

IN THE CHANCERY COURT OF COUNTY, MISSISSIPPI

VS.

NO.

OPINION AND ORDER OF THE COURT

This matter came before the Court on a statutory appeal from a decision of the state agency regulating the licensure of professional , the ("State Board"). The Appellant, (" "), had initially acted as a professional by comity.

Subsequently, without notice the state board informed that his/her license was issued in error and had been revoked communication between and the State Board, sued the individual members of the Board in federal court alleging a violation of his/her constitutional right to due process pursuant to 42 U.S.C. § 1983. Ultimately, the federal courts concluded that right to proper notice and hearing had been violated.

In an effort to conform the Board's conduct to the fundamental dictates of due process, the State Board gave notice of and held a hearing. The State Board rendered an order again purporting to revoke 's license. timely noticed his/her appeal from that decision.

FACTS

This appeal was considered on facts stipulated by the parties. The Court finds two additional facts. First, Mr./Ms. did not misrepresent any facts about his/her training, education or experience to the State Board. Second, the State Board had notice that its rule governing comity registration was in conflict with the statutes.

During the federal court trial, a previous executive director, one , testified that because the statutes governing the Board contain a "sunset" provision, was working with an employee of the Mississippi Legislature to revise the statutes for re-enactment. That employee told that the regulations could not be more stringent than the statute. (Ex.) informed the Board of the problem and was instructed to seek revision of the statutes along the lines of the regulations. (Ex.)

Facts stipulated by the parties are as follows:

1. Appellant graduated from University in with a degree in . This curriculum is an approved one within the meaning of Mississippi's statutes and the rules promulgated by the Board. (Ex.)

2. Additionally, holds a in , granted in , from , and a from , awarded in of . (Ex.)

3. sat for and passed the , an examination, in . He/She has been a licensed professional in since . He/She was registered in in . ()

4. worked continuously as a full time practicing , and then as a registered professional engineer, after his graduation from and until he/she began in the fall of . Prior to his/her legal career, had become the Chief Executive Officer and sole shareholder of an engineering firm in , . (Ex. ; Ex.)

5. In , considered changing careers to the field of law. He/She narrowed his/her choices to two schools with affiliations, and . (Ex.)

6. However, because would need to work some to support his/her family during his/her years in law school, he/she testified that he/she would only have attended if he/she were registered as a professional . (Ex.)

7. In the spring of , contacted the State Board and requested an application and information about licensure in Mississippi. The application package he/she received contained an application, instructions for its completion, and copies of Mississippi's statutes governing licensure as a professional . (Ex.)

8. Those statutes included the basic qualifications for registration as a professional engineer, Miss. Code Ann. § 73-13-23, and the statute governing comity registrations, Miss. Code Ann. § 73-13-35. At the time of 's application, those statutes read as follows:

§ 73-13-23. Qualifications for registration.

The following shall be considered as minimum evidence satisfactory to the board that the applicant is qualified for registration as a professional , or for certification as an , respectively.

(1) As a professional :

--graduation plus experience and examination.

(a) Graduation in an approved curriculum of four (4) years or more from a school or college approved by the board as of satisfactory standing; a specific record of four (4) years of qualifying experience indicating that the applicant is competent to practice (in counting years of experience, the board at its discretion may give credit in excess of three (3) years for satisfactory graduate study in), and the successful passing of a written, or written and oral, examination, in as prescribed by the board; or

(b) A specific record of eight (8) years or more of qualifying experience subsequent to graduation from high school, indicating that the applicant is competent to practice ; and successfully passing a written, or written and oral, examination designed to show knowledge and skill approximating that attained through graduation in an approved four-year

curriculum, and to show competence in the use of such knowledge and skills in the practice of _____.

§ 73-13-35. Persons holding certificate from a national body or other state.

