

# Commonwealth Of Kentucky

## Court of Appeals

NOS. 2001-CA-000694-MR AND 2001-CA-000775-MR

COMMONWEALTH OF KENTUCKY,  
BOARD OF DENTISTRY

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS B. WINE, JUDGE  
ACTION NO. 00-CI-003996

ROBERT GOODMAN, SR., D.M.D.

APPELLEE/CROSS-APPELLANT

### OPINION

### AFFIRMING

\*\* \*\* \* \* \* \*\*

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. The Kentucky Board of Dentistry (Board) and Robert Goodman, Sr., D.M.D. (Dr. Goodman) bring these appeals from an order of the Jefferson Circuit Court affirming the Board's finding that Dr. Goodman violated KRS Chapter 313 by permitting his dental assistant to polish teeth, but reversing and remanding that portion of the Board's decision imposing a one-year suspension of Dr. Goodman's dental license. We affirm the order of the circuit court.

Dr. Robert Goodman is a dentist licensed to practice in Kentucky. On February 4, 2000, the Kentucky Board of Dentistry filed a formal complaint against Dr. Goodman alleging that Dr. Goodman's "delegation of polishing teeth to dental auxiliary personnel constitute[d] a violation of KRS 313.130(3) and (4), and 201 KAR 8:135 .1(1) and (2) for which disciplinary action may be taken by the Board under the provisions of KRS Chapter 313." An administrative hearing was held on May 13, 2000, before the Board.<sup>1</sup>

On May 23, 2000, the Board entered its findings of fact, conclusions of law, and final order. The Board's findings stated, in pertinent part:

1. Robert Goodman, Sr., is licensed to practice dentistry in the Commonwealth of

---

<sup>1</sup>KRS 313.130 provides, in pertinent part:

The Board may reprimand or place on probation, or may revoke, suspend, refuse to renew, or refuse to issue a license to any dentist for any of the following causes:

. . . .

(3) Unprofessional conduct, gross ignorance, or inefficiency in his profession

. . . .

(4) Violating any of the provisions of this chapter or any lawful order, rule, or regulation made or issued under the provisions of this chapter.

Kentucky, and he has been practicing dentistry for 35 years.

2. On February 4, 2000, the Board issued a *Formal Complaint* against Goodman charging that for the past eight years he directed and delegated the procedure of polishing teeth of patients to unlicensed dental auxiliary personnel in violation of KRS 313.130(3) and (4) and 201 KAR 8:135, Section 1(1) and 1(2).

3. Goodman employs Monte Devine as a dental assistant in his dental practice.

4. At Goodman's direction Devine has been polishing the teeth of approximately 10 patients per week, 44 weeks per year, for the last 8 years.

5. Devine is not licensed as a dental hygienist.

6. Goodman admitted that he has had difficulty recruiting and retaining dental hygienists to work in a practice located in Harrodsburg, Kentucky. During the period that Devine has worked for Goodman, he has employed only one dental hygienist, and she remained with the practice for approximately two years. During the period that the hygienist was employed, she, rather than Devine, performed all of the polishing work on the patients.

7. When the hygienist left the practice, Goodman had Devine resume the polishing work.

8. The Kentucky Board of Dentistry publishes a quarterly newsletter which is distributed to all dentists licensed in the Commonwealth. In the Fall 1997 newsletter, the Board presented an article titled, "Board Wins Lawsuit about Polishing." The article announced that the Board had won a

lawsuit filed by a dentist who challenged the Board's statutes prohibiting the use of unlicensed dental auxiliary personnel to polish teeth. The article concluded by stating, "Practitioners should note that the court reaffirmed the long-standing interpretation of the law by the Board that only a licensed dental hygienist may polish teeth in the context of a professional dental service."

9. The quarterly newsletters also contain summaries of recent disciplinary actions taken by the Board against licensees. Recent newsletters contain numerous summaries of disciplinary actions in which dentists have been charged with and the Board has sanctioned their licenses for "allowing an unlicensed dental auxiliary person to polish teeth, a duty defined by law to be the practice of dental hygiene."

10. Goodman has received the newsletter from the Board, and thus, he has been repeatedly notified of the statutory requirement that dental assistants may not perform the teeth polishing work of dental hygienists.

11. Goodman admits that he has never attempted to contact the Board to inquire or clarify whether his dental assistant was authorized to polish teeth under the Board's statutes and regulations.

12. Goodman knew that Devine was not authorized by law to polish the teeth of his dental patients, but Goodman simply chose to ignore the requirements of the law when he did not have a dental hygienist employed in his office.

