
IN THE SUPREME COURT OF MISSOURI

TAP PHARMACEUTICAL PRODUCTS)
INC., D/B/A PHARMACY SOLUTIONS,)
)
Respondent,)
)
v.) Supreme Court No. SC88318
)
STATE BOARD OF PHARMACY,)
)
Appellant.)

Transferred from the Court of Appeals, Western District

Respondent Filing Appellant’s Substitute Brief Pursuant to Rule 84.05(e)

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Jurisdictional Statement

This appeal seeks judicial review of a Findings of Fact, Conclusions of Law and Disciplinary Order issued by Appellant State Board of Pharmacy (hereinafter “the Board”). Respondent TAP Pharmaceutical Products Inc., d/b/a Pharmacy Solutions, (hereinafter “TAP”) filed a Petition for Review, and the Circuit Court of Cole County subsequently reversed the Board’s decision. Under § 536.140.6, RSMo 2000, appeals in administrative cases may be taken from a court’s judgment as in other civil cases.

Pursuant to § 512.020, RSMo 2000, a party to a suit aggrieved by a final judgment of a circuit court in a civil cause, from which an appeal is not prohibited by the constitution, may take his appeal to a court having appellate jurisdiction. The Board timely appealed the circuit court’s Findings of Fact, Conclusions of Law and Judgment, and the Western District Court of Appeals affirmed the Board’s decision. TAP timely filed an Application for Transfer. Pursuant to Missouri Rule of Civil Procedure 83.04, this Court sustained said application and ordered the cause to be transferred. Article V, § 10 of the Missouri Constitution vests jurisdiction in the Supreme Court to finally determine all causes coming to it from the court of appeals, the same as if the case were heard on original appeal.

Statement of Facts

The Board is an agency of the State of Missouri, created and established pursuant to § 338.110, RSMo 2000¹ (L.F. 10). TAP is licensed by the Board as a pharmacy, doing business as Pharmacy Solutions, Permit No. 2001000487 (L.F. 10).

On or about September 28, 2001, and at the conclusion of a four-plus year investigation, TAP agreed to plead guilty (hereinafter “the Guilty Plea”) to a one-count criminal information brought by the United States Attorney for the District of Massachusetts (L.F. 80-87). The Guilty Plea was accepted and entered by the U.S District Court for the District of Massachusetts on December 6, 2001 (L.F. 88-92).

Concomitant with the entry of the Guilty Plea, the State of Missouri and TAP entered into a Settlement Agreement and Release on or about December 3, 2001 (hereinafter “the Agreement”) (L.F. 145-66). The Agreement is similar to the ones TAP executed with the other 49 states and federal government to resolve these governments’ alleged civil and administrative claims stemming from the conduct underlying the Guilty Plea. Pursuant to the Agreement, TAP paid the State of Missouri \$1,827,331.90 (L.F. 151). In consideration for this payment, the State of Missouri agreed to release any claims against TAP related to certain “Covered Conduct,” defined in Preamble Paragraph F, which includes, among other things, the conduct that was the subject of TAP’s Guilty Plea (L.F. 152, 146-49).

¹ All statutory references are to the Revised Statutes of Missouri, 2000, unless otherwise noted.

Paragraph 2 of the Agreement reads in pertinent part:

In consideration of this Agreement and payment set forth herein and subject to the exceptions from release set forth in Paragraph 3 below, the state of Missouri on behalf of itself, its officers, agents, agencies, and departments shall release and forever discharge TAP . . . from any civil or administrative claims for damages or penalties that the state of Missouri has or may have relating to the Covered Conduct as defined in Preamble Paragraph F (L.F. 152).

Pursuant to Paragraph 3 of the Agreement, the State of Missouri did not release TAP from any administrative liability, except as explicitly stated in the Agreement (L.F. 152-53).

Paragraph 4 of the Agreement reads in pertinent part:

In consideration of the obligations of TAP set forth in this Agreement, conditioned upon TAP's payment in full of the Settlement Amount and except as reserved in paragraph 3 above, the state of Missouri agrees to release and refrain from instituting, directing or maintaining *any administrative claim* or any action seeking exclusions from the state of Missouri's Medicaid program against TAP . . . for the Covered Conduct or for TAP's conviction in the Criminal Action [the Guilty Plea]. Nothing in this Agreement precludes the state of Missouri from taking action against TAP in the event TAP is excluded by the federal government, or for

conduct and practices *other than the Covered Conduct or the conviction in the Criminal Action* (emphasis added) (L.F. 153).²

In Paragraph 5 of the Agreement, the State of Missouri “agrees that it shall not investigate, prosecute, or refer for prosecution or investigation to any agency, TAP . . . for the Covered Conduct” (L.F. 154). Similarly, in Paragraph 6, “TAP fully and finally releases the state of Missouri, its agencies, employees, servants, and agents from any claims” which TAP had or could have asserted “against the state of Missouri, its agencies, employees, servants, and agents, related to or arising from the investigation and prosecution of the Covered Conduct” (L.F. 154).

