

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

FEB 25 2013

MICHAEL S. RICHIE
CLERK

STEVEN CONSTANTINE ANAGNOST, M.D.,)
License No. 21194,)

Petitioner,)

v.)

No. 111,246

STATE OF OKLAHOMA ex rel. OKLAHOMA)
BOARD OF MEDICAL LICENSURE AND)
SUPERVISION,)

Respondent.)

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KAUGER, J., with whom REIF, V.C.J., WATT and GURICH, JJ. join, dissenting:

¶1 Generally, a litigant must first seek review of agency decisions in a manner prescribed by statute and is not permitted to invoke the jurisdiction of this Court in a separate proceeding.¹ However, this Court has held that an independent action is permitted where, as here, the judicial review of an agency decision after the fact will fail to provide an adequate remedy.² Statutory procedures may be circumvented only when there is a constitutional question, inadequate

¹ Johnson v. Bd. of Gov. of Registered Dentists, 1996 OK 41, ¶13, 913 P.2d 1339; Conoco, Inc. v. State Dep't of Health of the State of Oklahoma, 1982 OK 94, ¶12, 651 P.2d 125; Martin v. Harrah Indep. School Dist., 1975 OK 154, ¶19, 543 P.2d 1370.

² Johnson v. Bd. of Gov. of Registered Dentists, see note 1, supra; Martin v. Harrah Indep. School Dist., see note 1, supra.

administrative relief, and threatened or impending irreparable injury.³

¶2 Dr. Anagnost alleges violations of his right to due process, and therefore is alleging a constitutional question.⁴ Due process entitles a person to an impartial and disinterested tribunal in both civil and criminal adjudicative proceedings.⁵ When an administrative board acts in an adjudicative capacity, it functions similarly to a court.⁶ Consequently, proceedings in such a capacity require a minimum standard of due process such as notice and an opportunity to be heard.⁷ Further, this Court has held that the lack of due process resulting from a biased tribunal is the sort of injury that cannot be corrected on appeal.⁸

³ Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Bd., 2011 OK 86, ¶12, 270 P.3d 133; Tinker Investment & Mortgage Corp. v. City of Midwest City, 1994 OK 41, ¶12, 873 P.2d 1029; Martin v. Harrah Indp. School Dist., see note 1, supra at ¶15.

⁴ The United States Constitution, amend. 14, §1 provides:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....

The Okla. Const. art. 2, §7 provides:

No person shall be deprived of life, liberty, or property without due process of law.

⁵ Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Bd., see note 3, supra at fn. 9; Johnson v. Bd. of Gov. of Registered Dentists, see note 1, supra at ¶14; Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980); Gibson v. Berryhill, 411 U.S. 564, 578-79, 93 S.Ct. 1689, 1697-98, 36 L.Ed.2d 488 (1973).

⁶ Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Bd., see note 3, supra at ¶15; Harry R. Carlile Trust v. Cotton Petroleum, 1986 OK 16, ¶10, 732 P.2d 438, cert. denied, 483 U.S. 1007, 107 S.Ct. 3232, 97 L.Ed.2d 738 and 483 U.S. 1021, 107 S.Ct. 326, 97 L.Ed.2d 764 (1987).

⁷ U. S. Const. amend 14, §1, see note 4, supra; Okla. Const. art. 2, §7, see note 4, supra; Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Bd., see note 3, supra at ¶15; DuLaney v. Oklahoma State Dept. of Health, 1993 OK 113, ¶9, 868 P.2d 676; Harry R. Carlile Trust v. Cotton Petroleum, see note 6, supra; Cate v. Archon Oil Co., 1985 OK 15, ¶7, 695 P.2d 1352.

⁸ Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Bd., see note 3, supra at fn. 9; Johnson v.

~~¶3~~ The interest in a professional license is substantial.⁹ When it is necessary to procure a license in order to carry on a chosen profession or business, the power to revoke a license, once granted, and thus destroy in a measure the very means of livelihood for that professional, is penal in nature and therefore should be strictly construed.¹⁰ The loss of a professional license is more than a monetary loss; it is a loss of a person's livelihood and loss of a reputation.¹¹

¶4 Certainly, then, ensuring proper due process and an unbiased, neutral hearing in matters concerning the revocation of a professional license should be a matter of prime concern for this Court. In Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Board, 2011 OK 86, 270 P.3d 133, this Court held:

Independence and impartiality are required of the courts. Although we have not addressed the precise circumstances presented here, we have previously examined a licensing board's responsibility to provide a licensee, not only with a neutral and impartial proceeding but also a proceeding which *appears* neutral and impartial. (Citations omitted)

The essential lesson is that the appearance of impartiality is as important as the

Bd. of Gov. of Registered Dentists, see note 1, supra at ¶14; Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 61, 93 S.Ct. 80, 83-84, 34 L.Ed.2d 267 (1972).