The Board's conclusions of law stated, in pertinent

part:

5. In KRS 313.010(3) "dental hygiene" is defined as "the treatment of human teeth by scaling, polishing, planing and removing therefrom calcareous deposits. . . ." In his defense, Goodman asserts that by the very terms of the statute a dental assistant is not prohibited from polishing teeth unless the purpose for the polishing is to remove calcareous deposits. Goodman asserts that Devine polished teeth for cosmetic purposes and not in order to remove calcareous deposits. The construction proposed by Goodman is not a reasonable interpretation of the statute. The conduct reserved for dental hygienists is not limited to the procedures which are utilized to remove calcareous deposits but includes any scaling, polishing, planing of teeth and, in addition, any removal of calcareous deposits from teeth. In other words, the phrase "calcareous deposits" modifies "removing" but does not also modify "scaling, polishing or planing." In fact, Goodman himself suggested that his was not a reasonable interpretation of the statute when he acknowledged that a dentist will not polish calcareous deposits and that polishing itself will not remove them. In addition, as shown by the Board's newsletters, the Board has consistently taken the position that under the Board's statutes and regulations, a dental assistant is not permitted to polish teeth.

6. Ms. Devine practiced dental hygiene as that term is defined in KRS 313.010(3) by polishing the teeth of patients in Goodman's dental practice.

7. By delegating the procedure of polishing teeth of patients to dental auxiliary personnel Goodman is guilty of unprofessional conduct, gross ignorance, and inefficiency in violation of KRS 313.130(3).

8. Goodman is guilty of violating KRS 313.130(4) by breaching the provisions of 201 KAR 8:135 as set forth below.

9. Goodman violated 201 KAR 8:135, Section 1(1) by delegating to a dental assistant the procedure of polishing teeth which required the professional judgment and skill of a dentist or a dental hygienist.

10. Goodman violated 201 KAR 8:135, Section 1(2) by delegating to a dental assistant the procedure of polishing teeth which is allocated by the dental laws to licensed and registered dental hygienists.

The Board imposed a one-year suspension of Dr.

Goodman's license to practice dentistry, followed by a four year period of probation.

Dr. Goodman subsequently filed a petition for review and appeal and for injunctive relief in Jefferson Circuit Court. In an opinion and order dated March 6, 2001, and entered March 7, 2001, the circuit court affirmed the Board's findings of fact and conclusions of law as to the violation of KRS Chapter 313, but reversed the one-year suspension of Dr. Goodman's license. The court found that the one-year suspension was not supported by substantial evidence and remanded the action to the Board for a new penalty determination. This appeal by the Board and cross-appeal by Dr. Goodman followed.

201 KAR 8:135 prohibits a dentist from delegating to auxiliary personnel, (i.e. a dental assistant), those procedures

which are allocated by the dental law to licensed and registered dental hygienists. Procedures reserved to dental hygienists are defined by KRS 313.010(3), the statute at issue in the present case, which defines "dental hygiene" as follows:

"Dental hygiene" shall mean the treatment of human teeth by scaling, polishing, planing and removing therefrom calcareous deposits, and by removing accumulated accretion from beneath the free margin of the gums . . . (emphasis added.)

Dr. Goodman does not dispute that his dental assistant polished teeth. Rather, Dr. Goodman contends on cross-appeal that the Board's interpretation of KRS 313.010(3), that the statute prohibits any type of polishing by dental assistants, is incorrect. Contrary to the Board's interpretation, Dr. Goodman contends that the terms of KRS 313.010(3) do not prohibit a dental assistant from polishing teeth unless the purpose for the polishing is to remove calcareous deposits. Dr. Goodman asserts that the polishing performed by his dental assistant, using an instrument referred to as a "rubber cup," was a purely cosmetic procedure with no therapeutic value. Because his dental assistant polished for cosmetic purposes only, and not to remove calcareous deposits, Dr. Goodman contends that he did not violate KRS 313.010(3).<sup>2</sup>

---

<sup>2</sup> Dr. Goodman maintains that he always performed the cleaning procedures for removing calcareous deposits.

Statutory construction is a matter of law for the courts, and a reviewing court is not bound by an administrative agency's interpretation of a statute. Delta Air Lines, Inc. v. Commonwealth Revenue Cabinet, Ky., 689 S.W.2d 14 (1985). The court must ascertain and give effect to the intent of the legislature. Beckham v. Board of Education of Jefferson County, Ky., 873 S.W.2d 575, 577 (1994); Newburg v. Thomas Industries, Ky. App., 852 S.W.2d 339 (1993). Statutory language must be given its plain, ordinary meaning. See ITT Commercial Finance Corp. v. Madisonville Recapping Co., Inc., Ky. App., 793 S.W.2d 849 (1990). An agency's construction of a statute continued uninterrupted over a long period of time is entitled to controlling weight. Hagan v. Farris, Ky., 807 S.W.2d 488, 490 (1991); Barnes v. Department of Revenue, Ky. App., 575 S.W.2d 169, 171 (1978). We agree with the circuit court to the extent that it held that the language of KRS 313.010(3) encompasses all types of polishing, and hence, conclude that the circuit court was correct in affirming the Board's decision finding Dr. Goodman in violation of KRS Chapter 313.

