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No. 35288

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

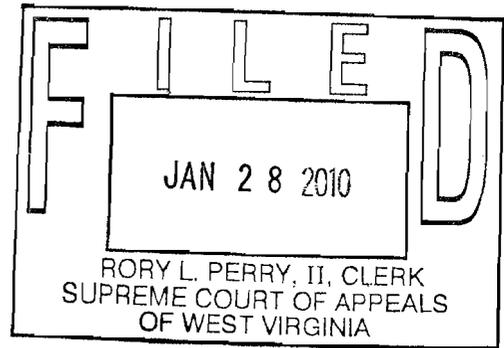
JAMES MICHAEL CASEY, D.V.M., M.S.,

Petitioner below, Appellee

v.

WEST VIRGINIA BOARD OF
VETERINARY MEDICINE,

Respondent below, Appellant.



APPELLANT'S REPLY BRIEF

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JAMES MICHAEL CASEY, D.V.M., M.S.,

Petitioner below, Appellee,

v.

WEST VIRGINIA BOARD OF
VETERINARY MEDICINE,

Respondent below, Appellant.

APPELLANT'S REPLY BRIEF

I.

INTRODUCTION

The Appellant, the West Virginia Board of Veterinary Medicine (Board), had sought appeal of the April 14, 2009, final Order Granting Writ of Mandamus by the Circuit Court of Kanawha County, West Virginia. This matter involved a determination by the Board that the Appellee's, James M. Casey, application for a veterinary license was incomplete due to a missing National Board Examination score, and as such, the Board would not issue the Appellee a veterinary license in the State of West Virginia.

Since the matter was accepted by this Court, the Board filed its Brief and the Appellee filed its Response Brief. Now the Appellant, the Board, comes to file its Reply Brief correcting

misstatements of the facts along with other inaccuracies found in the Responsive Brief. The Board does find it difficult to reply to the Appellee's Response Brief in that the Appellee did not respond to any of the assignments of error that the Board proffered in this matter; however, the Board has addressed the issues as best as possible below.

II.

STATEMENT OF FACTS

The Appellee in his Statement of Facts again attempts to place into evidence facts that are not supported by the record itself, such as his licensing credentials and educational background. Moreover, the Appellee seems to suggest that the Board delayed the processing of the Appellee's application given that the Appellee obtained an application for licensure in February 2004, but no application for licensure was filed with the Board until March 2005. The Appellee further states that he had to hire an attorney in order to file the application; however, there is no testimony as to why there is a delay of over one year from the time of the request for application for licensure to the actual filing of the application itself. Remember that the Appellee did not testify himself.

As far as the application itself, the Board acknowledged receipt of the application and sent the Appellee correspondence dated May 6, 2005, to the Appellee's address in Laurel, Maryland, which explained that the application was incomplete at that time. (3/12/08 R. at Ex.1.) In telephone conversations that followed with the Board's Executive Director, the Appellee assured her that the test scores would be forthcoming. This assurance was again given to the Board at its June 2005 meeting in which the Appellee appeared before the Board wherein he requested he be permitted to sit for the West Virginia examination the following day. The Appellee was permitted to sit for the West Virginia Examination the following day based upon his assurances to the Board that his

national test scores would be received by the Board. Thus, the Appellee's application for licensure was and has been processed as one based upon tests scores and not reciprocity as argued by the Appellee now.

Moreover, there are no "requirements and specifications" that are on the application form that are not required by statute or rule. The Appellee has not argued this point in any of the previous filings with the lower Kanawha County Circuit Court. Further, the final Order as noted above directed the Board to conduct an interview of the Appellee, James M. Casey, for which the Appellant filed a Motion for Stay with the Kanawha County Circuit Court. This Motion was ultimately denied and arrangements were being made for the interview when this matter was accepted for hearing by this Court. It was then agreed by Appellee's counsel that no stay was necessary since the matter had now been accepted by this Court, and he would await the decision of this Court without the interview being conducted at this time.

III.

ASSIGNMENT OF ERRORS

A. THE CIRCUIT COURT DOES NOT HAVE THE JURISDICTION TO ORDER A BOARD TO USE A RULE OR STATUTE IN ORDER TO ISSUE A LICENSE FOR AN APPLICANT WHO OTHERWISE FAILS TO MEET THE REQUIREMENTS FOR LICENSURE.