In Paragraph 7 of the Agreement, TAP agreed to waive certain defenses “*based in whole or in part* on a contention that, under the Double Jeopardy Clause of the Fifth Amendment of the Constitution or Excessive Fines Clause of the Eighth Amendment of the Constitution, this Settlement Agreement bars a remedy sought in . . . [an] administrative action” (emphasis added) (L.F. 154). Paragraph 7 further states that “nothing in this paragraph is intended to, or will operate to, limit the scope of paragraph 5, in which the state of Missouri agrees not to prosecute or investigate TAP for certain conduct” (L.F. 154-55).

On January 7, 2004, pursuant to § 338.065, RSMo 2000, the Board filed a Felony Conviction Complaint with itself, seeking to impose discipline against the pharmacy

² “Criminal Action” is defined in Preamble Paragraph C and is synonymous with the Guilty Plea (L.F. 145-46).

permit held by TAP based exclusively on TAP's Guilty Plea (L.F. 15-17). On or about January 9, 2004, a Notice of Felony Disciplinary Hearing was mailed to TAP stating that "the Missouri Board of Pharmacy, being in receipt of a judgment in a criminal case, . . . hereby notices you for a hearing" (L.F. 18). The notice further stated that the Board "shall, pursuant to Section 338.065.1, RSMo 2000, hold a hearing for the discipline of your license" (L.F. 18). The hearing was continued, and on or about August 13, 2004, a second Notice of Felony Disciplinary Hearing was mailed to TAP which is almost identical to the first notice and includes the same language as quoted herein (L.F. 20-21).

On September 9, 2004, the Board held a disciplinary hearing pursuant to § 338.065.1 (L.F. 22). The Board's president began the hearing by stating that the Board was in receipt of TAP's Guilty Plea and was holding the hearing "to determine the appropriate discipline in this action" (L.F. 26). In discussing preliminary matters at the start of the hearing, the Board's president twice characterized the hearing as a "disciplinary hearing" (L.F. 29). On or about March 16, 2005, the Board mailed to TAP an executed copy of its Findings of Fact, Conclusions of Law, and Disciplinary Order, which placed TAP's pharmacy permit on probation for a period of three (3) years (L.F. 167-70).³

³ The Findings of Fact, Conclusions of Law and Disciplinary Order erroneously reference §§ 338.055 and 621.110. It is undisputed that the Board held the disciplinary hearing and subsequently imposed discipline against TAP's permit pursuant to § 338.065. References to §§ 338.055 and 621.110 are the result of drafting errors.

TAP filed a Petition for Review, appealing the Board's decision to place TAP's Missouri pharmacy permit on probation (L.F. 5-12). The Cole County Circuit Court reversed the Board's Findings of Fact, Conclusions of Law and Disciplinary Order (L.F. 221-31). The Board timely appealed this ruling, and on November 30, 2006, the Western District Court of Appeals affirmed the Board's decision placing TAP's permit on probation. TAP timely filed an Application for Transfer, and on March 20, 2007, this Court sustained said application and ordered the cause to be transferred to the Supreme Court of Missouri.

Points Relied On

I. The State Board of Pharmacy erred in disciplining TAP's pharmacy permit because, under § 536.140.2, RSMo 2000, the decision is in violation of constitutional provisions, is in excess of the statutory authority or jurisdiction of the agency, is unsupported by competent and substantial evidence upon the whole record, is unauthorized by law, is made upon unlawful procedure or without a fair trial, is arbitrary, capricious or unreasonable, and involves an abuse of discretion in that TAP's due process rights were violated under the United States Constitution and the Missouri Constitution where the Board disciplined TAP's permit without holding a hearing to determine whether cause to discipline existed and where the complaint was not heard by a fair and impartial tribunal.

ARO Systems v. Supervisor of Liquor Control, 684 S.W.2d 504 (Mo. App. 1984)

Goldberg v. Kelly, 397 U.S. 254 (1970)

State Bd., Reg. for Healing Arts v. Finch, 514 S.W.2d 608 (Mo. App. K.C. 1974)

State ex rel. American Institute of Marketing Systems, Inc. v. Missouri Real Estate Commission, 461 S.W.2d 902 (Mo. App. 1970)

II. The State Board of Pharmacy erred in disciplining TAP's pharmacy permit because, under § 536.140.2, RSMo 2000, the decision is unsupported by competent and substantial evidence upon the whole record, is unauthorized by law, is arbitrary, capricious or unreasonable, and involves an abuse of discretion in that the State of Missouri entered into a State Settlement Agreement and Release with TAP, releasing all claims by the state against TAP for its Guilty Plea as well as the conduct underlying TAP's Guilty Plea, thereby prohibiting and estopping the Board from disciplining TAP's pharmacy permit based upon that conduct or TAP's Guilty Plea.

