
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

Substitute Reply Brief of Respondent Filing as Appellant Pursuant to Rule 84.05(e)

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Argument

In December, 2001, Respondent TAP Pharmaceutical Products Inc., d/b/a Pharmacy Solutions, (hereinafter “TAP”), entered into a settlement agreement with the state of Missouri (hereinafter “the Agreement”), to resolve alleged civil and administrative claims stemming, in part, from conduct underlying a guilty plea TAP entered with the United States Department of Justice. Under the Agreement, in exchange for payment of nearly two million dollars, the state of Missouri agreed to release TAP from civil and administrative claims related to TAP’s criminal plea, along with certain other “Covered Conduct” as defined by the Agreement. Nonetheless, Appellant State Board of Pharmacy (hereinafter “the Board”) determined that TAP’s pharmacy license was subject to discipline by virtue of the fact that TAP had pled guilty in a criminal action and held a hearing on the issue of discipline, which resulted in the Board placing TAP’s license on three years probation.

The Board’s decision should be reversed for two reasons. First, the Board violated TAP’s due process rights by failing to provide TAP with notice and an opportunity to be heard on the issue of whether there was cause to discipline TAP’s license. Second, the Board’s claim to discipline TAP’s license was released by the plain language of the Agreement. The Board’s response brief (hereinafter “Board Brief”) before this Court fails to offer anything countering either of these truths. This Court should reverse the Board’s imposition of discipline on TAP’s pharmacy license.

1. The burden of persuasion in the appellate court is not an issue properly preserved for review.

Before addressing the points raised by TAP, the Board impermissibly raises for the first time, an issue never previously addressed, and not before this Court in any event. The Board asks, “Who bears the burden in an appeal from a circuit court decision reversing an agency decision?,” and then attacks the Eastern District’s recent decision in *Versatile Management Group, Inc. v. Finke*, No. ED88144 (Mo. App. E.D. May 15, 2007), stopping just short of calling for its outright reversal (Board Brief at 11).

Other than acknowledging that the Board is dissatisfied with *Versatile Management*, it is difficult to understand why the Board spends nearly five pages discussing the decision without a single mention of why it applies to this case. *Versatile Management* may have been applicable when the Board appealed the circuit court decision, but neither TAP nor the Board raised this issue for the court’s determination. “Points raised for the first time on appeal are not preserved for review.” *Artman v. State Bd. of Registration for the Healing Arts*, 918 S.W.2d 247, 252 (Mo. banc 1996). The Board’s thinly veiled attempt to have this Court reverse a lower court decision that is not before the Court, regarding an issue not preserved for appeal, should be disregarded. *Smith v. Shaw*, 159 S.W.3d 830, 835 (Mo. banc 2005) (“This Court will generally not convict a lower court of error on an issue that was not put before it to decide.”).

2. The Board violated TAP's due process rights by disciplining TAP's license without holding any causal hearing.

Under Missouri law, disciplining a license is a bifurcated procedure, consisting of two components: (1) whether cause exists to discipline a license; and (2) the appropriate discipline. *ARO Systems v. Supervisor of Liquor Control*, 684 S.W.2d 504, 507 (Mo. App. E.D. 1984). A licensee is entitled to procedural due process at each step of the process. *Id.* In placing TAP's pharmacy license on three years probation, the Board failed to follow these procedures. The Board's failure to satisfy due process mandates reversal of the Board's order.

In its brief, the Board alternates between two equally unavailing arguments. First, the Board claims TAP received all the process it was due by its receipt of notice and an opportunity to be heard after cause was determined (Board Brief at 16). Alternatively, the Board argues that it had not in fact determined cause prior to TAP's disciplinary hearing, and therefore, nothing precluded TAP from arguing that cause to discipline did not exist at its disciplinary hearing (Board Brief at 28, n.5). As demonstrated below, neither of these contentions finds support in either law or fact and fails to satisfy due process.

The Board first contends that TAP was afforded due process rights because it received a hearing, with notice and an effective opportunity to defend (Board Brief at 16). The Board suggests that any wrongdoing on its part was therefore cured by the fact that TAP received notice of the disciplinary hearing, was represented by counsel and was given the opportunity to present evidence (Board Brief at 16-19). The Board's argument

ignores the central issue: TAP was not afforded notice, a hearing, or an effective opportunity to defend at the time the Board determined that cause existed to discipline its license. The events that took place at the *disciplinary* hearing do not absolve the Board of its duty to provide constitutional safeguards of notice and a hearing with regard to the primary determination of whether or not there was cause to discipline the license in the first place. *ARO Systems*, 684 S.W.2d at 507 (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.”).

