The possibility of any other interest in the matter is so shadowy, indefinite, and equivocal that it must be put out of consideration as altogether unreal. . . .[t]he right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned.

Id. 298 U.S. at 22-23.

The Court in Jones went on to say that there is no support for the SEC's actions in that case, in fact, their actions were unreasonable and arbitrary and violated the cardinal precepts that this shall be a government of laws, not an autocracy. Id. at 23-24.

The applicant in Jones v. SEC had been subject to some scrutiny as to material omissions of facts and misleading facts. Thereafter, he sought to withdraw, citing, in part, that the

SEC's actions had created much negative publicity and stood to cause him severe damage. Id. at 12-13. Even in light of this, the court allowed him to withdraw as he was the only one concerned with the matter. The questions raised as to Petitioner Marrero's abilities were in no way the serious allegations made in Jones v. SEC. Here, Petitioner was asked to explain some recommendations which said that he had met the minimum competence of a physician.

Respondent's argument that Petitioner attempted fraud upon the Respondent is absolutely ludicrous. Petitioner did not attempt to "string the Board along." As of January 30, he had not been given notice of a February 8th meeting. He must make arrangements to get time off from work, which doctors often find very difficult to do.

Respondent contends that the timing of Petitioner's desire to work in Pennsylvania is, at best, intriguing. Why? He had applied for licensure in Florida in January or February 1986. His first appearance before the Board was in August, 1986. And it was after this that he obtained employment in Pennsylvania. By this time, seven to eight months had expired and he knew it would be at least October before the Florida Board would consider his application. The doctor had to obtain gainful employment in order to support himself. Nothing intriguing about that, merely necessitous.

In relation to Middlebrooks v. St. Johns River Water Management District, 529 So.2d 1167 (Fla. 5th DCA 1988), the Petitioner would like to point out that Respondent's statement that Petitioner filed an injunction to keep the Board from rendering an order "reflecting the action that had already been taken" (Respondent's brief at 28) is incorrect. Petitioner's withdrawal came before Respondent's action to deny.

III.

There is no administrative remedy to exhaust which would provide an appropriate remedy.

Respondent asserts that Petitioner has an administrative remedy. First, what would be the issue since there is no application then pending before the Board?

Respondent asserts that Petitioner could go to a full 120.57 hearing appealing the preliminary order of intended action of denial of Petitioner's license (Respondent's brief at p. 33). Respondent fails to realize that Petitioner is arguing that Respondent never had jurisdiction to enter an order denying the license. Once Petitioner unilaterally withdrew his application, Respondent was divested of any further power. See Romar Int'l, supra; Bevan v. D'Alessandro, 395 So.2d 1285 (Fla. 2d DCA 1981). For the Board to enter a Notice of Intent to Deny, which would, in turn, allow Petitioner to go to a 120.57 hearing, it would have to exercise jurisdiction of which it is no longer possessed:

the power to notice an intent to deny an already withdrawn application which the Board had, after withdrawal, categorically denied. This is Alice in Wonderlandish.

Respondent contends that Petitioner could pursue the jurisdictional issue in the hearings where he is trying to defend his character even though he does not want a license. Respondent implies that only after the denial of the application would Petitioner be able to raise the jurisdictional issue. Raising the issue at the 120.57 hearing would only preserve the matter for appeal; it would not solve the lack of jurisdiction.

Any action taken within the administrative forum would be without jurisdiction since there is no application pending. Lack of agency jurisdiction is a widely recognized exception to the exhaustion of administrative remedies. DER v. Falls Chase Special Taxing District, 424 So.2d 787, 794 (Fla. 1st DCA 1982), rev. denied, 436 So.2d 98 (1983) (See Petitioner's brief on the merits, pp. 23-24). Where there is no jurisdiction, there are no administrative remedies to exhaust. The law does not require useless and futile acts. It would serve no interest to continue this proceeding in the administrative forum.

The First DCA said that Marrero should be obligated to exhaust his administrative remedies before seeking relief in the Circuit Court. However, the Board disagrees. The Board may have miscommunicated the issue to the courts below because it says on Page 37 of its brief, "All the Florida Board of Medicine is

asking in this issue on appeal is that it be permitted to exhaust the administrative process to establish whether or not Dr. Marrero is capable of practicing medicine safely" [emphasis added]. Again, this assumes a [false] legal premise. The remedy is for the Petitioner not the Respondent. The Respondent is supposed to serve the public. The privilege is not for Respondent; rather the obligation is for the Petitioner unless the remedy would be too little or too late, as it is here.

Respondent would have us believe that all it would like is to adjudicate the competency vel non of the nonapplicant over a nonexisting application. Under this premise, Respondent would like to adjudicate every person as not competent until he comes forward with the burden of proof, regardless of whether this person had ever filed an application before the Board. Thus, under this standard, neither the members of this Court nor this counsel would be competent, even as none of us had ever requested a Florida license.

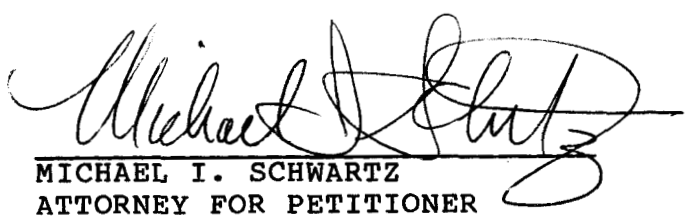
IV.

The discretionary review should not be dismissed.

Respondent argues that this Honorable Court should discharge jurisdiction on the basis of no conflict. Respondent conveniently forgets that Petitioner sought review based not only

on conflict, but on the basis of affecting classes of constitutional and state officers.

Conflict is, however, apparent between Middlebrooks and Dept. of Professional Regulation, Florida State Board of Medicine v. Marrero, 536 So.2d 1094 (Fla. 1st DCA 1988). By ruling that Petitioner had to go back to exhaust his administrative remedies, the Court ruled that the Board retained jurisdiction since it would have to act on the matter to even allow any administrative remedy. What "remedy" is to be sought from a Florida Board by one who has no wish to practice in Florida?



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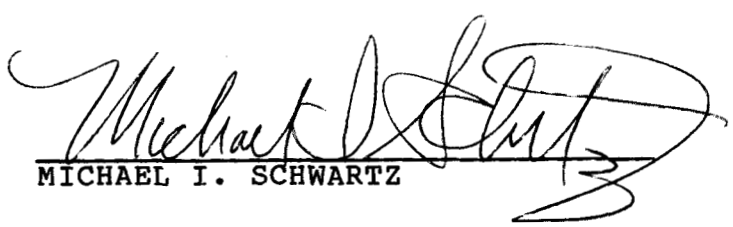
I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail this 20th day of April, 1989, to M. Catherine Lannon, Esquire, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301.



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