

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001942-MR

FRANCIS JAMES PEISEL, JR., M.D.

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 01-CI-004194

KENTUCKY BOARD OF MEDICAL
LICENSURE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, JOHNSON AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Francis James Peisel, Jr., M.D., (hereinafter "Dr. Peisel") has appealed from the Jefferson Circuit Court's Opinion and Order denying his Petition for Judicial Review of the Kentucky Board of Medical Licensure's (hereinafter "the Board") final order denying his application for licensure. Dr. Peisel asserts that he was denied his due process right to a

hearing and that the Board's decision was arbitrary and constituted an abuse of discretion. We affirm.

The basic facts underlying this appeal do not appear to be in dispute, but need to be summarized for a full understanding of the issues presented on appeal. On January 23, 2001, the Board received Dr. Peisel's Application for License to Practice Medicine/Osteopathy by Endorsement. In the application, Dr. Peisel indicated that he received his Bachelor of Science degree from the University of Louisville in 1971 and his medical degree from the University of Kentucky in 1975. He received his original medical license in North Carolina in 1976, and subsequently received licenses from the Georgia and Virginia licensure boards in 1978 and 1983, respectively. At the time he filed the subject application in Kentucky, all three licenses were current. Dr. Peisel stated that he had been working at Candler Hospital in Savannah, Georgia, since 1985. He further indicated that he specialized in anesthesiology, but had not received Board certification in that specialty, and that he was seeking licensure in Kentucky to obtain additional training to enter the board certification process. For his response to question 9 of the application, Dr. Peisel indicated that he had never applied for nor been issued a Kentucky medical license.

The section of the application entitled "Category I" contains a series of "yes" or "no" questions designed to allow

the Board to determine whether the applicant meets the essential eligibility elements for licensure. Any "yes" answer must be accompanied by a written explanation. In his application, Dr. Peisel answered "yes" to four questions, the first being:

3. Have you ever had any license, certificate, registration or other privilege to practice as a health care professional denied, revoked, suspended probated or restricted by a State, Federal or International authority, or have you ever surrendered such credential to avoid or in connection with disciplinary investigation/action by such jurisdiction?

For his explanation, Dr. Peisel stated that had been "diagnosed and treated for chemical dependency in 1983." As a result, his licenses in Virginia, Georgia and North Carolina were placed on probation, and were all reinstated after he had complied with several consent orders. The second question was, "4. Has any hospital, hospital medical staff or any other health care entity ever revoked, suspended, restricted, limited, reprimanded, placed on probation or otherwise disciplined your staff privileges?" Dr. Peisel explained that he was currently under suspension from Candler, and was being required to re-enter the board examination process as a result of a malpractice action. The third question was, "11. Have you ever been convicted of a felony or misdemeanor by any State, Federal or International court?" He explained that he "pled guilty to several misdemeanors involving falsifying records" in relation to the

1983 events. The final question was, "13. Have you ever had to pay a judgement [sic] in a malpractice action or other civil action against your medical practice or are any malpractice or other civil actions against your medical practice presently pending in any court?" Dr. Peisel attached two malpractice forms indicating that he had a settled a 1990 incident for \$9999 and that another malpractice action was pending. The form also included a question as to whether the applicant had ever been denied a license by any state, federal or international licensure jurisdiction. Dr. Peisel answered this question in the negative. At the conclusion of the questions, Dr. Peisel signed an affidavit to the effect that the information in his application was true, accurate and complete to the best of his knowledge and belief, and that he understood that the submission of any false statement would constitute grounds for the denial of licensure.

During the course of the Board's investigation of Dr. Peisel's application, it obtained and reviewed several documents regarding disciplinary actions taken against him as well as a March 2, 2001, Summary of Reported Actions from the Federation of State Medical Boards of the United States, Inc. The Summary

revealed that in 1988, Dr. Peisel had applied for and been denied a license to practice medicine in Kentucky.¹

On February 26, 2001, the Board sent Dr. Peisel a letter indicating that the Board would formally consider his application at their March 22, 2001, meeting. The Board made clear in the letter that several of his responses could be grounds for the denial of his application, citing the version of KRS 311.571(7) then in effect, which gave the Board the power to deny an application for licensure without an evidentiary hearing upon proof of a violation delineated in KRS 311.595 or KRS 311.597. The letter indicated that the March 22, 2001, meeting would be Dr. Peisel's one opportunity to address the Board. The letter concluded with the following sentence: "Please consider this letter your Due Process notice of the Board's intention to consider your application for medical licensure and your opportunity to be heard on the above matter." Notes from the Board's March 22, 2001, meeting reveal that both Dr. Peisel and Dr. Burns Brady of the Kentucky Physicians Health Foundation addressed the Board that day.