Once the Board had determined that there was cause to discipline TAP’s pharmacy license, deprivation of TAP’s property interest in its pharmacy license had already been decided. All that remained was a determination by the Board of how much of a deprivation would occur. TAP’s “due process” rights, such as they were provided, were limited to receiving notice and an opportunity to be heard as to what level of discipline would be imposed, not whether discipline should be imposed. The opportunity to be heard, to confront and cross-examine witnesses and to present evidence rebutting that testimony is not meaningful where these due process rights are afforded *after* the need for them has already passed. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); *see also ARO Systems*, 684 S.W.2d at 507.

Apparently realizing the futility of its initial argument, the Board later acknowledges the necessity of a determination of cause to discipline: “§338.065 does not apply to all felony convictions, so someone has to determine whether a particular felony

conviction fits within the statute” (Board Brief at 27). The Board then assumes it is that “someone,” but in an effort to avoid dealing with the causal determination issue directly, it summarily states that “nothing in the facts” supports TAP’s claim that the Board made a causal determination and found that the felony qualified under § 338.065 before the notice and hearing (Board Brief at 28, n.5). The Board continues that the proceedings were “a request for discipline” and “[w]hether the felony actually fit within the statute remained undecided until the Board took up the matter after the hearing” (Board Brief at 28, n.5). Thus, according to the Board, nothing prevented TAP from arguing that the Board did not have cause to discipline TAP’s license at the hearing (Board Brief at 28, n.5). The Board’s claim is contradicted by the record.

Instead, the record indicates that the hearing held by the Board was for the sole purpose of determining the appropriate discipline. The two hearing notices mailed to TAP were entitled “Notice of Felony Disciplinary Hearing” and 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). In his opening statement, the Board’s legal counsel stated that the parties were present at the “disciplinary hearing” to “discuss the discipline” of TAP (L.F. 30). He further stated that the Board was “entitled to hold a hearing to discipline TAP’s permit” and asked the Board to “impose such discipline” (L.F. 31). And in counsel’s closing statement, he again referred to the hearing as a “disciplinary proceeding” (L.F. 60).

The statements in the Board's prepared notices and by the Board's president and legal counsel clearly show that the issue of cause to discipline had already been determined against TAP. These statements also confirm that the hearing which TAP was afforded was one solely to determine discipline. The issue of whether there is cause to discipline is not before the Board at a disciplinary hearing, the issue of cause having already been determined. *State Bd. of Registration for the Healing Arts v. Masters*, 512 S.W.2d 150, 158 (Mo. App. K.C. 1974); *see also Dunning v. Board of Pharmacy*, 630 S.W.2d 155, 159 (Mo. App. E.D. 1982) (a licensing board does not redetermine the issue of cause to discipline at its disciplinary proceeding). At a disciplinary hearing, the licensee is given an opportunity to provide evidence relevant to the issue of *appropriate disciplinary action*. *See Masters*, 512 S.W.2d at 158; *see also Dunning*, 630 S.W.2d at 158 (at a disciplinary hearing, the Board "is required to determine suitable discipline after a hearing"). TAP did not have notice that the issue of cause was before the Board, and the Board was under no duty to consider evidence presented by TAP regarding this issue. Therefore, the fact that a disciplinary hearing took place and TAP had notice and an opportunity to be heard at that hearing certainly failed to cure the due process deprivation that took place at the cause stage.

Finally, even were the Board correct and it had not made a causal determination prior to the notice and hearing, then the record undeniably supports the charge of bias and a violation of TAP's due process rights. The hearing notices show that the Board was predetermined to reach a particular result: the discipline of TAP's license (L.F. 18, 20). The Board's president exhibited his prejudice towards TAP when he stated that the

hearing was being held “to determine the appropriate discipline in this action” (L.F. 26). “Any administrative decisionmaker who has made an unalterable prejudgment of operative adjudicative facts is considered bias.” *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. E.D. 1990). Furthermore, because “a biased decisionmaker may influence other, impartial adjudicators, the participation of such a decisionmaker in an administrative hearing generally violates due process, even if his vote is not essential to the administrative decision.” *Id.* The record establishes that the Board heard evidence with an unbendable or preconceived notion that TAP was guilty as charged. *Ross v. Robb*, 662 S.W.2d 257, 260 (Mo. banc 1983). The Board’s prior knowledge of facts resulted in an irrevocable commitment on its part to discipline TAP’s license, regardless of what the evidence at the hearing revealed.

