

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000602-MR

DOUGLAS RANK

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY MORRIS, JUDGE
ACTION NO. 00-CI-003761

KENTUCKY BOARD OF MEDICAL LICENSURE

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING
** ** * * * * *

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

DYCHE, JUDGE: As a result of a boundary violation@ (sexual liaison with a patient in his medical practice), Douglas Rank's license to practice medicine in this Commonwealth was the subject of disciplinary action by the Kentucky Board of Medical Licensure. That action was affirmed on review by the Jefferson Circuit Court as provided for by KRS 311.593; Dr. Rank now appeals.

Dr. Rank practices both internal medicine and psychiatry. The patient with whom he had the improper

relationship was being treated by him for pain and resulting depression from injuries suffered in an automobile accident. Dr. Rank has admitted having sexual intercourse with the patient on four occasions in a two-month period. Another physician treating the patient, after Dr. Rank's treatment ceased, reported the violation to the Board, and an investigation ensued. The Board issued an Emergency Order of Suspension (KRS 311.592) and a complaint (KRS 311.591[3][c]) against Rank's license on July 22, 1999, and a hearing on that order was held on August 3 and 9, 1999. Following the hearing, the hearing officer issued a Final Order Revoking Emergency Order of Suspension which found that Dr. Rank's conduct posed no immediate danger to the public health, safety or welfare so as to justify an immediate order of suspension. A hearing on the complaint was held on December 6, 1999, and the hearing officer filed his Findings of Fact, Conclusions of Law, and Recommended Order on February 7, 2000.

Findings pertinent to this appeal include: during the applicable time period, all billing by Dr. Rank for treatment of the patient was for medical care, not psychotherapy; Dr. Rank and the patient fell in love with each other; beginning in April 1999, Dr. Rank enlisted the help of a psychiatric nurse to assist him in his therapy sessions with female patients, and such assistance improved the quality of care the patients received; Dr. Rank has been treated for depression by a psychiatrist, and has cooperated fully with the Kentucky Committee on Impaired

Physicians (KRS 311.616-.619); and, no evidence was presented that Dr. Rank has had other improper relationships with patients.

The Conclusions of Law included: that despite some evidence to the contrary, the sexual relationship grew out of Dr. Rank's practice of psychiatry; and that the evidence presented did not support an absolute prohibition of Dr. Rank's treatment of female patients. The Recommended Order suspended Dr. Rank's license for two years, with eighteen months of the suspension probated, for an actual suspension of six months; Dr. Rank received credit against the total suspension for the twenty-five days of emergency suspension; Dr. Rank was restricted, in his psychiatric practice only, from treating female patients except in an office setting and in the presence of a Board-approved chaperone; Dr. Rank was ordered to continue his own treatment and counseling, and continue cooperation with the Committee on Impaired Physicians. Any subsequent violation involving a sexual relationship with a patient would, following a due process hearing and the proper findings, result in revocation of his license.

The Board adopted the Recommended Order in part, and rejected it in part, the primary differences (and grounds for this appeal) being: the Board revoked Dr. Rank's license, but stayed the revocation subject to terms of probation; the Board also suspended his license for two years, with eighteen months of the suspension stayed, subject, again, to the terms of his

probation; the Board did not give Dr. Rank credit for the twenty-five days of emergency suspension; the Board required Dr. Rank to have a chaperone during the treatment of all female patients; and the Board fined Dr. Rank in an amount equal to the costs of the proceeding. Dr. Rank sought judicial review by the Jefferson Circuit, which affirmed the Board's order. This appeal followed.

Dr. Rank's first argument is that the evidence was not sufficient to support a disciplinary order against his license.

Dr. Rank is not well served by making this argument, in that he has admitted the violation of KRS 311.595(5), which is, in and of itself, sufficient to revoke his license. There obviously was sufficient evidence in the record to support disciplinary action against his license.

In addition to his insufficiency of the evidence argument, Dr. Rank makes an overarching complaint concerning all of the Board's actions which were not congruent with the hearing officer's Recommended Order. That argument is that the Board violated KRS 13B.120(3), which provides,

The final order in an administrative hearing shall be in writing and stated in the record.

If the final order differs from the recommended order, it shall include separate statements of findings of fact and conclusions of law. The final order shall also include the effective date of the order and a statement advising parties fully of available appeal rights.

(Emphasis added.) Dr Rank maintains that the final order herein is deficient in that it fails to include the separate findings

and conclusions to support its deviation from the recommended order. We will consider this general argument along with each of the specific arguments.

He complains that it was improper for the Board to both revoke **and** suspend his license, as the penalties are mutually exclusive. We agree. The statute authorizing the imposition of such penalties reads, in part, as follows:

If the board substantiates that sexual contact occurred between the physician and the patient while the patient was under the care of or in a professional relationship with the physician, the physician's license may be revoked or suspended with mandatory treatment of the physician as prescribed by the board.

The use of the conjunction **or,** connotes an alternative, not additional, term of punishment. It is inconsistent, unfair, and arbitrary for the Board to issue an order which imposes both punishments, and the order is hereby vacated and remanded for the imposition of one (only) of the statutorily-authorized penalties.

Rank argues that the Board's refusal to credit him with the twenty-five days of emergency suspension against the ultimate suspension is arbitrary and capricious. We agree. While such a matter is generally within the discretion of the Board, sufficient findings must be made to justify its departure from the hearing officer's recommendations; it made no such findings herein, and that part of the Board's order is therefore vacated.

The imposition of the requirement of chaperones upon Dr. Rank's treatment of female patients is his next claim of

error. He argues that the evidence not only does not support this condition, but that all the evidence is that he was of no risk to reoffend in this manner. The hearing officer's findings and conclusions were somewhat internally inconsistent as to the necessity of chaperones in the two specialties of Dr. Rank's practice, and the Board's order fails to satisfactorily justify such a condition with citations to evidence in the record. The fact that Dr. Rank has committed a boundary violation in the past **could** conceivably be, in and of itself, sufficient grounds to impose such a condition of his treatment of females. The record does not **at this point** support such an action. This part of the order is therefore vacated and remanded for further proceedings.

Dr. Rank's final argument is that the imposition of the fine against him is punitive and retaliatory, and, again, not justified by sufficient findings. He claims that he was fined for not going along with proposed agreed orders to settle this controversy early in the proceedings, and punished for asserting his statutorily-granted rights. The Board responds that such a fine is entirely within its power, and that his grudging admission of the violations, followed by the needless expenditure of funds for the proceedings, justify the fine. We must agree with the Board. While one cannot be punished for asserting his or her rights, one who admittedly has violated statutes and professional ethical considerations, and thereby requires the

expenditure of public funds to redress those violations, can be required to bear the costs of a contested administrative proceeding. On remand, the Board should more artfully set out its reasons for the fine. We note that the General Assembly has amended KRS 311.565(1)(u) to clarify the Board's authority concerning the imposition of fines and costs.

One final matter is referred to in a footnote in the Board's brief, dealing with the length of probation. This matter can be corrected on remand.

The order of the Jefferson Circuit Court is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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