RENDERED: MAY 12, 2017; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000700-MR

JON M. STRAUSS, M.D. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 10-CI-007765

KENTUCKY BOARD OF MEDICAL LICENSURE APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Jon Strauss, M.D., appeals from an order of the Jefferson Circuit Court which affirmed an order of the Kentucky Board of Medical Licensure (hereinafter referred to as "the Board"). The Board's order adopted *in toto* a recommended order, which set forth findings of fact and conclusions of law, from a hearing officer. The Board's order also placed Dr. Strauss on probation for five years and subjected his medical license to various terms and conditions. Dr.

Strauss argues that the Board's order should be reversed because the Board and hearing officer violated certain sections of the Kentucky Revised Statutes. We agree and reverse and remand.

Between 2007 and 2009, the Board issued four complaints against Dr. Strauss alleging various infractions. Investigations ensued, ultimately leading to administrative hearings being held by a hearing officer during this period. The hearings concluded on May 27, 2010. In August of 2010, the hearing officer entered a recommended order which set forth his findings of fact and conclusions of law. The hearing officer found Dr. Strauss had violated three statutes in relation to his medical practice. The officer did not suggest an appropriate remedy, but stated that the Board should "take any appropriate action against his license for those violations."

Dr. Strauss and counsel for the Board timely filed exceptions to the hearing officer's recommendations. The Board then reviewed the fourth complaint, the hearing officer's recommended order, and the exceptions. The Board also heard arguments from counsel. On September 29, 2010, the Board adopted the hearing officer's findings of fact, conclusions of law, and recommended order, without revision, and ordered a five-year probationary period for Dr. Strauss.

On November 3, 2010, Dr. Strauss filed a petition for judicial review with the Jefferson Circuit Court. Dr. Strauss argued that the order of probation was void because the hearing officer and the Board did not follow certain statutory

requirements. Multiple motions, responses, and arguments were heard by the circuit court. The court eventually held a hearing on July 25, 2014. On April 2, 2015, the court entered an order which affirmed the Board's order of probation. The court's order held that the Board's order was based on substantial evidence and that neither the Board nor the hearing officer violated sections of the Kentucky Revised Statutes. This appeal followed.

This appeal concerns an administrative agency that is tasked with protecting "the health and safety of the public" and can "regulate, control and otherwise discipline the licensees who practice medicine and osteopathy within the Commonwealth of Kentucky." Kentucky Revised Statute (KRS) 311.555. KRS 311.591 allows the Board to, among other things, investigate grievances, issue complaints, assign matters to hearing panels or hearing officers, and to impose discipline upon licensed medical professionals. When the Board believes a medical licensee has violated the law and assigns the matter to a hearing panel or officer, the provisions of KRS Chapter 13B come into play.

KRS 13B.020(1) states:

> The provisions of this chapter shall apply to all administrative hearings conducted by an agency, with the exception of those specifically exempted under this section. The provisions of this chapter shall supersede any other provisions of the Kentucky Revised Statutes and administrative regulations, unless exempted under this section, to the extent these other provisions are duplicative or in conflict. This chapter creates only procedural rights and shall not be construed to confer upon any person a right to hearing not expressly provided by law.

This Board is not exempt from the provisions of Chapter 13B.

Dr. Strauss' primary argument on appeal is that the Board and the hearing officer violated certain statutory requirements. Specifically, his argument is based on KRS 13B.110(1) and KRS 13B.120(1). KRS 13B.110(1) states:

> Except when a shorter time period is provided by law, the hearing officer shall complete and submit to the agency head, no later than sixty (60) days after receiving a copy of the official record of the proceeding, a written recommended order which shall include his findings of fact, conclusion of law, and recommended disposition of the hearing, including recommended penalties, if any. The recommended order shall also include a statement advising parties fully of their exception and appeal rights.