“An appellate review is inadequate to correct injury to a professional's reputation after a board has pronounced a negative decision.” Johnson v. Bd. of Gov. of Registered Dentists, see note 1, supra at ¶15.

⁹ Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Bd., see note 3, supra at ¶13.

¹⁰ Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Bd., see note 3, supra at ¶13; Johnson v. Bd. of Gov. of Registered Dentists, see note 1, supra at ¶13; State ex rel. Oklahoma State Bd. of Embalmers and Funeral Directors v. Guardian Funeral Home, 1967 OK 141, ¶0, 429 P.2d 732.

¹¹ Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Bd., see note 3, supra at ¶13; Johnson v. Bd. of Gov. of Registered Dentists, see note 1, supra at ¶19.

actual impartiality or a conflict of interest.¹² We further emphasized in Bowen

that:

... the question is not whether one personally **believes** herself or himself to be unprejudiced, unbiased, and impartial, the question is whether the circumstances are of such nature to cause doubt as to his or her partiality, bias, or prejudice.¹³

¶5 The Oklahoma Board of Medical Licensure and Supervision (Board) began investigative proceedings concerning Dr. Anagnost in 2010. In June, 2010, the Board served Dr. Anagnost with an Application to Determine Emergency and a Citation seeking to revoke Dr. Anagnost's license to practice medicine in Oklahoma. This emergency proceeding was authorized by the Board Secretary, who Dr. Anagnost alleges did not obtain the concurrence of the Board President prior to authorization in violation of 50 O.S. Supp. 2010 §503.1.¹⁴

¶6 After the Board allegedly waited to deny Dr. Anagnost's request for a continuance of the hearing on the day the hearing was to occur, the Board called two witnesses to testify at the hearing, both of whom Dr. Anagnost alleges were his fierce competitors in the practice of medicine. After the conclusion of the

¹² Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Bd., see note 3, supra at ¶19.

¹³ Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Bd., see note 3, supra at ¶21; Johnson v. Bd. of Gov. of Registered Dentists, see note 1, supra at ¶32.

¹⁴ Title 59 O.S. Supp. 2010 §503.1 provides:

The Secretary of the Board, upon concurrence of the President of the Board that an emergency exists for which the immediate suspension of a license is imperative for the public health, safety and welfare, may conduct a hearing as contemplated by Section 314 of Title 75 of the Oklahoma Statutes to suspend temporarily the license of any person under the jurisdiction of the Board.

~~Board's case, the board prosecutor elected to withdraw the application for an~~
emergency suspension based on the evidence submitted.¹⁵

¶7 Dr. Anagnost alleges a significant conflict of interest regarding the Board's proceedings in that a lawyer and member of the Board from in or about May 2003 through July 2011, also represented plaintiffs in two separate medical malpractice actions against Dr. Anagnost at the time of the hearing and during the pendency of the current Board proceeding against him.¹⁶ At the very least, Dr. Anagnost is correct in his allegation that this creates the appearance of a conflict of interest. The Board's response brief acknowledges that this member did not rotate off of the Board until January 1, 2011, six months after the conclusion of the emergency hearing, and does not explain why the board member failed to recuse himself from proceedings against Dr. Anagnost, and the Board is critical of Dr. Anagnost's failure to request his recusal, despite the fact that 75 O.S. §316 places an affirmative burden on an agency member to withdraw in such a situation.¹⁷

¹⁵ Petitioner's Application for Original Jurisdiction and Petition for Writ of Prohibition, p. 9.

¹⁶ Petitioner's Application for Original Jurisdiction and Petition for Writ of Prohibition, p. 10.