Andes v. Albano, 853 S.W.2d 936 (Mo. banc 1993)

Lacey v. State Bd., Reg. for Healing Arts, 131 S.W.3d 831 (Mo. App. W.D. 2004)

Tadrus v. Missouri Bd. of Pharmacy, 849 S.W.2d 222 (Mo. App. W.D. 1993)

Tuttle v. Muenks, 21 S.W.3d 6 (Mo. App. W.D. 2000)

Argument

I. The State Board of Pharmacy erred in disciplining TAP's pharmacy permit because, under § 536.140.2, RSMo 2000, the decision is in violation of constitutional provisions, is in excess of the statutory authority or jurisdiction of the agency, is unsupported by competent and substantial evidence upon the whole record, is unauthorized by law, is made upon unlawful procedure or without a fair trial, is arbitrary, capricious or unreasonable, and involves an abuse of discretion in that TAP's due process rights were violated under the United States Constitution and the Missouri Constitution where the Board disciplined TAP's permit without holding a hearing to determine whether cause to discipline existed and where the complaint was not heard by a fair and impartial tribunal.

1. Standard of Review

Article V, Section 18 of the Missouri Constitution provides for judicial review of administrative actions to determine whether the agency actions “are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.” Consistent with the constitutional standard, § 536.140.2 provides for appellate review of the agency decision, rather than the decision of the trial court, to determine whether the agency action: 1) is in violation of constitutional provisions, 2) is in excess of the statutory authority or jurisdiction of the agency, 3) is unsupported by competent and substantial evidence upon the whole record, 4) is unauthorized by law, 5) is made upon unlawful procedure or

without a fair trial, 6) is arbitrary, capricious or unreasonable, or 7) involves an abuse of discretion. *Lagud v. Kansas City Board*, 136 S.W.3d 786, 791 (Mo. banc 2004).

A reviewing court does not view the evidence in the light most favorable to the agency's decision. *Id.* Rather, the court "must look to the whole record in reviewing the Board's decision, not merely at that evidence that supports its decision." *Id.* While § 536.140.5 prohibits the court from substituting its discretion for discretion legally vested in the agency, "[w]henver the action of the agency being reviewed does not involve the exercise by the agency of administrative discretion in the light of the facts, but involves only the application by the agency of the law to the facts, the court may weigh the evidence for itself and determine the facts accordingly." § 536.140.3.

2. TAP's due process rights were violated where the Board disciplined TAP's permit without holding a hearing to determine whether cause to discipline existed.

In its haste to impose discipline on TAP's pharmacy license, the Board skipped one critical step. At no time did the Board hold any hearing to establish cause to discipline TAP's license. TAP was provided no opportunity to be heard on the issue of whether cause existed to discipline its license. There are no factual findings as to whether cause existed. The Board's failure to hold such a causal hearing prior to imposing discipline was a violation of TAP's due process rights under both the United States and Missouri Constitution, and mandates reversal of the Board's decision.

"The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest

. . . , it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate safeguards.” *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974)). In *Loudermill*, the Court explained that administrative proceedings require pre-termination and post-termination hearings. *Id.* at 547-48. The pre-termination hearing “should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” *Id.* at 545-46.

Due process requires that parties to an administrative proceeding be afforded an opportunity to be heard at a meaningful time and in a meaningful manner, and with notice and an effective opportunity to defend. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); *see also Jamison v. State*, SC87360 (Mo. banc March 13, 2007). “It is fundamental that constitutional guarantees apply to any state action which affects a property interest represented by a validly issued license. Among these is procedural due process which requires, among other rights, a meaningful opportunity to be heard, to confront and cross-examine adverse witnesses and to present evidence rebutting their testimony.” *ARO Systems v. Supervisor of Liquor Control*, 684 S.W.2d 504, 507 (Mo. App. 1984) (citations omitted).

Disciplining a license is a bifurcated procedure where the agency first must establish that there is cause to believe that there are facts constituting a violation of professional licensing laws that support the discipline of a license *before* it determines the actual discipline. Any charge of violating licensing laws “is comprised of two

components – the facts constituting the violation and the appropriate discipline to be imposed if these facts are found to be true. The licensee is entitled to procedural due process with regard to each component.” *Id.* The issue of whether there is cause to discipline is not before the licensing agency at a disciplinary hearing, the issue of cause having already been determined. *State Bd., Reg. for Healing Arts v. Masters*, 512 S.W.2d 150, 158 (Mo. App. K.C. 1974). The only matter before the Board at a disciplinary hearing is the length and conditions of discipline to be imposed upon a licensee. At a disciplinary hearing, the licensee is given an opportunity to provide evidence relevant to the issue of appropriate disciplinary action. *Id.*

It is undisputed that the sole purpose of the hearing held on September 9, 2004 was to determine the appropriate discipline of TAP’s license. The Notice of Felony Disciplinary Hearing, mailed two days after the complaint was filed with the Board, stated that the Board was holding a hearing “for the discipline of your license” (L.F. 18, 20). Further, the Board’s president began the hearing by stating that the hearing was being held “to determine the appropriate discipline in this action” (L.F. 26). Before TAP received notice of the disciplinary hearing, facts constituting a violation of the Board’s licensing laws had already been determined against TAP.