All of this could have been avoided had the Board followed the normal course and presented these issues to the Administrative Hearing Commission (hereinafter “the AHC”). The intent of the Administrative Hearing Commission Act was to establish an impartial tribunal which could adjudicate cases fairly and without prejudgment. *State ex rel. American Institute of Marketing Systems, Inc. v. Missouri Real Estate Commission*, 461 S.W.2d 902, 908 (Mo. App. 1970). By the time the hearing was convened, the Board either determined that TAP was guilty of the charges it announced or made an unalterable prejudgment of the operative adjudicative facts that TAP was guilty. Had the Board

simply filed its complaint with the AHC, it could have avoided this entire problem, and TAP's due process rights would not have been violated.¹

The Board fails to come to grips with the fact that TAP was entitled to procedural due process at the time the Board determined that there was cause to discipline TAP's license. The Board is mistaken in its belief that it can make a causal determination without providing TAP a meaningful opportunity to be heard, to confront and cross-examine witnesses, to present evidence rebutting that testimony, or to raise the Agreement as an affirmative defense. The Board fails to understand the constitutional requirement that due process be provided both at the time when the board determines whether there are facts constituting a violation of professional licensing laws and also when the board determines the appropriate discipline to be imposed. *ARO Systems v. Supervisor of Liquor Control*, 684 S.W.2d 504, 507 (Mo. App. E.D. 1984). The lack of a separate causal hearing to which TAP was afforded notice and an opportunity to be heard was a violation of TAP's due process rights. This failure mandates reversal of the Board's order of discipline.

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¹ The Board is correct in noting that due process is satisfied if an administrative hearing, at which an agency plays multiple roles, is subject to judicial review (Board Brief at 20). However, the Board's determination that there were facts constituting cause to discipline TAP's license was not made part of any record. The administrative hearing at which this causal determination was made is not subject to judicial review, and therefore, the Board's combination of roles is in fact a violation of due process.

3. The Agreement entered into by and between the state of Missouri and TAP prohibits the Board from disciplining TAP's pharmacy license.

Regardless of who holds the authority to discipline TAP's license, or even whether the Board satisfied due process in doing so, the Board's entire effort to discipline TAP's license is nonetheless barred by the Agreement between TAP and the state of Missouri. This presents an additional reason the Board's imposition of discipline against TAP's license should be reversed.

The Board attempts to avoid the bar to its claims presented by the Agreement by arguing that the parties to the Agreement did not intend to release TAP from such claims. The Board is incorrect. Contrary to its arguments, both Paragraphs 2 and 4 of the Agreement, by their terms, serve to release the Board's claims. Further, the Board's action is also inconsistent with Paragraph 5 of the Agreement, a paragraph the Board fails to even discuss in its brief. Finally, the Board's efforts to reach outside the language of the Agreement are equally unavailing. As established below, the Board's tortured reading simply cannot be reconciled with either the plain language of the Agreement or the law of this state and should be rejected.

The Board's first salvo is to claim that the Agreement "specifically excludes from release 'administrative liability'" (Board Brief at 29). The Board's sweeping claim, as it appears to later acknowledge, is simply wrong. In fact, as TAP explained in its opening brief, both of the release paragraphs of the Agreement (Paragraphs 2 and 4) specifically provide that the state of Missouri released TAP from certain administrative claims (L.F. 152-53).

The Board next attempts to avoid the release language of Paragraph 2 of the Agreement which releases 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” (L.F. 152). The Board claims that because licensing laws are “remedial in nature” they are not encompassed by the definition of an “administrative claim for damages or penalties” under that paragraph (Board Brief at 30).

