NO: 101150

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

KENNETH A. HARRISON,

Respondent, Petitioner below,

vs.

From the Circuit Court of Monongalia County, West Virginia
C.A. No. 09-CAP-28

WEST VIRGINIA MEDICAL IMAGING AND RADIATION THERAPY TECHNOLOGY BOARD OF EXAMINERS,

Petitioner, Respondent below.

RESPONDENT'S RESPONSE TO PETITION FOR APPEAL

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Table of Contents

I. Kind of Proceeding and Nature of Ruling 1

II. Statement of Facts 1

III. Argument 7

A. The rights of Mr. Harrison had been violated by an administrative ruling which was clearly wrong, as it was contrary to the "reliable, probative and substantial evidence on the whole record," and it was also "arbitrary and capricious" 7

B. The punitive penalties imposed on Mr. Harrison by the Board were clearly disproportionate to his actions 10

IV. Conclusion 13

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is a case where a radiologic technologist who, when charged for his first infraction in a 22-year career, had his license suspended for two years, to be followed by three years of probation and additional penalties for having administered Benadryl to a patient whom he thought was experiencing a severe allergic reaction. There was a hospital protocol which permitted this in emergency circumstances. The lower court reversed the Administrative Order on the grounds that the hearing examiner's conclusions of law were "clearly wrong in view of the reliable, probative and substantial evidence on the whole record." The West Virginia Medical Imaging and Radiation Therapy Technology Board of Examiners has appealed the Court's March 26, 2010 ruling.

II. STATEMENT OF FACTS

Mr. Harrison has been a Radiologic Technologist since 1986. (Tr I, page 160)[1] He had worked at WVUH for approximately six years prior to the incident in question. (Tr I, page 163) This is the first disciplinary action ever brought against his licensure. (Tr I, pages 33, 164) He had never been disciplined at work prior to this incident. (Tr I, page 164) On June 22, 2008 he was part of a stroke team caring for a patient. Mr. Harrison was attending to the patient, while a co-worker, Ronna Shaneyfelt, handled the associated paperwork. (Tr I, page 192) The procedure for the patient entailed IV injection of contrast, which is known to cause an allergic reaction in certain individuals. (Tr I, pages 41 - 42) The widely acknowledged initial treatment for a patient with a contrast induced reaction is 50 mg of Benadryl administered intravenously. (Tr I, pages 129 - 130, 131 - 132; Tr II,

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1 The references "TR I" and "TR II" are to the transcripts of the hearings of January and April, 2009, respectively. The citations to Exhibit numbers are to exhibits that were admitted at the administrative hearing, and which were included in the designation of the record..

page 28; and Exhibit 1) Benadryl is an antihistamine which is also available over-the-counter in tablet form. (Tr II, page 27) The recommended dose for adults who are self-medicating outside of a hospital setting is 25 mg - 50 mg. (Respondent's Exhibit 7)

Typically, there are several safeguards that are meant to be implemented by other hospital staff to prevent a contrast reaction in a patient. These include pre-medicating the patient if an allergic reaction is expected, noting the allergy on a patient armband and with a sticker on the outside of the chart, and the attending nurse verbalizing the patient's allergy status. On this occasion, though, there was a complete breakdown in all these particulars as there was nothing indicating to Mr. Harrison prior to the administration of the contrast that this patient had an allergy. In fact, the nurse specifically told Kenneth Bragg, another member of the team, that the patient was not allergic. (Tr I, pages 125, 126, 151, 169. See also Tr I, pages 190 - 191, 194) Mr. Harrison made three injections of contrast material with this particular patient. (Tr I, page 169) Within a short time, Mr. Harrison noticed the patient breaking out in hives. Almost simultaneously, Ms. Shaneyfelt exclaimed that the chart stated the patient was allergic. Mr. Harrison told her to call the radiologist. After paging the resident on duty she told Mr. Harrison "no one is answering, no one is coming." (Tr I, page 171. See also Respondent's Exhibit 3) Mr. Harrison went immediately to where the Benadryl is stored. Upon returning to the scanning area, the patient's condition was deteriorating. (Complainant's Exhibit 3 and Tr I 174) Mr. Harrison administered a 50 mg dose of Benadryl to the patient (Tr I, page 174) Eventually, some five to seven minutes after the problem arose, the radiology resident appeared and determined that the patient was stable. (Tr I, pages 128; 196 - 197)