There is no record of any proceeding, if one in fact even occurred, at which the Board received evidence and determined that facts existed to find cause that TAP violated the Board’s licensing laws. Yet such a determination of cause to discipline TAP’s license was necessarily preliminary to the disciplinary hearing. An effective opportunity to defend must include advance notice of the right to contest charges and the

right to present evidence. TAP did not receive notice of the Board's proceedings to find cause, in violation of § 536.067. The opportunity to be heard, to confront and cross-examine witnesses, to present evidence rebutting that testimony and to raise the Agreement as an affirmative defense is only meaningful when the opportunity is afforded *prior* to the Board's determination of cause. The first time TAP could raise the Agreement as an absolute bar to the Board's proceedings was at the disciplinary hearing, by which time the Board had already determined, in TAP's absence, that cause existed to discipline TAP's permit.

The Western District Court of Appeals' decision infers that the Board does not have to determine whether there is cause to discipline TAP's license. According to the Court, § 338.065 substitutes an adjudication of guilt in a felony criminal proceeding for a finding of cause to discipline by the Administrative Hearing Commission (slip op. at 11). The Court's attempt to confine the area of factual determination to the single question of whether TAP committed a felony might only be persuasive if the statute made a disciplinary hearing mandatory on proof of *any* felony conviction. However, § 338.065 only applies to convictions where the felony offense is reasonably related to the qualifications, functions or duties of the profession or a felony offense, an essential element of which is fraud, dishonesty or an act of violence, or for a felony offense involving moral turpitude.

§ 338.065 necessarily requires the Board to exercise discretion and make a factual determination that the felony offense falls into at least one of the above-referenced categories. "The use of the term 'may' necessarily implies that the [board action] is not

mandatory, and that the conferee of the power has the discretion in exercising it. And since there is a discretion to be exercised, it follows that there are factual determinations to be taken into account, the determination of which must be reasonable and is subject to judicial review.” *State Bd., Reg. for Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. App. K.C. 1974). The *Finch* court further stated, “It is inconceivable that the legislature intended any separation of the exercise of discretion from the determination of facts which are necessarily preliminary to and decisive of how that discretion is to be exercised.” *Id.* at 614. Pursuant to § 536.130.2, the Board certified the records filed in the circuit court, however, there is no record of the Board’s proceedings to find cause and no way to test the reasonableness of the Board’s causal determination (L.F. 13-14). Due process requires that the Board’s decision finding cause be subject to judicial review. But here, there are no factual findings for this Court to review. “Any discretion exercised in a manner unrelated to factual findings could be vulnerable to serious charges that this constituted arbitrary action.” *Id.* at 615. Not even the Board’s decision following the disciplinary hearing includes findings of fact that TAP was convicted of a felony reasonably related to the practice of pharmacy (L.F. 168). A reviewing court “will not infer findings from the Board’s final decision.” *KV Pharmaceutical v. State Bd. of Pharmacy*, 43 S.W.3d 306, 310 (Mo. banc 2001).

The Western District Court of Appeals’ ruling that the Board’s disciplinary hearing did not violate TAP’s due process rights rests upon the holding that “TAP received notice of why the Board believed its permit was subject to discipline and was afforded an opportunity to tell its side of the story at a time ‘when the deprivation [could

have] still be[en] prevented” (slip op. at 19). The fact that the Board and TAP both presented evidence at the disciplinary hearing does not retroactively cure the Board’s failure to provide TAP with notice and opportunity to present evidence at the time when the Board determined that there was cause to discipline TAP’s license. It is suggested that so long as TAP is afforded a hearing at some point in the proceedings, TAP’s due process rights are not violated. Left unexplained is the interrelationship between 1) the determination of whether there are facts constituting cause to discipline and 2) the determination to impose discipline. The Western District Court of Appeals treats these two components as one, even though the facts clearly show that these two determinations were made at different times and due process is required before each determination is made. The Court’s holding rejects TAP’s due process rights to be present when the Board determines that there is cause to discipline its license, in conflict with fundamental principles of due process and administrative law.

By summarily and independently determining that facts existed constituting a violation of the Board’s licensing laws, without providing TAP with notice and the opportunity to participate in the proceedings, the Board failed to provide even the bare minimum due process rights necessary to making such a causal determination. The Board’s decision was in violation of constitutional provisions, was in excess of the statutory authority or jurisdiction of the agency, was unsupported by competent and substantial evidence upon the whole record, was unauthorized by law, was made upon unlawful procedure or without a fair trial, was arbitrary, capricious or unreasonable, and involved an abuse of discretion.

3. TAP’s due process rights were violated where the complaint was not heard by a fair and impartial tribunal.

Amendment XIV, Section 1 of the United States Constitution provides that no state shall “deprive any person of life, liberty or property without due process of law.” Article I, Section 10 of the Missouri Constitution also requires due process of law before the deprivation of life, liberty or property. Section 338.065 violates these fundamental constitutional provisions by authorizing a contested case hearing in front of the very agency that initiates the charges.

When the Administrative Hearing Commission Act was enacted in 1965, it sought to correct the situation where “the board acted as investigator, prosecutor, judge, jury and executioner, all rolled into one.” *State ex rel. American Institute of Marketing Systems, Inc. v. Missouri Real Estate Commission*, 461 S.W.2d 902, 908 (Mo. App. 1970). The purpose and intent of the legislature was summarized as follows:

In such a situation, even the best intentioned individuals could not function with actual and complete fairness and impartiality. Prejudgment of a case was inevitable. It was to remedy this situation that the Administrative Hearing Commission Act was passed, setting up an impartial tribunal to hold evidentiary hearings and make findings of fact and conclusions of law upon the evidence presented by the licensing board on one side, and by the licensee . . . on the other side.