¹⁷ Title 75 O.S. Supp. 2010 §316 provides:

A hearing examiner or agency member shall withdraw from any individual proceeding in which he cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of a hearing examiner or agency member, on the ground of his inability to give a fair and impartial hearing, by filing an affidavit, promptly upon discovery of the alleged disqualification, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be determined promptly by the administrative head of the agency, or, if it affects a member or members of the agency, by the remaining members thereof, if a quorum. Upon the entry of an order of disqualification affecting a hearing examiner, the agency shall assign another in his stead or shall conduct the hearing itself. Upon the disqualification of a member of an agency, the agency shall proceed with the proceeding if a quorum remains. If a quorum no longer exists, by virtue of the member's

Emergency, the board served Dr. Anagnost with a Complaint which he argues was void *ab initio* because there is no record of the Board entertaining or passing a motion to institute the Complaint.¹⁸ What is most disturbing, however, is since the filing of the original complaint, two years have gone by without resolution. During that time, it appears that the board has repeatedly re-published notice of a hearing on the complaint against Dr. Anagnost alleging fraud, negligence, and incompetence.¹⁹ Dr. Anagnost alleges that each time the Board prosecutor sought a continuance to push the hearing farther down the road, the stated reason was to obtain discovery in the form of certain medical records from Dr. Anagnost, though

disqualification, the Governor immediately shall appoint a member pro tempore to sit in place of the disqualified member in that proceeding. In further action, after the disqualification of a member of an agency, the provisions of Section 311 of this title shall apply.

¹⁸ Title 59 O.S. Supp. 2010 §503 provides:

The State Board of Medical Licensure and Supervision may suspend, revoke or order any other appropriate sanctions against the license of any physician or surgeon holding a license to practice in this state for unprofessional conduct, but no such suspension, revocation or other penalty shall be made until the licensee is cited to appear for hearing. No such citation shall be issued except upon sworn complaint filed with the secretary of the Board, charging the licensee with having been guilty of unprofessional conduct and setting forth the particular act or acts alleged to constitute unprofessional conduct. In the event it comes to the attention of the Board that a violation of the rules of professional conduct may have occurred, even though a formal complaint or charge may not have been filed, the Board may conduct an investigation of the possible violation, and may upon its own motion institute a formal complaint. In the course of the investigation persons appearing before the Board may be required to testify under oath. Upon the filing of a complaint, either by an individual or the Board as provided herein, the citation must forthwith be issued by the secretary of the Board over the signature of the secretary and seal of the Board, setting forth the complaint of unprofessional conduct, and giving due notice of the time and place of the hearing by the Board. The citation shall be made returnable at the next regular meeting of the Board occurring at least thirty (30) days after the service of the citation. The defendant shall file a written answer under oath with the secretary of the Board within twenty (20) days after the service of the citation. The secretary of the Board may extend the time of answer upon satisfactory showing that the defendant is for reasonable cause, unable to answer within the twenty (20) days, but in no case shall the time be extended beyond the date of the next regular meeting of the Board, unless a continuance is granted by the Board.

¹⁹ Petitioner's Application for Original Jurisdiction and Petition for Writ of Prohibition, p. 13.

he argues he never received any such requests. The Board prosecutor apparently obtained these continuances *ex parte* and without notice to Dr. Anagnost. Further, he alleges the continuances were obtained in violation of the Board's own rules.²⁰ A two year delay between the filing of the initial complaint against Dr. Anagnost and the hearing on that complaint, due to continuances by the Board, is unseemly given that the purpose of the Board is to protect the public.²¹ The only real effect of these delays appears to be continually publishing allegations of fraud, negligence, and incompetence without having determined any factual basis to support the allegations for over two years. I have stated before, in the context of disciplinary proceedings for lawyers, that excessive delay before holding a hearing implicates due process concerns.²²

¶9 It appears that the Board attempted to extend the authority of its trial

²⁰ O.A.C. 435:3-3-9 provides:

When time permits prior to a hearing, parties to the hearing shall be allowed to use discovery available in a civil action in the District Courts of Oklahoma. The failure of a party to have sufficient time to exercise any discovery mechanism on account of a lack of time shall not of itself constitute good cause for the granting of a continuance of a hearing.

²¹ See Reeves v. State, 253 P. 510, 512 (Okla. Crim. App. 1927).