KRS 13B.120(1) states: "In making the final order, the agency head shall consider the record including the recommended order and any exceptions duly filed to a recommended order." An agency head is "the individual or collegial body in an agency that is responsible for entry of a final order." KRS 13B.010(4). For our purposes, the agency head is the Board.[1]

As to KRS 13B.110(1), Dr. Strauss argues that the hearing officer did not conform to this statute's requirement that he recommend a penalty to the Board in his recommended order. As to KRS 13B.120(1), Dr. Strauss argues that the Board violated this statute when it did not review, or consider, the record before making

[1] Technically, the Board is split up into two panels: one panel is an inquiry panel that investigates grievances, determines if a violation of law occurred, and issues a complaint should it be warranted, and the other panel is the hearing panel which presides over the administrative hearing and enters a final order deciding if discipline is called for. KRS 311.591. No member who served on the inquiry panel may serve on the hearing panel. *Id.* In order to simplify our opinion, we are not differentiating between the two panels.

its final order. The Board argues that only it can determine whether or not a sanction is justified; therefore, the hearing officer need not recommend a penalty. The Board also argues that it is not required to review the entire record before issuing its final order, only the recommended order and the exceptions filed by the parties.

"[A]n administrative agency's findings of fact are reviewed for clear error, and its conclusions of law are reviewed *de novo.*" *Hutchison v. Kentucky Unemployment Ins. Comm'n*, 329 S.W.3d 353, 356 (Ky. App. 2010). We agree with Dr. Strauss that the hearing officer and the Board did not follow statutory requirements.

Unfortunately, there is no published case law directly on point; however, the unpublished case of *Moses v. Kentucky Bd. of Med. Licensure*, No. 2014-CA-000783-MR, 2016 WL 551431 (Ky. App. Feb. 12, 2016), will be considered by this Court pursuant to Kentucky Rule of Civil Procedure (CR) 76.28(4)(c).

In *Moses*, the same arguments in the case at hand are considered by a different panel of this Court. As to KRS 13B.120(1), that Court stated that

> the plain meaning of the statute indicates that the legislature intended for the Board to consider the record, including the hearing officer's recommended order; any testimony presented by witnesses or experts, as well as the exceptions filed by the parties and the original grievances which initiated the investigation; and make a determination as to whether substantial evidence supports revoking a physician's medical license.

Moses at 4.

Here, the Board admits that it did not review the entire record or the evidence relied upon by the hearing officer. The Board states that it only reviewed the fourth complaint, the hearing officer's recommended order, and the exceptions, and also heard arguments from counsel. We agree with Dr. Strauss and the Court in *Moses* that the statute requires the Board to review, at a minimum, the hearing officer's recommended order, the exceptions filed by the parties, and the evidence relied on by the hearing officer. KRS 13B.120(1) states that the Board shall consider "the record including the recommended order and any exceptions duly filed to a recommended order." It does not state that the Board should only consider the recommended order and the exceptions, but that those documents should be included in its review of the record.

This interpretation is supported by KRS 13B.120(2) and (3) and *dicta* found in *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

KRS 13B.120 states:

> (2) The agency head may accept the recommended order of the hearing officer and adopt it as the agency's final order, or it may reject or modify, in whole or in part, the recommended order, or it may remand the matter, in whole or in part, to the hearing officer for further proceedings as appropriate.
>
> (3) The final order in an administrative hearing shall be in writing and stated in the record. If the final order differs from the recommended order, it shall include separate statements of findings of fact and conclusions of law. The final order shall also include the effective date of the order and a statement advising parties fully of available appeal rights.

When analyzing a statute, we must keep in mind certain principles.

> "General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy." "No single word or sentence is determinative, but the statute as a whole must be considered." In addition, "[w]e have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion." Moreover, "[i]n construing statutory provisions, it is presumed that the legislature did not intend an absurd result." The legislature's intention "shall be effectuated, even at the expense of the letter of the law."
>
> We must further acknowledge that the General Assembly "intends an Act to be effective as an entirety. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every part of the Act."

Cosby v. Commonwealth, 147 S.W.3d 56, 58-59 (Ky. 2004) (citations omitted).