Id.

The Board made its own investigation and determined that cause existed to discipline TAP's license, without providing TAP with notice and an opportunity to be heard on the matter. There is no record of the Board's causal determination. The Board's attorney drafted a complaint which was then filed with the Board (L.F. 15-17). The Board held a hearing at which the Board both presented evidence and ruled upon the admissibility of that same evidence (L.F. 33-35). The Board then decided what discipline should be imposed against TAP (L.F. 167-70). The Board's complaint was not heard by a fair and impartial tribunal.

To discipline TAP's permit, the Board was required to file its complaint with the Administrative Hearing Commission (hereinafter "AHC"). Instead, the Board chose to bypass the impartial tribunal and deny TAP due process of law. The disciplinary action taken against TAP is in violation of constitutional provisions, is in excess of the statutory authority or jurisdiction of the agency, is unsupported by competent and substantial evidence upon the whole record, is unauthorized by law, is made upon unlawful procedure or without a fair trial, is arbitrary, capricious or unreasonable, and involves an abuse of discretion.

II. The State Board of Pharmacy erred in disciplining TAP’s pharmacy permit because, under § 536.140.2, RSMo 2000, the decision is unsupported by competent and substantial evidence upon the whole record, is unauthorized by law, is arbitrary, capricious or unreasonable, and involves an abuse of discretion in that the State of Missouri entered into a State Settlement Agreement and Release with TAP, releasing all claims by the state against TAP for its Guilty Plea as well as the conduct underlying TAP’s Guilty Plea, thereby prohibiting and estopping the Board from disciplining TAP’s pharmacy permit based upon that conduct or TAP’s Guilty Plea.

1. Standard of Review

Article V, Section 18 of the Missouri Constitution provides for judicial review of administrative actions to determine whether the agency actions “are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.” Consistent with the constitutional standard, § 536.140.2 provides for appellate review of the agency decision, rather than the decision of the trial court, to determine whether the agency action: 1) is in violation of constitutional provisions, 2) is in excess of the statutory authority or jurisdiction of the agency, 3) is unsupported by competent and substantial evidence upon the whole record, 4) is unauthorized by law, 5) is made upon unlawful procedure or without a fair trial, 6) is arbitrary, capricious or unreasonable, or 7) involves an abuse of discretion. *Lagud*, 136 S.W.3d at 791.

A reviewing court does not view the evidence in the light most favorable to the agency's decision. *Id.* Rather, the court "must look to the whole record in reviewing the Board's decision, not merely at that evidence that supports its decision." *Id.*

While § 536.140.5 prohibits the court from substituting its discretion for discretion legally vested in the agency, "[w]henver the action of the agency being reviewed does not involve the exercise by the agency of administrative discretion in the light of the facts, but involves only the application by the agency of the law to the facts, the court may weigh the evidence for itself and determine the facts accordingly." § 536.140.3. Where an agency's decision is based upon an interpretation or application of law, the decision is subject to the independent judgment of the reviewing court. *See J.H. Berra Const. Co., Inc. v. Holman*, 152 S.W.3d 281, 282 (Mo. banc 2005). "The decision of the administrative body on a question of law does not preclude, restrict or control review of the issue by the Court." *Kansas City v. Mo. Comm'n on Human Rights*, 632 S.W.2d 488, 490 (Mo. banc 1982). Contract interpretation is a question of law on which a reviewing court's decision is entirely independent from the agency decision. *Lacey v. State Bd., Reg. for Healing Arts*, 131 S.W.3d 831, 838 (Mo. App. W.D. 2004). While the parties dispute the scope and effect of the Agreement, its interpretation, including its breadth, does not involve the exercise by the Board of administrative discretion. The interpretation of the Agreement involves only the application of the law to the facts. This Court may weigh the evidence for itself and interpret the Agreement.

2. The Settlement Agreement entered into by the State of Missouri and TAP prohibits the Board from disciplining TAP's pharmacy permit.

In the fall of 2001, TAP reached what it believed to be a global peace with the federal government and the governments of all 50 states regarding criminal and alleged civil and administrative liability. As part of that global peace (which came at a total price to TAP of over 800 million dollars), TAP entered into a settlement agreement with the State of Missouri (L.F. 145-66). TAP paid the State of Missouri nearly two million dollars in exchange for the State releasing claims, including administrative claims, relating to the conduct underlying the Guilty Plea and the Guilty Plea itself (*See generally* L.F. 145-166).

That global peace had been respected nationwide until the Board filed the instant action against TAP in January, 2004 (L.F. 15). It is undisputed that the discipline imposed by the Board upon TAP's license was based exclusively on the Guilty Plea. Therefore, the issue presented here is rather simple: was the Board's action in placing TAP's license on probation for three years released under the terms of the Agreement? Because the answer to that question is "yes" as a matter of law, TAP asks that this Court reverse the Board's order of discipline as released by the Agreement, and remand the case back to the circuit court for entry of a final judgment in favor of TAP.