We now turn to the Board's argument that the circuit court erred in reversing the Board's sanction. "Judicial review of an administrative agency's action is concerned with the question of arbitrariness." Commonwealth Transportation

Cabinet, Dept. of Vehicle Regulation v. Cornell, Ky. App., 796 S.W.2d 591, 594 (1990). An administrative decision may be considered "arbitrary" if it is not within the scope of the agency's granted powers; the agency failed to provide procedural due process; or the agency's decision is not supported by substantial evidence. Commonwealth Revenue Cabinet v. Liberty National Bank of Lexington, Ky. App., 858 S.W.2d 199, 201 (1993). The circuit court found that substantial evidence did not exist to support the Board's one-year suspension of Dr. Goodman, stating:

To justify the penalty, the Board relies, in part, on the fact that Dr. Goodman was aware, through quarterly newsletters, that the Board was disciplining other dentists for the same offense and the fact that he violated the statute multiple times. First, the Court questions whether the dentists previous [sic] disciplined by the Board did not have the same or similar notice and knowledge of Dr. Goodman concerning violations under KRS 313.010(3). Further, the Court is convinced that each of these previous cases involve multiple violations of the statute prior to the Board filing its Complaint and ultimately imposing a penalty. Thus, under the circumstances of this case, the Court concludes that the the [sic] prolonged suspension of Dr. Goodman's license is excessive.

The Board also contends that the one-year suspension was appropriate as it was "uniquely tailored" to Dr. Goodman's part-time practice. []. The Court finds no basis that Dr. Goodman's part-time status, disputed by Dr. Goodman, would justify such

an increase from the longest previously imposed suspension of sixty days. The Court finds that the one-year suspension is not supported by the substantial evidence and therefore, remands the action for a new penalty determination.

Additionally, although enacted subsequent to the Board's action against Dr. Goodman, we believe it important to consider the General Assembly's recent passage of House Bill 467, entitled "An Act relating to dental hygienists," which included a provision permitting dental assistants to perform cosmetic polishing if certain criteria are met. Section 3 of the Act, codified as KRS 313.345 (effective July 15, 2002), reads in pertinent part as follows:

(6) Dental assistant services may include coronal polishing, a cosmetic procedure that is not essential to therapeutic oral prophylaxis, if the following criteria are observed:

(a) Polishing activities are limited to the use of a rubber cap attached to a slow-speed rotary dental handpiece;

. . . .

(7) Dental assistant services shall not include the following:

(a) The practice of dental hygiene or the performance of the duties of a licensed dental hygienist that require the use of any instrumentation which may elicit the removal

of calcareous deposits or accretions on the crowns and roots of teeth;<sup>3</sup>

This subsequent legislation does not affect the issue of Dr. Goodman's guilt with regard to his violation of the dental laws and regulations as they existed at the time he engaged in the polishing conduct at issue. Nevertheless, we believe the enactment of KRS 313.345, which recognizes a distinction in cosmetic and therapeutic polishing and now permits the very conduct for which Dr. Goodman was severely sanctioned, further reflects the excessiveness of the penalty imposed by the Board. In light of KRS 313.345, and the findings of the circuit court, we agree that the Board's decision to impose a one-year suspension of Dr. Goodman's dental license was not supported by substantial evidence.

---

<sup>3</sup> The General Assembly did not change the definition of "dental hygiene" found in KRS 313.010(3).

Finally, we address Dr. Goodman's argument on cross-appeal that the circuit court should have changed the penalty as opposed to remanding the action to the Board for a new penalty determination. The position of the circuit court in administrative matters is one of review. Kentucky Unemployment Insurance Commission v. King, Ky. App., 657 S.W.2d 250, 251 (1983). The circuit court properly remanded the case to the Board for a new penalty determination. KRS 13B.150(2).

For the aforementioned reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/  
CROSS-APPELLEE:

Albert B. Chandler, III  
Attorney General

Mark Brengelman  
Assistant Attorney General  
Frankfort, Kentucky

BRIEF FOR APPELLEE/CROSS-  
APPELLANT:

J. Guthrie True  
Frankfort, Kentucky