

IN THE DISTRICT COURT OF THOMAS COUNTY, KANSAS

VICTOR H. HILDYARD, II, M.D., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KANSAS STATE BOARD OF )  
 HEALING ARTS, )  
 )  
 Defendant. )

Case No. 06-CV-027

MEMORANDUM OPINION

On the 28<sup>th</sup> day of November, 2006, this matter was presented to the court. Plaintiff appeared personally, and by Michael R. O'Neal, of Hutchinson, Kansas. The Defendant appeared by Mark W. Stafford and Diane Bellquist, of Topeka, Kansas.

This matter comes before the court on appeal of action taken by the Kansas State Board of Healing Arts (hereinafter referred to as Board) and is filed pursuant to the Kansas Act for Judicial Review and Civil Enforcement of Agency Action (K.J.R.A.), K.S.A. 77-601, *et seq.* This action was initially pursued administratively under the Kansas Administrative Procedure Act (K.A.P.A.), K.S.A. 77-501, *et seq.* The administrative hearing lasted several days and was heard before a hearing examiner, who following said hearing issued an initial Order. The full Board later reviewed and modified the examiner's Order and issued its final Oder revoking the license of Dr. Victor H. Hildyard, II, M.D. (hereinafter referred to as Doctor.). This appeal was then filed in the District Court of Thomas County, Kansas. Both parties submitted briefs to this court setting out their arguments and authorities, and following the oral arguments of counsel this court took the matter under advisement and now enters the following Memorandum Opinion.

## FINDINGS OF FACT

The petition in this matter contained 19 counts alleging possible violations by the Doctor. Following the initial hearing the hearing examiner set out findings of fact and based on those findings entered an Order in which the Doctor was the prevailing party in all of said counts except Counts 8, 9, 10 and 11. Following the initial hearing the full Board reviewed the findings of the hearing examiner and following said review modified the findings and issued orders on the 19 counts which modified the initial findings and ordered that the Doctor should prevail in Counts 2, 4, 5, 6, 7, 10 and 12. On Counts 1, 3, and 12 through 19, the Board agreed with the majority of the findings of fact entered by the hearing examiner, however, the Board added additional findings of fact and found a violation of the standard of care by the Doctor concerning those counts. The original order of the hearing examiner found against the Doctor in Counts 8, 9, 10 and 11. There was no real dispute by either party concerning those four counts and the Board agreed with the original findings of fact and orders entered in Counts 8, 9 and 11. The Board in considering Count 10 did not modify the findings but disagreed with the hearing examiner that the findings were unprofessional conduct on behalf of Dr. Hildyard and changed the original Order as to that count. Count 12 concerned the revocation of the hospital privileges of the Doctor. The Board made no finding insofar as this count was concerned and indicated that it did not consider this count as it had no bearing whatsoever on its final orders.

It would serve no purpose for this court to reiterate the findings of fact. The dispute presented to this court essentially surrounds the findings of the Board in Counts 1, 3 and Counts 13 through 19 in which the Board found deviations from the standard of care, by the Doctor. The transcript of the initial hearing held in this matter which includes evidence and exhibits presented by both parties covers in excess of three thousand pages. Both parties presented the testimony of expert medical witnesses concerning those counts revolving around the allegations of a violation of

the standard of care in specific instances. The testimony of the medical experts involved in this matter speaks for itself as outlined in the transcripts, however it is noted by the court that the experts did not agree in many instances as to the exact standard of care that was applicable. The hearing examiner in entering his findings chose to find that the standard of care testimony was in dispute and therefore did not allow a finding of a deviation from the standard of care in any of these instances. The Board in reviewing the hearing transcripts and applying its collective medical expertise disagreed with the initial findings of the examiner and found in Counts 1, 3 and 13 through 19 that there had been a deviation from the proper standard of care. This also is disputed by the Doctor and the issue will also be discussed by the court in its conclusions of law.

#### CONCLUSIONS OF LAW

The Kansas Healing Arts Act is set out by K.S.A. 65-2801 *et seq.* This act recognizes that the practice of healing arts is a privilege granted by the legislature. Administration of the licensing and practice of the healing arts, as provided by statute, is the responsibility of the 15 member Board of Healing Arts. K.S.A. 65-2812 and K.S.A. 65-2813 provides that the make up of the Board be 12 members from various medical disciplines and 3 members representing the general public.

Employees of the Board perform the clerical tasks necessary for the issuance of licenses and the checking for compliance with licensing requirements. This case involves the Board's responsibility to investigate complaints and present those investigative results to a panel of Board members for authority to proceed.

In this case the Board authorized the convening of proceedings before a designated hearing officer. A petition setting out the allegations concerning the Doctor was filed and after pretrial discovery a hearing lasting 9 days was held. Following this testimony and the introduction of numerous exhibits the hearing officer issued his Order as indicated in the Findings of Fact set out earlier.