Missouri courts treat settlement agreements as contracts between the parties, and the interpretation of settlement agreements is therefore governed by the same principles applicable to any other contractual agreement. *Andes v. Albano*, 853 S.W.2d 936, 941 (Mo. banc 1993); *Lacey*, 131 S.W.3d at 838. Under Missouri law, "the cardinal principle

for contract interpretation is to ascertain the intention of the parties and to give effect to that intent.” *Lacey*, 131 S.W.3d at 838. “Language that is plain and unambiguous on its face will be given full effect within the context of the agreement as a whole.” *Andes*, 853 S.W.2d at 941. “In determining the intent of the parties to a contract,” this Court is to “review the terms of the contract as a whole, not in isolation.” *Lacey*, 131 S.W.3d at 838.

The Agreement was entered into by “the state of Missouri, on behalf of itself, its officers, agents, agencies, and departments” (L.F. 152). Initially, the Board sought to avoid the bar of the Agreement by arguing that despite this clear language, it was not subject to the Agreement (L.F. 200-01). The Board abandoned this untenable argument, given its silence on the issue in briefing before the Appellate Court. The Agreement was negotiated and signed by the Missouri Attorney General’s Office (L.F. 165). This Court has previously noted that § 27.060 “grants the attorney general the power to control and manage litigation for the State” and his broad common law powers to manage litigation grant him the authority to “enter into settlement in behalf of the State.” *State ex. Rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 128 (Mo. banc 2000). It is simply beyond dispute that the Board, as an “agency” of the State of Missouri, is bound by and subject to the terms of the Agreement. *See* L.F. 152; § 338.110, § 536.010(5), § 536.010(1).

It is likewise clear that the Board’s claim is also barred by the terms of the Agreement. The specific “release” provisions of the Agreement can be found at Paragraphs 2 and 4. Individually, either of these paragraphs is sufficient to prohibit the Board from disciplining TAP’s pharmacy license.

Paragraph 2 of the Agreement states, in pertinent part:

In consideration of this Agreement and payment set forth herein and subject to the exception from the release set forth in Paragraph 3 below, the state of Missouri, on behalf of itself, its officers, agents, agencies, and departments, shall release and forever discharge TAP . . . from any civil or administrative claims for damages or penalties that the state of Missouri has or may have relating to the Covered Conduct as defined in Preamble Paragraph F (L.F. 152).

Paragraph 4 of the Agreement states, in pertinent part:

In consideration of the obligations of TAP set forth in this Agreement, conditioned upon TAP's payment in full of the Settlement Amount and except as reserved in Paragraph 3 above, the state of Missouri agrees to release and refrain from instituting, directing, or maintaining *any administrative claim* or any action seeking exclusions from the state of Missouri's Medicaid program against TAP, for the Covered Conduct or for TAP's conviction in the Criminal Action [the Guilty Plea]. Nothing in the Agreement precludes the state of Missouri from taking action against TAP in the event TAP is excluded by the federal government, or for conduct and

practices other than the Covered Conduct or the conviction in the Criminal Action (emphasis added) (L.F. 153).⁴

Both of these paragraphs specifically note that they are limited pursuant to Paragraph 3 of the Agreement, which provides that the State did not release TAP from any administrative liability, except as explicitly stated in the Agreement (L.F. 152-153). Nonetheless, both Paragraphs 2 and 4 explicitly do release TAP from the administrative claims pursued by the Board here, which were based entirely upon TAP's Guilty Plea in the Criminal Action.

First, the Board's action runs afoul of Paragraph 4 of the Agreement. Under this paragraph, the State of Missouri agreed to release and refrain from: (1) instituting, directing or maintaining any administrative claim for the Covered Conduct or for TAP's Guilty Plea; and (2) instituting, directing, or maintaining any action seeking exclusion from the State's Medicaid program against TAP for the Covered Conduct or for TAP's Guilty Plea (L.F. 153). The Western District Court of Appeals accepted the Board's argument that Paragraph 4 did not apply because it "concern[s] only claims seeking exclusions from the state of Missouri's Medicaid program" (slip op. 23). Yet the language of Paragraph 4 evidences a much broader release than the Board acknowledges.

⁴ A description of the Covered Conduct referred to in Paragraphs 2 and 4 encompasses four pages of the Agreement (L.F. 146-149). Included within the Covered Conduct was precisely the conduct that was the subject of the Guilty Plea.

The Board's interpretation ignores the disjunctive "or" found in Paragraph 4. The provision barring the State of Missouri from bringing "any administrative claim" is separated from the provision referring to "any action seeking exclusions from the state of Missouri's Medicaid program" by the disjunctive "or" (L.F. 153). The disjunctive "or" in its ordinary sense marks an alternative generally corresponding to the term "either." *Council Plaza Redevelopment Corp. v. Duffey*, 439 S.W.2d 526, 532 (Mo. banc 1969); *Stonger ex rel. Stonger v. Riggs*, 85 S.W.3d 703, 708 (Mo. App. W.D. 2002). Under this canon of construction, the Board's claim against TAP was released if it was *either* an "administrative claim [for the Covered Conduct or for TAP's Guilty Plea]" *or* an "action seeking exclusion from the state of Missouri's Medicaid program [for the Covered Conduct or for TAP's Guilty Plea]." *See Stonger*, 85 S.W.2d at 708. Because the Board's action falls under the first clause of Paragraph 4, that claim was released by the Agreement.