²² State of Oklahoma ex rel. Oklahoma Bar Association v. Casey, 2012 OK 93, ¶8, --- P.3d ---- (Kauger, J., concurring in part and dissenting in part). I stated that:

There was nothing before the Court which explained the excessive delay in holding the hearing. It is unseemly to charge a lawyer with lack of reasonable diligence and conduct prejudicial to the administration of justice when it appeared that the Bar Association engaged in the same conduct. I recommended issuing a show cause order to the Bar Association asking for an explanation for its unreasonable delay and an explanation of how the misconduct charges of lack of diligence and conduct prejudicial to the administration of justice comport with fairness and due process. There is a reason that the law provides for laches, estoppel and dismissal for failure to prosecute. (Internal citations omitted.)

examiner beyond that allowed by the Oklahoma Administrative Code. Pursuant to O.A.C. §435:3-3-13, the Board may assign a trial examiner for the purpose of hearing non-physician witnesses.²³ While I do not agree with Dr. Anagnost's

²³ O.A.C. §435:3-3-13 provides:

435:3-3-13. Trial examiner

(a) The Board or the Board Secretary may direct that the Board utilize a Trial Examiner to hear matters specified by the Secretary or as authorized by this Chapter. Generally, where the Trial Examiner is requested, the duties of the Trial Examiner in an individual proceeding shall be:

- (1) to hear and rule upon pretrial discovery disputes.
- (2) to hear and rule on Motions in Limine.
- (3) to review Motions to Dismiss in order to advise the Board on questions of law therein.
- (4) to hear and rule on Motions for Continuance of a hearing (a continuance which is granted by the Trial Examiner must be ratified by the Secretary of the Board).
- (5) to hear and rule on other preliminary motions.
- (6) to hear and rule on motions to have a Board Member recused from a hearing.

(b) The Board or the Secretary may assign the Trial Examiner to perform any of the following duties:

- (1) to mark, identify and admit or deny exhibits.
- (2) to hear non-physician prosecution witnesses.
- (3) to hear non-physician defense witnesses.
- (4) to hear prosecution/defense corroborating witnesses.
- (5) to hear character witnesses.
- (6) to hear cumulative witnesses.
- (7) to hear peripheral witnesses.
- (8) to receive offers of proof.
- (9) to prepare a written report to Board members and counsel summarizing all proceedings, rulings, testimony, and exhibits received. The Trial Examiner shall allow counsel time to file any written objections or exceptions to the report.

(c) The Board members shall read the Trial Examiner's report and any objections that were filed.

assertion that the appointment of a trial examiner to make pretrial and evidentiary rulings on behalf of the Board is an improper delegation of the Board's authority under 59 O.S. §505²⁴, the Board must still follow its own rules and procedures. Dr. Anagnost alleges that the trial examiner entered a scheduling order indicating he planned to hear physician expert testimony, which would be a violation of O.A.C. §435:3-3-13.

¶10 Dr. Anagnost further alleges that the Board proceedings against him are tainted by the appointment of a trial examiner, because the trial examiner in these proceedings also serves as the Board's legal advisor pursuant to O.A.C. 435:3-3-

(d) In the event the Trial Examiner assumes the additional duties of (b) in this section, the format for the hearing before the Board shall be as follows:

- (1) The Board receives brief orientations from the Trial Examiner before each case is presented.
- (2) The Board hears only physician witnesses or expert witnesses that the Trial Examiner has permitted because of the nature of the testimony.
- (3) The Board hears rebuttal witnesses, if any.
- (4) The Board hears opening and closing arguments.

²⁴ Title 59 O.S. Supp. 2010 §505 provides:

It is hereby provided that the State of Oklahoma is a proper and necessary party in the prosecution of all such actions and hearings before the Board in all matters pertaining to unprofessional conduct under the contemplation of this act, and the Attorney General of the state, in person, or by deputy, is authorized and directed to appear in behalf thereof and the defendant in such action shall have the right to be represented by counsel. The Board shall sit as a trial body and the rulings of the president thereof in all questions shall be the rulings of the Board, unless reversed by a majority vote of the Board upon appeal thereto from such rulings of the president. The secretary shall preserve a record of all proceedings in such hearings and shall furnish a transcript thereof to the defendant upon request therefor, provided the said defendant shall pay the actual cost of preparing such transcript. If the services of a court reporter are requested, the court reporter shall be reimbursed or paid by the party who made such request.

In Van Horn Oil v. Oklahoma Corp. Com'n, 1998 OK 42, 753 P.2d 1359, this Court recognized the authority of an agency to hear evidence through a hearing officer.