The board may, upon application therefore and the payment of a fee in accordance with section 73-13-25, issue a certificate of registration as a professional _____ to any person who holds a certificate of qualification or registration issued to him/her by proper authority of the national council of _____ examiners, or of any state or territory or possession of the United States, or of any country, provided that the applicant's qualifications meet the requirements of sections 73-13-1 through 73-13-45 and the rules established by the board, or provided that the applicant has held such certificate of registration for a period of ten (10) or more years and has continued to practice.

9. The Board's rule governing comity registrations, Rule 3.026, stated that registration as a professional _____ "will" be granted if the applicant meets either of two qualifying provisions: (a) if the applicant was registered prior to _____, _____, and held a current registration from another state; or (1) if the applicant was registered after _____, _____, had passed the EIT examination and the principles and practice examination, a total of sixteen hours, and held a current registration from another state. (Ex. _____)

10. In _____ of _____, _____ filed his/her application and paid the application fee. (Ex. _____)

11. On _____, _____, the executive director of the Board informed _____ by letter that the Board had issued his license "on the basis of graduation plus experience, examination, and registration in another state." The effective date of his/her registration was _____, _____; his registration number was 11236. (Ex. _____)

12. In late _____ of _____, _____ began his law studies at Mississippi College School of law. In the fall of _____, _____ to sell his/her _____ firm and moved his/her family to Mississippi. (Ex. _____)

13. Also during the _____ of _____, the Board had begun an audit of registrations apparently because staff turnover caused some or all Board members to believe there may have been mistakes made in registrations. Subsequently, on _____, _____, in a letter from the Board's executive director, it informed _____ that because of staff turnover, the Board discovered that _____'s registration was issued by mistake: "Mississippi requires both the FE examination and the Principles and Practice of _____ examination. Because you have not passed this examination, your registration does not comply with the legal requirements and is, therefore, invalid." (_____) (emphasis in original)

14. No pre-revocation hearing was noticed or held, nor was a post-revocation hearing noticed or held until after the United States District Court for the _____ District of Mississippi ruled, on _____, _____, that the State Board's failure to have a hearing violated Mr./Ms. _____'s constitutional right to due process of law where fundamental property rights are concerned. (Ex. _____; Ex. _____)

15. testified that he/she never received the Board's , , letter. The letter was accepted by his/her year old daughter/son, , at the family's address on , . (Ex. , , letter from to Board; Ex. 8 at 30) Of course, at this time, was living in Mississippi.

16. Subsequent to the family's removal to Mississippi, received a letter dated , , from one , the Board's attorney. That letter reiterates the information in the , , letter and then states that the Board received 's renewal fee. The letter then threatened possible legal action for unregistered practice. (Ex. ; Ex. ; Ex.)

17. Following a conversation with the executive director, wrote the , , letter to the Board. The letter set out 's personal and professional history, related that he/she had decided on a Mississippi law school in reliance on his/her licensure, and offered to meet with the Board to explore these matters. (Ex.)

18. Without hearing, the Board wrote to Mr./Ms. informing him/her that they had reviewed his/her letter and application. The Board, however, remained of the opinion that 's license had been issued by mistake and that the Board had no choice but to abide by Mississippi's statutes and the Board's rules and regulations. (Ex.)

19. The cover of Mr./Ms. 's official application file has a white pre-printed strip of paper pasted to the cover of the folder. On this strip of paper are blanks to be checked relating to the various requirements for registration. The blanks indicating graduation from an accredited curriculum, experience of four years, and the FE (EIT) examination are all check-marked. The blank indicating whether an applicant has taken the PPE examination is also check-marked. The parties do not dispute that Mr./Ms. had graduated from an accredited curriculum, continuously practiced for over year(s), and had taken the EIT examination. The parties also do not dispute that Mr./Ms. has never taken the PPE examination. (Ex.)

20. Subsequently, filed suit in federal court alleging, inter alia, that the Board's issuance of a license was a property interest entitling him/her to a hearing and that this failure violated his civil rights pursuant to the Fourteenth Amendment and 42 U.S.C. § 1983. (Ex. .; Ex. .)