In addition, the Board's reading would impermissibly render the first part of Paragraph 4 redundant and superfluous. Under Missouri law, "each term" of a settlement agreement "is construed to avoid an effect which renders other terms meaningless." *Tuttle v. Muenks*, 21 S.W.3d 6, 11 (Mo. App. W.D. 2000); *see also Transit Cas. Co. in Receivership v. Certain Underwriters at Lloyd's of London*, 963 S.W.2d 392, 398 (Mo. App. W.D. 1998) ("a construction attributing a reasonable meaning to each phrase and clause, and harmonizing all provisions of the agreement is preferred to one which leaves some of the provisions without function or sense"). Here, if the Board's reading were correct and the only "administrative claim" released by Paragraph 4 was that "seeking

exclusion from the State’s Medicaid program,” then the clause referring to “any administrative claim” would be unnecessary. Presumably, an “administrative claim” seeking exclusion from the State’s Medicaid Program would already be encompassed by the language of the second part of Paragraph 4, releasing “any action seeking exclusions from the state of Missouri’s Medicaid program” (emphasis added) (L.F. 153). The Board’s limited reading of Paragraph 4 renders the phrase “any administrative claims” useless and redundant, and therefore, the Board’s interpretation should be rejected.

Contrary to the Board’s reading, the “preferred construction” under Missouri law is “one that provides a reasonable meaning to each phrase and clause, not one that leaves some of the provisions without function or sense.” *Tuttle*, 21 S.W.3d at 12. And the only construction of the Agreement allowing the phrase “any administrative claim” to have any function or sense is the construction put forward by TAP: that any administrative claims for the Covered Conduct or the Guilty Plea itself have been released by the State. This is precisely the type of claim that the Board pursued when it chose to discipline TAP’s pharmacy license based solely on the fact that TAP entered the Guilty Plea.

The Board’s action also cannot be squared with Paragraph 2 of the Agreement. The Board has long maintained, and the Western District Court of Appeals agreed, that Paragraph 2 of the Agreement did not bar the Board’s action because “the only administrative liability the State agreed to release TAP from . . . is for ‘administrative claims for damages and penalties’” (slip op. 22). Under this reading, the Board’s action seeking to “sanction TAP’s pharmacy permit” was not a claim for “damages or penalties,” but instead was “intended to protect the public and not to punish,” and

therefore, not released by Paragraph 2 (slip op. at 22). The Board's reasoning should be rejected.

First, the Board's claim that placing TAP's pharmacy license on three years probation is not a "penalty," and thus not released by Paragraph 2, cannot be harmonized with the decisions of multiple Missouri courts, which have labeled similar disciplinary actions taken by the Board as "penalties." See *Tadrus v. Missouri Bd. of Pharmacy*, 849 S.W.2d 222, 228 (Mo. App. W.D. 1993) ("punishment" assessed by Board of three months suspension and five years probation on pharmacist's license was a "penalty" left largely to discretion of the board); *Dunning v. Board of Pharmacy*, 630 S.W.2d 155, 157 (Mo. App. E.D. 1982) (Board imposed "penalties" of six month suspension and eighteen month probation on pharmacist's license). Similarly, Missouri appellate courts have routinely described disciplinary actions taken by other state licensing agencies against a license, such as suspending or placing a license on probation, as a "penalty." See *Orion Security, Inc. v. Board of Police Commissioners of Kansas City, Missouri*, 90 S.W.3d 157, 163 (Mo. App. W.D. 2002) (in an action to discipline a license to operate a private security service, court frequently refers to similar disciplinary actions by licensing boards as "penalties"); *Ray v. Director of Revenue*, 970 S.W.2d 910, 910 (Mo. App. E.D. 1998) (discussing changing "penalty" from revocation of license for one year to suspension of license for thirty days); *M.M. v. State Board of Accountancy*, 728 S.W.2d 726, 727 (Mo. App. E.D. 1987) (State Board of Accountancy's revocation of CPA's certification described as "the harshest penalty" the board could impose).

The Western District Court of Appeals' reliance on this Court's decision in *In re Caranchini* in support of the Board's argument is misguided (slip op. at 22). In that case, this Court's examination was limited to whether disciplinary action on an attorney's license was a punishment for purposes of the double jeopardy clause of the United States and Missouri Constitutions, preventing further discipline. *See* 956 S.W.2d 910, 914 (Mo. banc 1997). But that is not the issue raised in this case. Here, the question is whether the Board's action constitutes a "penalty" under Paragraph 2 of the Agreement. And as to that question, the *In re Caranchini* Court actually described the licensing board's act of disciplining a license as "a civil penalty" and acknowledged that while the United States Supreme Court previously equated such sanction as "synonymous with the term *penalty*," the Court never indicated that it was "*punishment* for purposes of double jeopardy analysis." *Id.* (citing *In re Ruffalo*, 390 U.S. 544 (1968)).