There is nothing in the chart to indicate that Mr. Bragg, Ms. Shaneyfelt or Mr. Harrison knew that Dr. Asadi was the resident assigned to the department that day. There have been occasions

where the Radiologic Technologists have experienced problems in having a resident respond to a page in a timely fashion. (Tr I, pages 138 - 139, 153; Tr II, pages 91 - 92) When Mr. Bragg spoke to Ms. Shaneyfelt shortly afterwards, she told him that the patient "had had a reaction and Ken had to shoot the patient up with Benadryl," intimating that the resident had not responded as quickly as the circumstances warranted. (Tr I, pages 144 - 145)

On the date in question, there were multiple protocols in effect for Radiologic Technologists at the WVUH Department of Radiology, one of which provided as follows:

c. If the patient develops a mild to moderate allergic reaction with the injection:

I. Notify the radiology resident and/or attending.

ii. **If the allergic reaction is hives, rash, redness or itching, the treatment is Benadryl 50 mgm IV or PO.**

iii. Observe the patient for 30 to 60 minutes until hives or rash begin to resolve. If the patient has someone to drive, he or she may leave. If no driver is available, check with the radiology resident or attending regarding a time frame for discharge.

iv. The patient must be seen by a physician prior to discharge, and must be given a copy of the contrast reaction discharge instructions, which must be signed by the patient by the physician.

v. Add IV contrast allergy in CHIP.

vi. Fill out an incident report on line (RubyOn-Line-departments-pharmacy-med. incident report, all other departments).

vii. Fill out QI report and give to Manager.

d. If the patient develops a severe allergic or anaphylactic reaction with the current injection:

I. Notify radiology resident/attending. **Initial treatment is Benadryl 50 mgm IV**, SoluMedrol 125 mgm IV, and Epinephrine 1:1000, 0.3 ml subcutaneously. The patient is then transferred to the Emergency

Department. Notify the ED at 7-4172.

ii. Follow steps 4, 5, 6, and 7 as above.

(Emphasis added) (Exhibit 1) (Addendum 1)

Not all the protocol books in each of the scanning rooms are identical. (Tr II, pages 12 - 13) And this is not just because of differences in scanning equipment from room to room. Rather, some have handwritten notations that are not present in other books. Thus, presumably, a Radiologic Technologist at WVUH could familiarize himself with the contents of a particular manual that would have different information than other manuals in other rooms. (Tr II, pages 12 - 13) The protocols are directed toward Radiologic Technologists, as Dee Headley, the Director of Radiology and Radiation Therapy acknowledges. (Tr II, page 18) She acknowledges that every single pertinent directive of that particular protocol is directed to the Radiologic Technologists — except the one confirming that 50mg Benadryl is the appropriate treatment for a contrast allergy reaction. Ms. Headley insisted that a protocol dated 10/6/01 is the one which is to be observed and it permits only treatment "as directed by the radiologist." However, Ms. Headley also acknowledges that Exhibit 1 is a true copy of a document present in <u>two</u> scanning rooms. She stated that this an old protocol, but the fact remains that it was present in existing protocol books, and that this was the condition of the protocol books when Mr. Harrison was employed there. (Tr II, pages 38 - 39) Mr. Bragg — who has been a Radiologic Technologist for nearly 17 years — testified that this particular protocol (Exhibit 1) was addressed to the "Rad Techs" (Tr I, page 142), and he would act on the authority of that protocol to medicate a patient with Benadryl if it proved necessary. (Tr I, page 143) Mr. Harrison testified that he was aware of this protocol on the day in question. (Tr II, pages 76, 87) Ms. Headley had written to Ms. Cofer, the Assistant Attorney General representing the Board, that

"[Exhibit 1] is not a document we are familiar with or support. I am still investigating for its origin." (1/30/09 fax, Respondent's Exhibit 5) But, she also testified at the first hearing that it was unlikely that she would not have seen Exhibit 1 before that date. (Tr I, page 208) Again, though, the fact remains that this document is in the protocol books for Radiologic Technologists. Ms. Headley characterizes Exhibit 1 as a document "out communicating with my employees that I was not aware of and may have the ability to be misused or misunderstood;" and "I was trying to understand it so that I knew how it was being used and what I needed to do as the director to clarify maybe an operational issue." (Tr II, pages 46 - 47); yet she refused to concede that Radiologic Technologists in her department might legitimately feel justified in administering Benadryl in the absence of a physician and where two national organizations endorse the medication of patients where "state statutes and/or institutional policy permit." The weight to be given to Ms. Headley's testimony is suspect due to her lack of familiarity with the pertinent protocol. This is emphasized by her testimony in the first hearing where she maintained: "I can tell you with certainty that technologists in my department, to my knowledge, do not have any documentation, guidance, or anything else to lead them to give medications without proper physician involvement." (Emphasis added) (Tr I, page 209)