21. During the hearing before the federal district court, the parties entered into a stipulation that none of the past or present Board members testifying at the trial would have changed their votes absent evidence that had passed the second examination. (Ex.)

22. All past and present Board members who testified during that hearing admitted that they did not notice or hold a hearing, that they did not consider Mr./Ms. 's , , letter as a request for a hearing, and that they would not have changed their minds based on 's contention that he/she was qualified under the terms of the comity statute. (Ex.)

23. A former Board member, , testified in the federal court proceeding that he/she had chaired a committee in to review the Board's comity practice. He/She stated that neighboring states generally require both the EIT, now called the FE (Fundamentals of Engineering), and the PE (also referred to as the PPE) examinations for comity registrations. Mr./Ms. stated that many years ago, a single sixteen hour examination was given. That old

examination was subsequently divided into two parts, the EIT and PE. In _____, according to _____, the Mississippi law was changed so that anyone registering in Mississippi, other than by comity, had to have both examinations. Consequently, _____ said, the Board changed its comity registration rule to reflect both pre- and post-_____ time periods to "level the playing field" for in-state and out-of-state applicants. (Ex. _____)

24. _____ also testified that the Board saw no conflict between its rule and the comity statute because the statute was permissive, using the term "may," and did not require the Board to register on the bases stated in Miss. Code Ann. § 73-13-35. (Ex. _____)

25. The statute governing the issuance of registrations generally stated:

§ 73-13-29. Certificate of Registration.

The board shall issue a certificate of registration upon payment of registration fee as provided for in sections 73-13-1 through 73-13-45, to any applicant who, in the opinion of the board, has satisfactorily met all the requirements of said sections.

26. _____ testified during the federal court trial that he/she now was engaged in the full-time practice of law. However, _____ testified that he/she still wished to be a licensed _____ in Mississippi so that he/she could work as an expert witness. _____ also opined that being a licensed professional _____ could give him/her an edge, in terms of credibility, in dealing with other experts. (Ex. _____)

27. The Board appealed from the District Courts _____, _____, decision to the United States Court of Appeals for the _____ Circuit. On _____, _____, that Court affirmed the district court, holding that _____ was entitled to a pre-revocation hearing. The Court concluded "[t]he possibility that the defendants might not have accepted (_____'s) theory had they used proper procedure does not excuse them from following that procedure." (Ex. _____)

28. Following remand from the _____ Circuit, an evidentiary hearing was held before the district court, the Honorable _____ presiding, without a jury. The District Court filed its Memorandum Opinion and Order on _____, _____. The Court reiterated its earlier findings that _____ acquired a property interest in his/her license and that failing to accord him/her a hearing denied _____ right to due process under the Fourteenth Amendment to the Constitution of the United States. (Ex. _____)

29. On _____, _____, through its executive director, the Board noticed a post-statute because the statute was permissive, using the term "may," and did not require the Board to register on the bases stated in Miss. Code Ann. § 73-13-35. (Ex. _____)

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26. testified during the federal court trial that he now was engaged in the full-time practice of law. However, testified that he still wished to be a licensed engineer in Mississippi so that he/she could work as an expert witness. also opined that being a licensed professional could give him/her an edge, in terms of credibility, in dealing with other experts. (Ex.)

27. The Board appealed from the District Court's , , decision to the United States Court of Appeals for the Circuit. On , , that Court affirmed the district court, holding that was entitled to a pre-revocation hearing. The Court concluded "[t]he possibility that the defendants might not have accepted ('s) theory had they used proper procedure does not excuse them from following that procedure." (Ex.)

28. Following remand from the Fifth Circuit, an evidentiary hearing was held before the district court, the Honorable presiding, without a jury. The District Court filed its Memorandum Opinion and Order on , . The Court reiterated its earlier findings that acquired a property interest in his/her license and that failing to accord him/her a hearing denied 's right to due process under the Fourteenth Amendment to the Constitution of the United States. (Ex.)