The Board fails to offer any authority for the notion that the terms “remedial” and “penalty” are somehow mutually exclusive such that a remedial measure could not constitute a “penalty” under Paragraph 2. This is hardly surprising, given that the courts of this state have routinely labeled as “penalties” similar disciplinary action by licensing boards, including disciplinary actions taken by the Board itself, which the Board would apparently also deem as “remedial.” *See e.g.* TAP Brief at 30 *citing 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 months suspension and eighteen months probation on pharmacist’s license). The Board fails to respond to any of these cases cited by TAP, nor does it come forward with a single case of its own which provides that a licensing board’s imposition of discipline could not constitute a “penalty” under the Agreement.

The Board’s efforts to avoid the release language of Paragraph 4 of the Agreement are likewise flawed. The Board claims that the disputes as to the interpretation of

Paragraph 4 “rest on a grammatical question” (Board Brief at 31). The disagreements are not so limited. Indeed, the disputes regarding Paragraph 4 center on which reading: (1) is consistent with caselaw on statutory interpretation and (2) gives meaning to each phrase or clause of that paragraph. And the only reading of Paragraph 4 that meets these conditions is the one put forward by TAP.

For one thing, the Board fails to explain why the phrase “any administrative claim” is anything but redundant if, as the Board contends, Paragraph 4 is limited to releasing claims for exclusions from the state Medicaid program. As noted in TAP’s brief, a release of any administrative claims seeking exclusion from the state Medicaid program would certainly be covered by the second part of the clause, releasing “any *action* seeking exclusion from the state of Missouri’s Medicaid program” (L.F. 153). The Board’s brief leaves unanswered what purpose the phrase “administrative claims” serves under its reading of Paragraph 4. *See Transit Cas. Co. in Receivership v. Certain Underwriters at Lloyd’s of London*, 963 S.W.2d 392, 397 (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.”).

For another thing, the Board leaves unanswered how its reading can be reconciled with established caselaw that treats the disjunctive “or” as “mark[ing] an alternative which generally corresponds with the word ‘either.’” *Council Plaza Redevelopment Corp. v. Duffey*, 439 S.W.2d 526, 532 (Mo. banc 1969); *see also Boone County Court v. State of Missouri*, 631 S.W.2d 321, 325 (Mo. banc 1982) (where the “disjunctive word ‘or’”

was used, to separate words that “frequently overlap, it is illogical to view them as having the same meaning where, as here, both are used in the alternative.”). According to the Board, “[t]he better reading of Paragraph 4 is that it applies only to administrative claims in *and* exclusion from the Medicaid program” (emphasis added) (Board Brief at 31). This reading not only fails to present any “alternatives,” it disregards the disjunctive “or” and inserts the conjunctive “and.” Had the parties intended the redundancy inherent in the Board’s interpretation then the Agreement would have included the word “and” rather than “or.” See *Council Plaza*, 439 S.W.2d at 532 (refusing to interpret “or” to mean “and”; instead applying “the plain and unambiguous terms used in the sentence in their ordinary sense”). The language of the Agreement, as written, is plain and unambiguous and should be given full effect. *Andes v. Albano*, 853 S.W.2d 936, 941 (Mo. banc 1993). The only reading of Paragraph 4 that makes any sense releases: (1) any administrative claims for the Covered Conduct or Guilty Plea; and (2) any action seeking exclusion from the state Medicaid program.

The Board tries to cover up its inability to come up with a sensible reading of the plain language of Paragraph 4 by charging that TAP’s reading renders Paragraph 3 a nullity. Not so. Paragraph 3 of the Agreement simply provides that the state is not releasing administrative liability “except as explicitly stated in the Agreement” (L.F. 153). And the administrative liability explicitly released by Paragraph 4 is limited to administrative claims “for the Covered Conduct or the conviction of the Criminal Action” (L.F. 153). TAP’s reading provides meaning to both Paragraphs 3 and 4 of the Agreement. The Board’s interpretation does not.

Next, the Board did not even bother to explain how its action in disciplining TAP's license as a result of the Guilty Plea could be harmonized with Paragraph 5 of the Agreement. That paragraph provides that "the state of Missouri agrees that it shall not investigate, prosecute, or refer for prosecution or investigation to any agency TAP, [its subsidiaries, owners, etc.] for the Covered Conduct" (L.F.154). The Board's investigation and prosecution of TAP based solely on TAP's entry of a Guilty Plea designed to resolve a portion of that very "Covered Conduct" runs headlong into the language of Paragraph 5. The Board fails to offer a contrary argument. To borrow a phrase from the Board's own brief, its "silence as to that question, both at the agency level and on appeal, demonstrates its lack of merit" (Board Brief at 28, n. 5).