The Board has long maintained that its action was not a "penalty" within the meaning of Paragraph 2 of the Agreement, but instead "remedial" in nature and "intended to protect the public and not punish" (slip op. 22). The Western District Court of Appeals accepted this argument, and also suggested without any support that "damages and penalties' when used in the context of administrative claims, however, suggests liability of a punitive nature" (slip op. 22). Neither the Board nor the Court of Appeals has ever identified authority supporting these assertions. Nor has the Board ever pointed to authority that supports the notion that the terms "remedial" and "penalty" are inconsistent with one another, such that an action could not be both "remedial" in nature while also constituting a "penalty" under Paragraph 2 of the Agreement. Language that is plain and

unambiguous must be given full effect. “Any civil or administrative claims for damages or penalties” are released and forever discharged (emphasis added) (L.F. 152). The Board’s discipline of TAP’s license is a penalty which the Board is specifically prohibited from imposing pursuant to Paragraph 2 of the Agreement.

Even if the Board could distinguish between “remedial” action and a “penalty,” it has never explained: (1) what remedial purpose was served by placing TAP’s pharmacy license on probation for three years; nor (2) how the public was protected in any way by doing so. While the Board may point to cases indicating that licensing laws are generally remedial, and not punitive in nature, that is nothing more than an exercise of form over substance. In this case, the “remedy” had already occurred: TAP pled guilty in the US District Court in Massachusetts and settled the resultant civil claims with the fifty states, including Missouri. The Board’s action, taken nearly three years after the Guilty Plea on which said action is entirely based, served no other purpose than to once again punish TAP because TAP had pled guilty. It falls squarely within the definition of an administrative claim for penalties, which was released under Paragraph 2 of the Agreement.

The Board and the Western District Court of Appeals also mistakenly relied on Paragraph 7 of the Agreement as a justification of the Board’s action in disciplining TAP’s license (slip op. 25). In that paragraph, TAP agreed to waive defenses “*based in whole or in part* on a contention that, under the Double Jeopardy Clause of the Fifth Amendment of the Constitution or Excessive Fines Clause of the Eighth Amendment of the Constitution, this Settlement Agreement bars a remedy sought in . . . [an]

administrative action” (L.F. 154-155). TAP, however, has never maintained that the Board’s action is barred by either the Fifth or Eighth Amendment to the Constitution. Rather, the Board’s action is one that has been specifically released under the terms of the Agreement. If TAP were somehow prohibited from raising the Agreement as a defense in such a context, than the entire Agreement, and its releases, are rendered totally meaningless.

Finally, the Board’s action is inconsistent with Paragraph 5 of the Agreement. This provision provides that in consideration of the resolution of the federal government’s criminal action against TAP, “the state of Missouri agrees that it shall not investigate, prosecute, or refer for prosecution or investigation to any agency, TAP . . . for the Covered Conduct” (L.F. 154).⁵ The Board’s apparent assertion that it may discipline TAP’s pharmacy license based solely on TAP’s Guilty Plea rings hollow when viewed against this provision prohibiting Missouri state agencies from prosecuting or investigating TAP for any of the Covered Conduct, a portion of which was resolved by that very Guilty Plea. *See Lacey*, 131 S.W.3d at 838 (“contract language is not interpreted in a vacuum, but by reference to the contract as a whole”). This provides yet another reason why the Board’s action is barred by the Agreement.

The Board’s action in disciplining TAP’s pharmacy permit is expressly prohibited by the Agreement. Contrary to every other state agency in Missouri, and every other

⁵ Paragraph 7 also made clear that “nothing in this paragraph” limits the scope of Paragraph 5 of the Agreement.

state agency in the other 49 states that entered similar agreements with TAP, the Board unilaterally decided that it continued to have a right to discipline TAP based solely on the Guilty Plea. Parties should feel free to enter into universal agreements with the State of Missouri to resolve all the claims the state may have against it, without existing in fear that years later a renegade state agency will determine, on its own, that it is not bound by the terms of that agreement. The Board's action is an improper effort to resurrect a claim that the State of Missouri released when it entered into the Agreement with TAP. Its action is unsupported by competent and substantial evidence upon the whole record, is unauthorized by law, is arbitrary, capricious and unreasonable, and involves an abuse of discretion. It should be reversed, and the matter remanded to the Circuit Court of Cole County for entry of final judgment on TAP's behalf.

Conclusion

For the foregoing reasons, TAP Pharmaceutical Products Inc., d/b/a Pharmacy Solutions, respectfully requests that this Court reverse the decision of the State Board of Pharmacy imposing discipline against TAP's pharmacy permit and further find that the State Settlement Agreement and Release released all claims by the State of Missouri and the State Board of Pharmacy against TAP for its Guilty Plea as well as the conduct underlying TAP's Guilty Plea.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 9th day of April, 2007, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 8,176 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Michael J. Schmid