29. On , , through its executive director, the Board noticed a post-revocation hearing to be held on , , at : a.m./p.m. (The letter noticing the hearing has not been made part of the official transcript. However, the parties stipulate to the existence of the notice and the fact of the hearing, held on ,)

30. On , , through a letter from its executive director, the Board informed that it had reconsidered its previous action revoking the license issued to him/her and affirmed its earlier decision that the license had been granted in error. The Board's order, enclosed with the letter of , , was dated , . The reason for the delay in informing of the Board's action does not appear in the Record.

LAW

This Court sits as an appellate court and does not consider the evidence de novo, but will consider de novo the legal rules to be applied. "The decision of an administrative agency shall not be disturbed unless unsupported by substantial evidence; arbitrary or capricious; beyond the agency's scope or powers; or violative of the constitutional or statutory rights of the aggrieved party. (Citations omitted) . . . Chancery and circuit courts are held to the same standard as [the Supreme Court] when reviewing agency decisions. (Citation omitted)" State Board of Public Accountancy V. Gray, 674 So.2d 1251, 1253 (Miss. 1996); see also, Mississippi State Tax Comm'n V. Dyer * Co., Inc., 507 So.2d 1287 (Miss. 1987) (reviewing court need not defer to agency's interpretation of a statute which is repugnant to the statute's clear meaning).

This case has no disputed facts; it turns on applying unambiguous statutes to the facts. The State Board's actions were governed by the statutes as they existed at the time of application. Miss. Code Ann. § 73-13-15, as amended; Crosby V. Barr, 198 So.2d 571 (Miss.1967).

The statute allowing for licensure by comity provided, in relevant part:

The board may . . . issue a certificate of registration as a professional to any person who holds a certificate of qualification or registration issued to him by proper authority . . . of any state . . . provided that the applicant has held such certificate of registration for a period of ten (10) or more years and has continued to practice.

Miss. Code Ann. § 73-13-35. The Board purported to revoke's license based on the Board's Rule 3.026, governing comity registrations. The Rule stated that an applicant "will" be granted a license if the applicant was registered by a foreign jurisdiction after , , and has passed the examination usually taken immediately post-graduation, the EIT (in training) examination, now known as the FE (fundamentals of engineering) examination, as well as another examination called the Principles and Practice Examination (the "PE").

The rule is void because it conflicts with § 73-13-35. Consequently, the State Board's revocation of's validly issued license is also void. Of great concern to the Court, aside from the State Board's adopting a rule in conflict with the governing statute, is that the Board had notice that there was a discrepancy between the statute and the Board's comity registration rule.

There is another reason why the Court is required to vacate the State Board's order. contends that even if the Board granted a license "in error," a license, valid under the terms of the statutes, was issued. The Board's power to suspend or revoke a license is governed by Miss. Code Ann. § 73-13-37, as amended. The statute requires a verified charge be served before a hearing is noticed and held. No verified charge has ever been filed and served upon .

The Supreme Court of Mississippi has said, applying a statute substantially identical to §73-13-37, [S]ince there was no formal charge filed against Dr. with the Mississippi Board of Dental Examiners as required by Mississippi Code Annotated Section 73-9-63 (1972), the Board had no authority to give notice, hold a hearing, and revoke the license of Dr. . The order of the Board was Void. Boring V. Mississippi State Board of Dental Exam 'rs, 300 So.2d 135, 138-39 (Miss. 1974) (emphasis supplied). In this case, the positive command of the law was not fulfilled and the order of the Board was void.

ORDER

The State Board's order revoking's validly issued license exceeded the Board's powers granted by the Legislature. The State Board's order revoking's license is void and its order is hereby vacated. The Court hereby orders the State Board immediately to reinstate's license to practice professional engineering in Mississippi.

SO ORDERED, this the day of , 20 .

Special Judge