The remainder of the Board's arguments, all of which exist outside the language of the Agreement, are similarly flawed. The Board first relies on its claim "the state of Missouri neither contemplated any claims other than Medicaid-related claims, nor intended to release any claims other than Medicaid-related claims against TAP" (Board Brief at 33). Of course, TAP never contemplated that it could enter into a global settlement agreement with the 50 states, including the state of Missouri, "expressly conditioned upon resolution of the Criminal Action," pay the state nearly \$2 million, and then have its pharmacy license subject to discipline based solely on the fact that it entered the Guilty Plea in the Criminal Action in the first place (L.F. 154). That said, what the parties "contemplated" is best evidenced by the language of the Agreement, and the language demonstrates that the Board's claims here have been released. *See Crumbaker v. Zadow*, 151 S.W.3d 94, 97-98 (Mo. App. E.D. 2004) ("Interpretation of a release is

governed by the same principles applicable to any other contractual agreement, and the primary rule of construction is to give effect to the parties' intent, which is to be determined solely from the four corners of the contract itself.”).

The Board's continued, puzzling reliance on *Commonwealth of Pennsylvania v. TAP Pharmaceutical Products, Inc., et al.*, 885 A.2d 1127 (2005), is as mystifying as it is irrelevant. The settlement agreement referenced in *Commonwealth* is between the state of Pennsylvania and Bayer Corporation, a company which has no relationship to TAP whatsoever. *Id.* at 1148-49. The terms of that agreement bear little similarity to the terms of the Agreement between TAP and the state of Missouri. The term “covered conduct” in the Bayer agreement has a totally different definition than the one given in the Agreement involving TAP that is currently before this Court. *Id.* at 1149-50.

It is absurd for the Board to claim that another court's interpretation of a totally separate agreement, entered into by totally different parties, and containing totally different terms, somehow dictates this Court's interpretation of the Agreement in this case. And even if the Court determined that another tribunal's interpretation of a different agreement involving different parties had some relevance here, then it should likewise find instructive the fact that a Nevada state court came to precisely the opposite conclusion of the court in *Commonwealth* in interpreting the same agreement involving Bayer. *State of Nevada v. Abbott Laboratories, Inc.*, No. CV02-00260 (Washoe County Ct., December 13, 2004) (finding that the “covered conduct” in the Bayer agreement encompassed all claims against Bayer, in addition to Medicaid claims).

The Board also once again argues that any ambiguity in the Agreement should be resolved in favor of it due to public policy concerns (Board Brief at 33-34). But as stated before, there is no ambiguity in the terms of the Agreement. *Mid Rivers Mall, L.L.C. v. McManmon*, 37 S.W.3d 253, 256 (Mo. App. E.D. 2000) (“Simply because parties disagree over the meaning of a contract does not mean that it is ambiguous.”). And even if “public policy” concerns were taken into consideration, those concerns favor TAP, not the Board. Parties should be permitted to enter into universal settlement agreements with the state to resolve all claims against it, without fearing that years later a renegade state agency will determine, on its own, that it is not subject to the terms of such an agreement. While the Board once again claims that it was taking action to “protect Missouri citizens,” it fails to explain exactly how disciplining TAP’s pharmacy license advances that goal. The Board’s inexplicable reliance on its “public protection” mantra rings especially hollow in light of the unchallenged testimony at the hearing by TAP’s head pharmacist, Charles Sommercorn, who testified that TAP’s pharmacy unit was never investigated as part of the Department of Justice’s investigation of TAP, nor was the conduct of TAP’s pharmacy unit related in any way to the conduct resolved by TAP’s Guilty Plea and the alleged conduct resolved by the Agreement (L.F. 39-40). *See Carron v. Ste. Genevieve School Dist.*, 800 S.W.2d 64, 68 (Mo. App. E.D. 1990) (“administrative agencies may not arbitrarily ignore the testimony of an uncontradicted witness, unless the agency makes a specific finding that the evidence is not credible.”).

The Agreement bars the Board’s efforts to discipline TAP’s pharmacy license in this matter. Its imposition of discipline should be reversed.

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 11th day of June, 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 4835 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