The initial Order was then reviewed by the Board and the Final Order issued which ordered revocation of the Doctor's license. Prior to the issuance of the Board's Final Order the Doctor and his counsel were requested to meet with the Board. The Doctor pursuant to advice of counsel declined to appear citing K.S.A. 77-526(c). Counsel for the Doctor argues that this statute requires the Board to proceed with its review based only on the evidence in the record of the hearing. The Board did not pursue enforcement of its request that the Doctor testify further before it. The Board proceeded to issue its orders without hearing from the Doctor. While the Board indicated that it disagreed with the position taken by the Doctor, it indicated that it made no negative inference from the refusal to answer questions.

The Court simply does not consider this issue to be directly involved in this case. While one side argues that a discussion between the Doctor and his peers might have been beneficial to both sides, the opposite side argues that further questions would have been accusatory in nature and were not allowable under the interpretation of the statute.

While the issue concerning the Board's authority to ask further questions is interesting from an academic standpoint, the finding of the Board that it did not include this issue in reaching its conclusion make the discussion moot. Anything further as to what might have happened is speculation.

The procedure for court review of an agency action is controlled by the KJRA. As the party challenging the agency action the Doctor has the burden of showing the invalidity of the action under one of the grounds set out in K.S.A. 77-621(c). The power to provide professional licensing of doctors is given by the Kansas legislature to the Board. The administration of licenses and enforcement of actions of license holders is delegated to the Board and is not a function of the judicial branch. *Kansas Board of Healing Arts v. Foote*, 200 Kan. 447, 436 P. 2d 818, 28 A.L.R. 3d

472 (1968). Courts are prohibited from deciding an agency decision *de novo*. K.S.A. 77-618 provides that court review is based on the record of proceedings created by the Board in this case.

The standard of review for this court is to consider the evidence presented to the Board and determine whether a reasonable person could reach the same conclusion as the Board, based on that evidence. *Blue Cross and Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 263, 75 P. 3d 226, 246 (2003); *Shawnee Mission Med. Center v. Kansas Dept. of Health and Environment*, 235 Kan. 983, 989, 685 P. 2d 880 (1984); *Kansas Department of Health and Environment v. Banks*, 230 Kan. 169, 172, 630 P. 2d 1131 (1981). In applying the substantial evidence test, the court must not reweigh the facts, try the case *de novo* or substitute its own judgment for that of the agency. *Id.* The court must instead evaluate the agency record to determine whether sufficient evidence supports the agency's decision. *Vakas v. Kansas Bd. of Healing Arts*, 248 Kan. 589, 604, 808 P. 2d 1355, 1366 (1991). During this process of evaluation, the court must focus solely on evidence in support of the agency's findings rather than contrary evidence. *Blue Cross and Blue Shield of Kansas*, 276 Kan. at 263, 75 P. 3d at 246. The court must accept as true the evidence and all inferences which support or tend to support the agency's findings. *Id.* The court is to disregard any conflicting evidence or inferences. *Id.* The court does not evaluate credibility but accepts the agency's version of the facts. *Id.* The court is not concerned with evidence which might support other conclusions. *Kansas Pipeline Partnership v. Kansas Corporation Commission*, 24 Kan. App. 2d 42, 941 P. 2d 390 (1997); *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 21, 687 P. 2d 603 (1984).

A dispute may also raise the question of whether the agency action is unreasonable, arbitrary or capricious. Agency action is unreasonable when it is exerted without regard to the benefit or harm to all interested parties. *Vakas*, 248 Kan. at 604, 808 P. 2d at 1366. Agency action is arbitrary when it lacks determining principles, reason, or judgment. *N. Natural Gas Co. v.*

*Williams*, 208 Kan. 407, 430, 493 P. 3d 568, 586 (1972). Agency action that lacks regard for the law is capricious. *Id.* And agency action that is not supported by substantial evidence is arbitrary or capricious. *In re ANR Pipeline Co.*, 276 Kan. 702, 710, 79 P. 3d 751, 758 (2003).

The findings of facts of the hearing officer and the later findings by the full Board are set out individually as to each of the 19 counts and this court finds that the findings are in agreement as to the facts other than the Board's additional findings in those counts which had issues as to the standard of care. This court adopts the findings of facts as outlined in the Board's order. While this court may have arrived at a different decision, as did the hearing officer, it cannot find that a reasonable person could not reach the conclusions reached by the Board based on the record as a whole. The Board is given the power by statute to reach conclusions concerning a medical license ranging from taking no action to revocation.

The Board specifically found that any actions taken by the hospital in the way of discipline would not be considered in this action and their findings would not be considered. Therefore, this allegation outlined in Count 12 is not considered by this Court.

As indicated earlier, Counts 1 through 7 and Counts 13 through 19 involved allegations concerning violations of the standard of care in each of those individual situations. Each party in the initial hearing presented expert testimony concerning the standard of care as it applied in each patient encounter. While the facts are not disputed in each of the counts the issue of standard of care is disagreed on by the experts presented by both parties. The examiner found that since the expert testimony was conflicting then he could reach no conclusion that the standard of care was violated. He simply found that since he could not give one sides experts more credibility than the other that he could not find a failure to adhere to the standard of care.