W. Va. Code § 30-23-10, which sets for the Scope of Practice fo a Radiologic Technologist neither proscribes nor prohibits the administration of medication. (Tr I, pages 39 - 40) There is nothing in the guidelines of the pertinent Code of State Regulations that "address Benadryl in any way, shape, or form," or that addresses a Radiologic Technologist administering medication. (Tr I, pages 48 - 49, 118 - 119) There is no protocol at WVUH stating that the Radiologic Technologists are prohibited from administering Benadryl. (Tr II, page 36) In fact, the Scope of Practice statute

provides that the "Scope of practice of a Radiologic Technologist includes the following:

> ... (11) Maintaining values congruent with the profession's Code of Ethics and scope of practice as well as adhering to national, institutional and/or departmental standards, policies and procedures regarding delivery of services and patient care; and
>
> (12) Performing any other duties that the board authorizes for a Radiologic Technologist.

Subsection (11) of the statute is congruent with evidence of national standards that were brought to the attention of both the Board and the lower court. The American Society of Radiologic Technologists (ASRT) — a national professional organization — has adopted the following "Position Statement":

> "The ASRT acknowledges that preparation, identification and administration of contrast media, radiopharmaceuticals and/or medications are within the scope of practice of Radiologic Technologists **with appropriate clinical and didactic education where state statutes and/<u>or</u> institutional policy permit."** (Emphasis added) (Exhibit 2)

The other leading professional organization, the American Registry of Radiologic Technologists, concurs with this position. (Exhibit 4) Mr. Harrison has had extensive pharmacological education and training (Tr II, pages 65, 69), including no fewer than 89 credit hours with the Department of the Army's Academy of Health Sciences. (Respondent's Exhibit 8)

As to subsection (12), the lower court was provided (but did not mention in its decision) an excerpt of the Board's own website wherein the Board actually promotes the administration of emergency care:

> Scope of Practice for Radiologic Technologist. Patient Care:...
>
> 22. Recognize need for prompt medical attention and administer emergency care.
>
> (Source:*http://www.wvrtboard.org/Portals/WVRTBOARD/docs/RT%20SCOPE.pdf*)

(Addendum 2)

Mr. Harrison acted out of concern that his patient was in need of emergency care and would suffer serious consequences without the administration of Benadryl, as he had begun to display respiratory symptoms and his oxygen saturation levels were dropping. (Complainant's Exhibit 3 and Tr I 174, 181 - 182) He was under the impression that "there was no help coming." (Tr I, page 184) He thought he was acting reasonably in keeping with his training, the standards of his profession, the policies of his hospital, and the needs of his patient.

III. ARGUMENT

A. The rights of Mr. Harrison had been violated by an administrative ruling which was clearly wrong, as it was contrary to the "reliable, probative and substantial evidence on the whole record," and it was also "arbitrary and capricious."

The actions taken by the West Virginia Medical Imaging and Radiation Therapy Technology Board of Examiners ("the Board") were fundamentally unfair towards Mr. Harrison, so that his substantial rights had been prejudiced. Consequently, the lower court's reversal of the Board's decision was entirely appropriate.

The statutory grounds for Mr. Harrison's appeal to the Circuit Court of Monongalia County were as follows:

West Virginia Code § 30-23-26

> (e) Any licensee or permittee adversely affected by any decision of the board entered after a hearing, may obtain judicial review of the decision in accordance with section four, article five, chapter twenty-nine-a of this code...

West Virginia Code § 29A-5-4:

> (g) The court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the

administrative findings, inferences, conclusion, decision or order are:

> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record...
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion...

In *Kanawha County Bd. of Educ. v. Sloan*, 219 W.Va. 213, 632 S.E.2d 899 (W.Va. 2006), the Court quoted *Harry v. Marion County Bd. of Educ.*, 203 W.Va. 64, 506 S.E.2d 319:

> "Misconduct by a school employee which can be characterized as sexual harassment can constitute a basis for the termination of the offending employee's employment."