On May 14, 2001, the Board entered an order denying Dr. Peisel's application for licensure based upon three sections

¹ The Board attached a copy of the June 30, 1988, order denying Dr. Peisel's application for licensure to its brief. In the order, the Board found that he had pled guilty to misdemeanor crimes for falsifying medical records, that his hospital privileges had been suspended for diverting Fentanyl from patients to himself, and that his medical licenses in Virginia, North Carolina and Georgia had been placed on probation.

of KRS 311.595 then in effect, in that he knowingly made a false statement in his application;² that he had had his medical license revoked, suspended, restricted, or limited;³ and that he had been disciplined by a licensed hospital or medical staff of the hospital.⁴ Relying upon those findings and upon KRS 311.571(7), the Board concluded that there was a legal basis to deny Dr. Peisel's application. Dr. Peisel filed a Petition for Judicial Review with the Jefferson Circuit Court, arguing that he was deprived of his right to be heard and that the Board's decision was arbitrary and capricious. In an Opinion and Order entered August 19, 2002, the circuit court denied Dr. Peisel's petition, holding that the Board sufficiently protected Dr. Peisel's due process rights by providing him with notice and an opportunity to be heard and that its decision was not arbitrary. This appeal followed.

On appeal, Dr. Peisel continues to argue that the Board's reliance on KRS 311.571(7), which permits it to deny an application without an evidentiary hearing, is constitutionally defective in that it denies him his due process right to be heard. Additionally, Dr. Peisel asserts that the Board's decision to deny his application was arbitrary and an abuse of its discretion. On the other hand, the Board argues that its

² KRS 311.595(1).

³ KRS 311.595(17).

⁴ KRS 311.595(21).

procedures did not deprive Dr. Peisel of his due process rights and that its action in denying the application was supported by substantial evidence.

KRS 311.530, et seq., address the licensing requirements for the practice of medicine and osteopathy in this Commonwealth. KRS 311.530 provides for the formation of a State Board of Medical Licensure consisting of fifteen members, made up for the most part of licensed physicians. KRS 311.565(1)(c) permits the Board to "[i]ssue, deny, suspend, limit, restrict, and revoke any licenses or permits that may be issued by the board . . . in compliance with the provisions of KRS 311.530 to 311.620." In this case, because Dr. Peisel had previously obtained a medical license in another state, he had to comply with KRS 311.571(5). That section provides that the applicant does not have to complete any further testing or training so long as he has been endorsed by the original licensing state as being a current license holder in good standing and would have satisfied all of the requirements for original licensing. However, KRS 311.571(5) must be read in conjunction with KRS 311.571(7), which at that time provided:

Notwithstanding any of the requirements for licensure established by subsections (1) to (6) of this section, the board may deny licensure to an applicant or the reregistrant of an inactive license without a prior hearing upon a finding that the applicant or reregistrant has violated any

provision of KRS 311.595 or 311.597 or is otherwise unfit to practice. Orders denying licensure may be appealed pursuant to KRS 311.593.^[5]

When circumstances permit, KRS 311.572⁶ provides that the Board "may" order an applicant to show cause why he should be granted a license. If this is done, the matter is assigned to a hearing panel, and the burden of proof lies with the physician.

We shall first address Dr. Peisel's assertion that the procedure the Board followed in this case violated his constitutional right to due process. The question here is whether the notice he received regarding the upcoming meeting and his actual opportunity to address the Board were sufficient to provide him his full right to due process. We agree with the Board's argument and the circuit court's reasoning that Dr. Peisel's right to due process was not violated in this matter.

In Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the United States Supreme Court addressed the

⁵ The current version of this subsection, now KRS 311.571(8), which became effective July 15, 2002, provides:

Notwithstanding any of the requirements for licensure established by subsections (1) to (7) of this section and after providing the applicant or reregistrant with reasonable notice of its intended action and after providing a reasonable opportunity to be heard, the board may deny licensure to an applicant or the reregistrant of an inactive license without a prior evidentiary hearing upon a finding that the applicant or reregistrant has violated any provision of KRS 311.595 or 311.597 or is otherwise unfit to practice. Orders denying licensure may be appealed pursuant to KRS 311.593.

⁶ Subsection (3) of this section has also been amended, but the amendment has no effect on this case.

issue of due process and set out a three-prong analysis to determine if that right has been violated:

In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. . . .

These decisions underscore the truism that "[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. . . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 333-35, 96 S.Ct. at 902-03, 47 L.Ed.2d at 32-33. The Supreme Court of Kentucky adopted this three-prong analysis in Division of Driver Licensing v. Bergmann, Ky., 740 S.W.2d 948 (1987). In Kentucky Cent. Life Ins. Co. v. Stephens, 897 S.W.2d 583 (1995), the Supreme Court of Kentucky also addressed the sufficiency of due process safeguards:

Not always does due process require a trial or the strict application of evidentiary rules and/or unlimited discovery. The court may construct, especially under special statutory proceedings, a more flexible procedure to account for the affected interest or potential deprivation. Procedural due process is not a static concept, but calls for such procedural protections as the particular situation may demand.

Id. at 590.