The Board is authorized by the KAPA to conduct review of an Initial Order, and in doing so to exercise all of the decision-making authority as if it were hearing the matter in the first instance.

K.S.A. 77-527(d). This subsection has been construed to specifically allow review of a presiding officer's findings, even regarding witness credibility. The agency head exercises *de novo* review on the record. *Tire Disposal Facilitators, Inc. v. Kansas Department of Health and Environment*, 22 Kan. App. 2d 491, 492, 919 P. 2d 362 (1996).

As the record indicated the Board in reviewing this matter determined that based on its collective medical expertise there was failure to adhere to the proper standard of care in counts 1, 3 and 13 through 19. Both parties cite the case of *Hart v. Kansas State Board of Healing Arts*, 27 Kan. App. 2d 213, 2 P. 3d 797 (2000). The *Hart* case involves a discussion by the Kansas Court of Appeals at p. 216:

The Kansas Board of Healing Arts has as members various experts in the medical profession for the purpose of regulating the practice of the healing arts. Where substantial evidence is presented that supports a finding of a violation of the Kansas Healing Arts Act, members of the Kansas Board of Healing Arts are allowed to rely on their own professional expertise in determining whether violations have occurred. *Hart*, Syl. ¶ 1.

The arguments of the Doctor's attempt to distinguish *Hart*. These arguments as outlined in the brief apply possibly in civil cases but are not persuasive here.

The Board as authorized in Kansas is made up of a large majority of members who possess medical education and training. It seems unreasonable to provide that the Board be constituted largely of members with medical expertise and then to hamper them by making them leave their own expertise out of their decision making role. Juries in civil trials are routinely instructed that they can use their common knowledge and experience to help decide matters presented to them in court. It seems that the Board should be allowed to do the same.

There is some discussion in the brief of the Doctor that the burden of proof in this case should be a clear and convincing standard. The case of *Lacy v. Kansas Dental Board*, 274 Kan.

1031, 58 P. 3d 668 (2002) indicates that a clear and convincing standard is not required in an action concerning revocation of a dentist's license.

The Doctor presents the issue of the Board and its various functions being incestuous in nature. This theory contends that the various tasks such as granting licenses, conducting investigations into complaints, holding hearings, reviewing hearings, and issuing orders somehow make these actions rubber stamped. This court disagrees. The agency is operating pursuant to its statutory mandate. The fact that the full Board delegates to a hearing examiner the power to marshal witnesses and exhibits and to conduct hearings to determine issues is understandable in light of the fact that there are 15 members of the Board making it at best difficult to conduct 9 day hearings before the whole Board. This procedure appears to be practical and should not and does not prevent a full Board review and the exercise of the Board's medical expertise.

At the April 8 hearing of the Board one member motioned the Board to order an evaluation of the Doctor. The Board later discovered that an evaluation of the Doctor had been performed in Colorado. In any event this issue is moot in light of the action taken by the Board subsequent to this request.

Generally, the Court will not second-guess an agency decision that is within the agency's authority, even if it is claimed to be too severe. *Hemry v. State Board of Pharmacy*, 232 Kan. 83, 86, 652 P. 2d 670 (1982); *Kansas Board of Healing Arts v. Acker*, 228 Kan. 145, 154, 612 P. 2d 610 (1980). This Court for reasons outlined herein is not able to find that the Board's actions are unreasonable, arbitrary, or capricious. The argument that the order of revocation is excessive punishment cannot succeed since the Board had the authority to make the findings and Orders that it made. The fact that the actions of the Doctor may be argued to have caused no harm does not add to the discussion in this case. Even if this allegation is accurate there is no requirement for harm to occur before action can be taken.

ORDERS

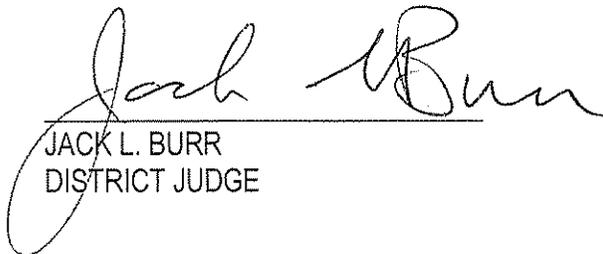
IT IS BY THE COURT ORDERED, ADJUDGED AND DECREED that the final orders of the Kansas State Board of Healing Arts entered in the Matter of Victor H. Hildyard, II, M.D. are hereby upheld.

IT IS BY THE COURT FURTHER ORDERED the actions of the Board in this matter were based on findings supported by substantial competent evidence, and legal conclusions having a basis in law.

IT IS BY THE COURT FURTHER ORDERED that this Memorandum Decision shall serve as a Journal Entry in this matter and no further filing shall be necessary for the entry of the judgment of this Court.

IT IS BY THE COURT SO ORDERED.

Dated this 6<sup>th</sup> day of December, 2006.

  
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JACK L. BURR  
DISTRICT JUDGE