The Appellee seems to argue in his Response Brief that the Declaratory Judgment Act requires the Board to issue a license to the Appellee; however, the Kanawha County Circuit Court did not make any rulings based upon the Declaratory Judgment Act nor did the Appellant assign

any error to the Declaratory Judgement Act. As such, any argument regarding the Declaratory Judgment Act is irrelevant to the case in the instant matter.¹

Moreover, the Appellee argues that if the Board has a statute and/or rule it must be used by the Board at all times. In support of this argument, the Appellee cites to *L.H. Jones Equipment Co. V. Swenson Spreader LLC*, 2009 WL 3857999 (W. Va. 2009), which the Appellee contends finds that when the West Virginia State Legislature creates a statute it is intended to be utilized. Yet, this argument is flawed, the *Jones* case sets out the standard for statutory interpretation. It lays out the framework for how a statute is to be interpreted if there is a dispute over the interpretation or intent of a statute. *Jones* does not discuss when or how a statute is actually utilized, but instead how a statute is to be interpreted, and in the case of *Jones* that statute was the Farm Equipment Dealer Contract Act.

The Appellee continues with this argument of statutory construction and interpretation by stating the Kanawha County Circuit Court Judge that heard this matter is to be given deference since at one point in her career she was an attorney working in the West Virginia State Legislature. This argument is irrelevant and without merit especially considering the instant matter is not about statutory interpretation nor construction.

Instead, this matter is about an incomplete application as presented to the Board in March 2005. Now at the time of the Appellee's application and pursuant to W. Va. Code § 30-10-8, applicants may have obtained a license to practice veterinary medicine without examination;

¹Moreover, a declaratory action is not designed to determine the outcome of the case matter, but only to clarify the legal rights and obligations of the parties. There must be a justiciable controversy as defined "when a legal right is claimed by one party and denied by another party." *West Virginia Contractors Ass'n v. Laidely Field Athletic and Recreational Ctr. Governing Bd. et al.*, 164 W. Va. 127, 131, 260 S.E.2d 847, 851 (1979).

however, the issuance of such a veterinary license was discretionary by the Board. Subsection (a) states “[t]he board may issue a license without written examination, and, subject to the provisions of subsection (b) of this section, without any type of examination, to a qualified applicant who is a resident of this state” Moreover, in subsection (b) it states “[i]n its discretion, the board may orally and practically examine any person qualifying for licensing under this section, and may enter into agreements for reciprocal licensing with other jurisdictions. . . .”

In the instant case, the only evidence regarding the Appellee’s residence is his address in Laurel, Maryland. (3/14/08 R. at Ex. 2.) Moreover, why would the Appellee make a personal appearance before the Board itself in June 2005 to request to sit for the West Virginia examination the following day when application for licensure pursuant to W. Va. Code § 30-10-8, does not even require any examination.

Moreover, the Code of State Rules in 1992 that were found to be in effect at the time of the Respondent’s application did have provisions for application by reciprocity; however, it is clearly stated within these rules at § 26-1-8.4, “[a]ll applicants for license by reciprocity are hereby advised that the granting of licensure by reciprocity is by privilege, not by right; and the granting of the license rests solely in the discretion of the West Virginia Board of Veterinary Medicine.” Further, the rule states at § 26-1-8.3, “[t]he Board may waive the requirement of the National Board scores for applicants by reciprocity.”

If one looks to the record in the instant case, one would find that the only individual who testified at the evidentiary hearing held on this matter was Wanda Goodwin, the Board’s Executive Director since 1980. Ms. Goodwin testified that in her time with the Board that no applicant has been issued a license to practice veterinary medicine in the state of West Virginia based upon

reciprocity without first submitting a passing NBE test score. Moreover, as Ms. Goodwin testified there were reciprocal agreements with three states. The states were Ohio, Kentucky, and Florida; however, those agreements were not in place when the Appellee submitted his application. (3/14/08 R. at 7-8.) The agreements had been cancelled by the participating state. So even though veterinary licenses have been issued to a few individuals when these agreements were in place, the Board in its discretion still required the applicant to submit a passing NBE score to West Virginia from the national reporting service. And if the Board were to grant a veterinary license in the instant case, then the Board would be seen as arbitrary because it would be breaking with its policy of only granting a reciprocal license to those from states with whom they have an agreement and to those applicants who have a passing NBE test score.

The Appellee clearly did not have an established right to a veterinary license by reciprocity and there is no evidence within the record as established that shows any arbitrary or capricious actions by the Board. All the language for licensure by reciprocity or licensure without examination is discretionary in nature, and all the actions taken by the Appellee in the application process show that he was applying to the Board for licensure not by reciprocity, but by the submission of NBE test scores which have never been properly submitted from national testing service pursuant to W. Va. Code R. § 26-1-3.