In the present matter, Dr. Peisel was afforded sufficient notice of the board's meeting and the problems with his application, and was also provided with the opportunity to address the Board, which he chose to do. We have reviewed the circuit court's decision, and agree with Judge Abramson's analysis of the Eldridge factors as they pertain to the facts of this case:

While the private interest in obtaining a license to practice medicine is certainly substantial, the state has a compelling interest in providing its citizens with quality health care. Furthermore, the risk

of erroneous deprivation of a license to practice medicine under KRS 311.571(7) is low. Any offenses described in KRS 311.595 may be fairly determined by prima facie evidence. Thus, under the Mathews v. Eldridge analysis, the Board's denial of Petitioner's application, without a prior hearing, does not violate the due process guarantees in the Fourteenth Amendment of the United States Constitution and Sections 10 and 11 of the Kentucky Constitution.

The Board's procedure in this case was sufficient to protect Dr. Peisel's due process rights even under the current version of the statute, as the February 26, 2001, correspondence informed Dr. Peisel that his application could be denied based upon his answers to several questions and allowed him the opportunity to respond. As pointed out by the Board in its brief, nowhere does Dr. Peisel indicate what additional information he could have provided or how this would have supported his position. As he should have, Dr. Peisel provided information as to his prior licensure and legal problems on his application, to which he completed a sworn affidavit. Furthermore, all of the information used by the Board in making its determination was either provided by Dr. Peisel, or within his knowledge, although omitted from the application.⁷ In sum, Dr. Peisel had a sufficient opportunity to present his case to the Board and to

⁷ Dr. Peisel appears to argue, somewhat disingenuously, that he had either forgotten that the Board had denied his application for licensure in 1998 or misunderstood the question. In any event, even without these deficiencies in his application, there still remained four questions of which any one could allow the Board to deny his application pursuant to KRS 311.571(7).

explain why his application for licensure should be granted despite his multiple violations of KRS 311.595.

We shall next address Dr. Peisel's argument that the Board's decision to deny his application for licensure was arbitrary and an abuse of discretion. The General Assembly provided the standard of review for decisions of the Board in KRS 311.555:

It is the declared policy of the General Assembly of Kentucky that the practice of medicine and osteopathy should be regulated and controlled as provided in KRS 311.530 to 311.620 in order to prevent empiricism and to protect the health and safety of the public. Further, the General Assembly of Kentucky has created the board, as defined in KRS 311.530, to function as an independent board, the majority of whose members are licensed physicians, with the intent that such a peer group is best qualified to regulate, control and otherwise discipline the licensees who practice medicine and osteopathy within the Commonwealth of Kentucky. In furtherance of this intent, the judiciary of the Commonwealth of Kentucky, who may be caused to review the actions of the board, shall not interfere or enjoin the board's actions until all administrative remedies are exhausted, and modify, remand, or otherwise disturb those actions only in the event that the action of the board:

- (1) Constitutes a clear abuse of its discretion;
- (2) Is clearly beyond its legislative delegated authority; or
- (3) Violated the procedure for disciplinary action as described in KRS 311.591.

In relation to judicial review of an agency's action generally, this Court discussed arbitrariness in its opinion of Com. Transp. Cabinet v. Cornell, Ky.App., 796 S.W.2d 591, 594 (1990), as follows:

Judicial review of an administrative agency's action is concerned with the question of arbitrariness. American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, Ky.[], 379 S.W.2d 450, 456 (1964). The Constitution prohibits the exercise of arbitrary power by an administrative agency. In determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. American Beauty Homes Corporation, supra. Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. American Beauty Homes Corporation, supra. If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

With this rule and our particular standard of review in mind, we shall review the Board's action in the present matter.

Based upon the power the General Assembly granted to it in KRS 311.591(7), the Board did not exceed the constraints of its statutory power under the first prong of the test

enunciated in Cornell, supra. As to the second prong, we have already determined that Dr. Peisel was afforded his due process rights. The third prong addresses the question of whether the Board's action is supported by substantial evidence. KRS 311.591(7) gives the Board the power to deny an application for licensure without an evidentiary hearing upon proof of a violation delineated in KRS 311.595 or KRS 311.597. Here, Dr. Peisel admitted to violating two subsections of KRS 311.595, as he admitted to having had his medical licenses probated in other states and to having been disciplined at Candler Hospital. Furthermore, the Board obtained supporting documentation from other licensing boards as well as from the National Practitioner Data Bank. Additionally, the Board obtained documentation regarding false statements Dr. Peisel made in his application as to his never having been denied licensure by a licensing board. The Board itself had previously denied Dr. Peisel's 1988 application for licensure.

As a result of Dr. Peisel's own answers in his application and the supporting documentation, we must agree with the circuit court that substantial evidence supports the Board's action in denying his application. Dr. Peisel submits that this action is unfair in that his chemical dependency problem, which resulted in the probation of his licenses and misdemeanor convictions, ended many years before and that he should not

continue to be harmed by his past history. Although we agree that the Board could just as easily have granted his application for licensure despite his multiple violations, the Board was well within its statutory power to ultimately deny his application. The Board did not abuse its discretion in so doing, as its action was supported by substantial evidence in the form of Dr. Peisel's own responses on his application and the supporting documentation.

For the foregoing reasons, the circuit court's Opinion and Order is affirmed.

ALL CONCUR.

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