The Court then explained that "a board of education must act reasonably in imposing such discipline. The authority of a county board of education to dismiss a[n employee] under W. Va. Code 1931, 18A-2-8, as amended, must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." *Kanawha County Bd. of Educ. v. Sloan*, *Id.* at 220, 906. In this case, the Board acted arbitrarily and capriciously when it penalized Mr. Harrison in a manner disproportionate to his actions. Furthermore, The Board acted arbitrarily and capriciously and was clearly wrong when it adopted the Hearing Examiner's findings that were not supported by competent or substantial evidence.

This Honorable Court has explained the scope of the circuit court's review of an agency decision seizing upon the " 'clearly wrong' " and " 'arbitrary and capricious' " standards delineated by statute. West Virginia Health Care Cost Review Auth. v. Boone Mem'l Hosp., 196 W.Va. at 334-35, 472 S.E.2d at 419-20. In employing these standards, the "reviewing court must evaluate the record of the agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision." Frank's Shoe Store v. West Virginia Human Rights Comm'n, 179

W.Va. at 56, 365 S.E.2d at 254 (citation omitted). More simply stated, "[e]videntiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." Randolph County Bd. of Educ. v. Scalia, 182 W.Va. at 292, 387 S.E.2d at 527 (citations omitted). The Board cites *Berlow v. W.Va. Bd. of Medicine*, 293 W.Va. 666, 458 S.E.2d 469 (W. Va. 1995) in its Amended Response to Petition for Appeal in an attempt to explain why administrative agencies should be given deference when rendering final decisions. However, there is a significant and notable distinction between this case and *Berlow*. In *Berlow*, the Board explained why it imposed the penalty it issued:

> "The Board's decision to apply a procedure based limitation rather than a time based restriction and to require the presence of a supervising physician are supported by the record. The Board's determination of the sanction is not arbitrary and the Board's order explained why a procedure based restriction was preferred to a time based restriction."

Berlow, *Id.* at 670, 473. Here, the Board has not provided Mr. Harrison with an explanation for its harsh, arbitrary and capricious punishment.

There is nothing in the *West Virginia Code*, or in *W. Va. Code of State Rules* § 18-1-1 *et seq.*, which addresses, let alone prohibits, a Radiologic Technologist from administering Benadryl to a patient experiencing an allergy to contrast. *W. Va. Code* § 30-23-10 provides:

The scope of practice of a Radiologic Technologist includes the following:

> (11) Maintaining values congruent with the profession's Code of Ethics and scope of practice as well as **adhering to national, institutional and/or departmental standards, policies and procedures regarding delivery of services and patient care**

(Emphasis added). This is a non-inclusive listing of a Radiologic Technologist's scope of practice, which also places reliance on national standards and the specific policies and procedures in place at

a given institution or department. There is nothing in WVUH's institutional protocols for Radiologic Technologists which addresses, let alone prohibits, a Radiologic Technologist from administering Benadryl to a patient experiencing an allergy to contrast.[2] In fact, the Board's own website informs its licensees that their scope of practice includes providing emergency care. Benadryl is a benign drug which is also available over the counter. The resident who finally appeared in response to the call affirmed at the January 29 hearing that administering a dose of 50 mg of Benadryl to an allergic patient was the appropriate treatment, and that this is what she would have done had she been there. (Tr I, pages 129 - 130) In fact, there was a protocol document in place for WVUH's Radiologic Technologists which, describes the administration of 50 mg of Benadryl to a patient who is experiencing an allergy to contrast. The position taken by Ms. Headley, and by extension the Board, that the entire protocol which is Exhibit 1 is intended for the Radiologic Technologists <u>except for</u> the two entries about Benadryl was not only totally implausible — it was arbitrary and capricious.

B. The punitive penalties imposed on Mr. Harrison by the Board were clearly disproportionate to his actions.

The Board wrongly adopted the Hearing Examiner's Findings to suspend Mr. Harrison's license to practice radiologic technology for an arbitrary and capricious period of time as a result of their misinterpretation of WVUH protocols for Radiologic Technologists, state statute, national standards, and the erroneous decision of the Hearing Examiner. This Court has determined that a

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[2] Reference is made again to the Hearing Examiner's finding of fact number 47:

> The ASRT acknowledges that preparation, identification and administration of contrast media, radiopharmaceuticals and/or medications are within the scope of practice of Radiologic Technologists with appropriate clinical and didactic education where state statutes and/or institutional policy permit.

license to practice a recognized profession is a valuable property right. Vest v. Cobb, 138 W.Va. 660, 76 S.E.2d 885 (1953). Limitations on the enjoyment of that property right, coupled with a public reprimand and fine, imposed by a disciplinary body as in this case, clearly prejudice substantial rights of the holder of that property right and justify careful scrutiny by reviewing courts of the proceedings resulting in such action. Modi v. West Virginia Bd. of Medicine, 195 W.Va. 230, 465 S.E.2d 230 (1995).