Moreover, pursuant to W. Va. Code § 30-10-12, an individual who has completed an application for licensure by the Board, but whose application is denied by the Board, is entitled to an administrative hearing. In the instant case, there was no administrative hearing since the Board determined that the application itself was incomplete, and as such, there was no application to deny by the Board. Moreover, the Board argues that the Appellee is entitled no other legal remedies since

he failed to complete the application as required by the Board's statutes and regulations. There can be no legal recourse if there is no completed application for the Board to review and act upon.²

B. THE BOARD REQUIRES ALL APPLICANTS FOR LICENSURE TO SUBMIT NATIONAL TEST SCORES FROM A NATIONAL REPORTING SERVICE.

The Board requires pursuant to W. Va. Code R. § 26-1-5.6 that “[a]ll veterinary applicants must pass both national and West Virginia Board examinations. National Examination score reports must be sent to the Board directly from the national reporting service.” According to the 1992 state rules for reciprocity found to be in effect when the Appellee filed his application in March 2005, it states that “[t]he Board may waive the requirement of National Board scores for applicants by reciprocity.” W. Va. Code R. § 26-1-8.3.

Thus, in the instant case matter there is no scenario wherein the Appellee would not either be required to submit his national test report from a national testing service or where the Board has the discretion to request these results.³ The Appellee incorrectly states that the “applicable rules of the Board did not specifically require that Dr. Casey include the national board information on his application.” *See* Appellee’s Response Brief at 14 and 17. Moreover, the Board is unclear as to the Appellee’s citation to the record at pages 48 and 66 for authority that there are no rules. These references are to Wanda Goodwin’s testimony and whether there are rules that require such test results for which Ms. Goodwin was unsure. The rules speak for themselves, and Ms. Goodwin’s

²However, if the Appellee had applied for licensure by reciprocity or licensure without examination and the Board denied such an application, then the Appellee would be entitled to an administrative hearing on the basis of such a denial by the Board.

³The only statutory provision regarding licensure without examination the Appellee does not qualify for since he is not a West Virginia resident. *See* W. Va. Code § 30-10-8.

knowledge of these rules is not the issue in the instant case matter. Yet, the Appellee seems to be making Ms. Goodwin's knowledge of the rules an issue, and the Board is unclear as to what purpose. Ms. Goodwin's testimony was not offered to the Court as a legal expert, but as someone who has run the daily operations of the Board for over twenty years and dealt exclusively with the Appellee's application for licensure. Moreover, the lower Kanawha County Circuit Court did not issue a ruling on the Appellee's request for declaratory judgment nor was this an assignment of error by the Board in this matter. As such, any discussion or argument regarding these issues are irrelevant.

Further, Ms. Goodwin did not admit that the Appellee has the "appropriate credentials in at least seven or eight other states." She merely answered in the affirmative when asked if the Appellee was licensed in seven or eight other states. (3/14/08 R. at 56-57.) Ms. Goodwin is not the credentialing authority for these states. As far as the licensing arrangements of other states, this issue has not been in question and still is not in question. The issues are how does the state of West Virginia license veterinarians, and the Board's jurisdiction to ensure that the public's safety is paramount.

The Appellee clearly has not submitted test scores from a national reporting service as required by the Board and its rules which makes his application for licensure incomplete without legal recourse since the Board cannot act upon an incomplete application. Should the application be viewed as one by reciprocity, the granting of such an application is purely discretionary in nature by the Board for which there is no clear legal right. The Appellee fails to meet the three elements for a writ of mandamus and offers no new argument how the Kanawha County Circuit Court did not err when granting the writ of mandamus. Moreover, the Appellee offers no argument as to how the

Kanawha County Circuit Court did not err when making its sweeping findings that the Appellee had met the requirements for licensure by reciprocity.

IV.

CONCLUSION

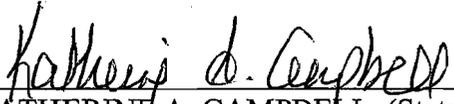
Based upon the foregoing, the Appellant, West Virginia Board of Veterinary Medicine, respectfully requests that this Court reverse the granting of the Writ of Mandamus as ordered in the Kanawha County Circuit Court's April 14, 2009, final Order.

Respectfully submitted,

WEST VIRGINIA BOARD OF
VETERINARY MEDICINE,

By counsel

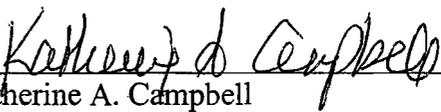
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CERTIFICATE OF SERVICE

I, Katherine A Campbell, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Appellant's Reply Brief" was served by depositing the same postage prepaid in the United States Mail, this 28th day of January 2010, addressed as follows:

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Katherine A. Campbell