Here, looking at the statute as a whole and giving its words their literal meanings, we believe that it is apparent that the Legislature intended the Board to review the evidence contained in the record that the hearing officer relied upon, not just the recommended order and exceptions. KRS 13B.120(2) and (3) indicate that while the Board may rely on the work product of its hearing officer, *Robinson v. Kentucky Health Facilities*, 600 S.W.2d 491, 492 (Ky. App. 1980), the Board is the ultimate decision maker when it comes to the findings of fact and conclusions of law. If the Board simply adopted the hearing officer's findings of fact and conclusions of law without reviewing the record and evidence relied upon, then the

Board would seemingly never reject or modify the recommended order as contemplated by these statutes.

In addition, the case of *Rapier v. Philpot*, 130 S.W.3d 560, 563 (Ky. 2004), states that "[t]he agency head is required to review the entire record and to determine whether there is justification—according to the facts and the applicable law—for adopting the recommended order."

KRS 13B.120(1) states that the Board must "consider the record". We believe the record consists of more than just the recommended order and exceptions. The Board must also review the evidence relied upon by the hearing officer as held by *Moses*. The Board cannot simply rubber stamp the findings and conclusions of the hearing officer; it must determine whether the evidence relied on justifies a finding of guilt or innocence. The only way this can occur is if the members of the Board review and consider the evidence in the record. We therefore reverse the orders of the circuit court and the Board.

As to KRS 13B.110(1), we believe the hearing officer erred when it did not recommend a specific penalty for Dr. Strauss. The statute states that the hearing officer must recommend a penalty "if any." The Board argues that the "if any" phrase means the statute allows the hearing officer to decline to recommend a penalty. Dr. Strauss claims that the phrase contemplates the situation where a hearing officer finds no violation of law and that the complaint should be dismissed; therefore, no penalty is required.

"The actual words used are important but often insufficient. The report of legislative committees may give some clue." *Fiscal Court of Jefferson Cty. v. City of Louisville*, 559 S.W.2d 478, 480 (Ky. 1977). "[W]here the language of a statute has been found to be ambiguous or uncertain, reference may be had to the legislative records showing the legislative history of the act in order to ascertain the intent of the legislature." *MPM Fin. Grp., Inc. v. Morton*, 289 S.W.3d 193, 198 (Ky. 2009) (citation omitted).

Here, because both parties' arguments as to the meaning of this statute are reasonable, we look to legislative records. Dr. Strauss brings our attention to the debate regarding KRS 13B.110. He provides a transcript of the 1996 Committee Action where this statute was discussed.[2] In that transcript, the members of the Legislature discussing this statute specifically state that the intent is to have the hearing officer recommend a penalty to the Board. The General Counsel for the Board at that time is allowed to speak on the matter and tries to convince the legislative members to only require the Board provide a penalty for any infraction; however, counsel is unsuccessful.

We believe the language in the statute that the hearing officer "shall" include a recommended penalty in his or her order and the legislative record provided by Dr. Strauss indicate that the hearing officer must provide a recommended penalty

[2] The Board's brief makes no argument regarding the legislative record provided by Dr. Strauss.

to the Board. In the case at hand, the hearing officer made no such recommendation; therefore, we reverse.[3]

Dr. Strauss also makes arguments related to the sufficiency of evidence in this case; however, because we are reversing the orders of the circuit court and the Board, we decline to rule on that issue.

Based on the foregoing, we find that the hearing officer and the Board did not satisfy their statutory duties; therefore, we reverse and remand to the circuit court. On remand, the circuit court will order the hearing officer to make a recommended penalty to the Board and order the Board to review the record, including the evidence relied upon by the hearing officer, before rendering a new final order.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Fox DeMoisey
Louisville, Kentucky

BRIEF FOR APPELLEE:

Leanne K. Diakov
General Counsel
Kentucky Board of Medical Licensure
Louisville, Kentucky

[3] We would like to note that *Moses*, *supra*, also discusses this issue, but does not hold as we do. That Court found that because the Board must make the final decision regarding a doctor's sanction, the hearing officer is not required to recommend a penalty. While we agree that the Board makes the ultimate decision regarding a sanction or penalty pursuant to KRS 311.591(7), we believe KRS 13B.110(1) requires the hearing officer to make a recommended penalty. Because *Moses* is not binding precedent, we are not required to following its holding on this issue.