In *Clark v. West Virginia Bd. Of Med.*, 203 W.Va. 394, 508 S.E.2d 111 (W.Va. 1998), this Court had to decide whether the West Virginia Board of Medicine's punishment of Dr. Tom Clark for concealing substance abuse was fair (the Board of Medicine had revoked Dr. Clark's license to practice medicine and surgery). This Honorable Court referred with approval to the Circuit Court's "well-reasoned, fair and persuasive memorandum opinion" which had stated *inter alia*:

> "It is not only an overkill, but foolish for the Board to end this man's medical career. Without question, he made mistakes – some of them serious. But, surely those mistakes do not justify the use of the guillotine on Dr. Clark's career. I am [the Court] of the Opinion that the Board's Order must be modified. Upon the facts proved by clear and convincing evidence, the Board may impose upon Dr. Clark:
>
> 1. A public reprimand;
>
> 2. A suspension of his license to practice medicine and surgery for a period of six months." *Id.* at 405, 122.

Ultimately this Court reduced the Circuit Court's proposed penalty even further and ordered the imposition of a penalty consisting of community service and a public reprimand. *Id.* at 401, 118. The punishment which the Board inflicted upon Mr. Harrison was harsh, arbitrary, and capricious. It consisted of this:

1. License suspension for two (2) years;

2. Probationary license for three (3) additional years after completion of the two (2) year suspension;

3. Completion of thirty (30) continuing education credits in medical ethics in addition to the twenty-four (24) required to maintain a state license, during the two (2) year suspension period, of which a minimum of fifteen (15) must be completed within the first year; and

4. Assessment of the Board's administrative costs and legal fees which total Eight Thousand Two Hundred Fifty-on Dollars and Sixty-three Cents ($8,251.63).

When the Circuit Court ruled in his favor, Mr. Harrison was already just a few months shy of a two year hiatus from his chosen profession — the result of being disqualified from seeking other Radiologic Technologist employment while this cloud was hanging over him. He should not have to suffer any longer for what was at most a minor error in judgment with no adverse consequences to the patient. It is absurd that the punishment Mr. Harrison has suffered is more harsh than what a Radiologic Technologist could most likely expect for actual substance abuse.

Finally, This Honorable Court has held that a "Court must determine whether the [ALJ's] findings were reasoned, i.e., whether he or she considered the relevant factors and explained the facts and policy concerns on which he or she relied, and whether those facts have some basis in the record." *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 465 S.E.2d 399 (W. Va. 1995). In this case, the Board failed to give any consideration to the fact that Mr. Harrison was presented with an emergency not of his own making following multiple breakdowns of safeguards by other healthcare providers which led to the patient being exposed to contrast in the first place. Hence, arbitrary and capricious conduct is obviously present as the penalty imposed is clearly disproportionate to his actions — those being only the last effort to salvage the consequences of multiple breakdowns in the patient's care that day.

In sum, the Board did not sustain its burden of proving that Mr. Harrison violated the pertinent statutory and regulatory provisions of West Virginia law. The Board has presented no evidence or argument as to why a physician would have to be told that the appropriate counter to an allergic reaction is 50 mg of Benadryl. It is logical to conclude that the protocol in question takes the place of a standing order or a standing directive to the Radiologic Technologists for whom the document is intended as to how they are to proceed. Hence, the principal point remains that Mr. Harrison's administration of Benadryl was within his scope of practice given the terms of the protocols in effect for Radiologic Technologists at the WVUH Department of Radiology, and the policy statements of the two national professional organizations, and this was important to the Circuit Judge of Monongalia County in rendering his decision.

As discussed in detail *supra*, there can be no doubt that the Board had reached the wrong conclusion based on the evidence in the record, which led the Board to uphold the Hearing Examiner's decision. Accordingly, the Board had erred by affirming the improper conclusions of the Hearing Examiner. Because of those multiple errors, it was appropriate for the Circuit Court of Monongalia County to reverse the Board's Final Administrative Order on the basis that the West Virginia Medical Imaging and Technology Board of Examiners was clearly wrong and arbitrary and capricious.

IV. CONCLUSION

For these reasons, the Respondent asks this Honorable court to deny the Petition for Appeal and proceed no further with this matter.

Respectfully submitted this 23rd day of August, 2010.

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