12.²⁵ Dr. Anagnost raises questions about a potential conflict of interest as a result of the trial examiner serving in both roles, and essentially alleges that the individual's appointment as trial examiner combined with the sudden push to have a hearing and bring the matter to a swift conclusion, are directly related to the possibility that Dr. Anagnost might seek to pursue a 42 U.S.C. §1983 (Civil Rights) claim against the Board.²⁶ The fact that the trial examiner provides legal advice to the board, and has been appointed trial examiner in this case against an individual who has accused the board of wrongdoing on multiple occasions, at least gives rise to the appearance of a conflict of interest. The Legislature, in similar contexts, recognized that a problem arises when administrative officials attempt to wear too many hats, and addressed the issue in legislation, although the new provision has since been challenged²⁷

²⁵ O.A.C. §435:3-3-13 provides:

435:3-3-12. Board advisor

The Board may utilize a Board Advisor in the course of a hearing/individual proceeding to perform any of the following duties:

- (1) To advise the Board on issues of law and rules of proceedings;
- (2) To participate with the Board in the questioning of witnesses/applicants;
- (3) To advise the President on the admissibility of evidence;
- (4) To advise the President on motions or objections arising in the course of the hearing/individual proceeding; and
- (5) To accompany the Board into Executive Session, provide assistance as legal advisor and take minutes.

²⁶ Petitioner's Application for Original Jurisdiction and Petition for Writ of Prohibition, p. 28; Petitioner's Brief in Support of Application for Original Jurisdiction and Petition for Writ of Prohibition, P. 10.

²⁷ Title 70 O.S. Supp. 2012 §6-101.7 serves to place restrictions on attorneys involved in due process hearings for

¶11 Even if the alleged due process violations are not egregious enough to taint the entire proceeding against Dr. Anagnost, it is still the duty of this Court to ensure that he receives the minimum standard of due process such as notice and an opportunity to be heard.²⁸ I make no pronouncement on the validity of the Board's case against Dr. Anagnost. It may be that the Board's allegations against Dr. Anagnost have merit and it may be that they do not, but that does not mean the Board is entitled to proceed in a manner which tramples over the requirements of due process. Further, as this Court has previously held that revocation of a professional license is not the sort of injury that can be corrected on appeal, the

schools, and provides:

An attorney, representative, or other designee of the school district who has represented or represents a school district or the administration of a school district at a hearing held for the purpose of affording due process rights and requirements for an administrator as provided for in Section 6-101.13 of Title 70 of the Oklahoma Statutes, a teacher as provided for in Section 6-101.26 of Title 70 of the Oklahoma Statutes, or a support employee as provided for in Section 6-101.46 of Title 70 of the Oklahoma Statutes or who has been involved or participated in any prehearing actions of the school district with respect to a recommendation for the termination of employment or nonreemployment of an administrator, teacher, or support employee shall not:

1. Conduct or preside as the hearing officer or judge at a due process hearing or hearings; and
2. Attend, advise at, or in any way influence an executive session of the school district board of education that is held in conjunction with a due process hearing or hearings if the attorney, representative, or other designee of the school district conducted or presided over the due process hearing or hearings as the hearing officer or judge.

The bill containing this provision, the Comprehensive Lawsuit Reform Act of 2009 found at 2009 Okla. Session. Laws ch. 228, has since been challenged as violating the single-subject rule mandated by the Okla. Const., art. 5, §57, in other litigation pending before this Court.

²⁸ U. S. Const. amend 14, §1, see note 4, supra; Okla. Const. art. 2, §7, see note 4, supra; Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Bd., see note 3, supra at ¶15; DuLaney v. Oklahoma State Dept. of Health., see note 7, supra; Harry R. Carlile Trust v. Cotton Petroleum, see note 7, supra; Cate v. Archon Oil Co., see note 7, supra.

time to deal with these possible violations is now, rather than later.²⁹ If this Court is only willing to examine the Board's potential due process violations after it has revoked Dr. Anagnost's license, then our examination comes too late. For these reasons, I would assume original jurisdiction to further examine this issue and ensure that Dr. Anagnost is receiving the due process he is entitled to under the law. I respectfully dissent to the Court's refusal to assume original jurisdiction.

²⁹ Bowen v. State of Oklahoma, ex rel. Oklahoma Real Estate Appraiser Bd., see note 3, supra at fn. 9; Johnson v. Bd. of Gov. of Registered Dentists, see note 1, supra at ¶15; Ward v. Village of Monroeville, Ohio, see note 8, supra.