

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Spencer B. Wagner, D.M.D.)	Docket No. 06-ALJ-11-0716-AP
)	
Appellant,)	
)	
vs.)	
)	ORDER
South Carolina Department of Labor,)	
Licensing and Regulation, South Carolina)	
State Board of Dentistry,)	
)	
Respondent.)	
)	

Appearances: For the Appellant: Aaron J. Kozloski, Esquire
For the Respondent: Marvin G. Frierson, Esquire

REVERSED

STATEMENT OF THE CASE

The above-captioned matter is before the South Carolina Administrative Law Court (“ALC” or “Court”) pursuant to S.C. Code Ann. §§ 40- 1-160, 40-15-200 and 1-23-600(D) (Supp. 2006) for an administrative appeal. In this appeal, Spencer B. Wagner, D.M.D., (“Appellant”) challenges the South Carolina Department of Labor, Licensing and Regulation, South Carolina State Board of Dentistry’s (“Board”) Final Order dated July 28, 2006. In its Final Order, the Board found that Appellant violated S.C. Code Ann. § 40-15-190(A)(15) (Supp. 2005) and 23A S.C. Code Ann. Regs. 39-11, Principle 4, and imposed sanctions against Appellant’s license. After timely notice to the parties, oral arguments on this appeal were heard before me at the Court in Columbia, South Carolina.

Based upon the Record on Appeal, the parties’ briefs and oral arguments, and upon the applicable law, I find that Respondent’s decision in this matter must be reversed.

PROCEDURAL HISTORY

Appellant is a general dentist licensed by the Board to practice dentistry in South Carolina. Appellant maintains two dentistry practices. His primary practice, “Spencer B. Wagner, DMD, PC,” is located in Fairfax, South Carolina, and his second practice, “Coastal Orthodontics,” is located in Beaufort, South Carolina.

Appellant advertised “Coastal Orthodontics” and the availability of orthodontic services at that practice through advertisements in newspapers and the Yellow Pages. In one advertisement, Appellant included a statement that he is a general dentist; however, that statement appears in small type at the bottom of the ad while the name “Coastal Orthodontics” appears in larger type at the top of the ad. Appellant is not licensed as a specialist in orthodontics in South Carolina.

On June 18, 2004, the Board issued a Formal Accusation against Appellant that alleged he engaged in misconduct by publishing misleading advertisements. A panel hearing was held on December 10, 2005. After the hearing, the panel issued a report in which it found that Appellant had violated various provisions of the Dental Practice Act, S.C. Code Ann. § 40-15-10 *et seq.*, and recommended that Appellant be sanctioned. A Final Order hearing was then held before the Board on July 21, 2006. The Board adopted the Panel Report and issued its Final Order on July 28, 2006. In its Final Order, the Board found that Appellant violated § 40-15-190(A)(15) and 23A S.C. Code Ann. Regs. 39-11, Principle 4. As a result, the Board suspended Appellant’s license for one year, which suspension would be stayed and Appellant’s license reinstated in a probationary status for one year upon compliance with certain terms and conditions which included: (1) payment of a \$3,000.00 fine within 30 days of the Final Order; (2) advance submission of all advertising related to the practice of dentistry for Board review prior to publication during the one year probationary period; and, (3) periodic review by the Board of Appellant’s dental records at Appellant’s expense. Appellant was further ordered to appear and report to the Board as requested. Appellant filed a notice of appeal with the Court on September 6, 2006 to challenge the Board’s Final Order.

JURISDICTION AND STANDARD OF REVIEW

Jurisdiction on this appeal is vested in the ALC pursuant to S.C. Code Ann. §§ 1-23-600, 40-1-160 and 40-15-200. The provisions of the South Carolina Administrative Procedures Act (“APA”)

govern an appeal from a Final Order of the Board. Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995).

A final decision of the Board may be reversed or modified if substantial rights of the appellant have been prejudiced because the administrative findings or decision are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, are arbitrary or capricious, are in violation of constitutional or statutory provisions, are made upon unlawful procedure, or are affected by other error of law. S.C. Code Ann. § 1-23-380(A)(6). Furthermore, a finding of fact by the Board will not be overturned by this Court “unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.” Lark v. Bi-Lo, 276 S.C. 130, 137, 276 S.E.2d 304 (1981).

“Substantial evidence” is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached. Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453 (1999). It is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Midlands Utility, Inc. v. S.C. Dep't of Health and Env'tl. Control, 298 S.C. 66, 69, 378 S.E.2d 256, 258 (1989). The possibility of drawing two inconsistent conclusions from the evidence will not mean the agency's conclusion was unsupported by substantial evidence. Palmetto Alliance, Inc. v. S. C. Public Service Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

Where there is a conflict in the evidence, the agency's findings of fact are conclusive. Id.; see Harbin v. Owens-Corning Fiberglas, 316 S.C. 423, 450 S.E.2d 112 (Ct. App. 1994). This Court cannot substitute its judgment for that of the Board upon a question as to which there is room for a difference of intelligent opinion. Chemical Leamen Tank Lines v. S.C. Pub. Serv. Comm'n, 258 S.C. 518, 189 S.E.2d 296 (1972). The Board has the benefit of seeing and hearing the testimony of the witnesses and judging their credibility and demeanor. The factual findings of an administrative agency [the Board] are presumed to be correct and will be set aside only if unsupported by substantial evidence. Kearse v. State Health and Human Fin. Comm'n, 318 S.C. 198, 456 S.E.2d 892 (1995). Applying the “substantial evidence rule,” an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. S.C. Code

Ann. § 1-23-380 (A)(6) (Supp. 2003); Toussaint v. State Bd. of Med. Exam'rs, 303 S.C. 316, 400 S.E.2d 488 (1991).

An abuse of discretion occurs when an administrative agency's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006) (application of standard to circuit court) (citing Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); see also Converse Power Corp., 350 S.C. 39, 47 564 S.E.2d 341, 345 (Ct. App. 2002) (quoting Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) ("A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.")).

DISCUSSION

Appellant raises several grounds on appeal of the Board's final decision: (1) the Board's application of 23A S.C. Code Ann. Regs. 39-11, Principle 4 violates Appellant's constitutional rights because it "amounts to an outright ban on the use of the term orthodontics by a general dentist"; (2) the Board improperly admitted and relied upon a biased expert witness; and, (3) the sanctions imposed on Appellant by the Board are arbitrary and capricious as the sanctions serve no relation to the alleged conduct committed by Appellant.

In its Final Order, the Board found that Appellant violated § 40-15-190(A)(9) and Regs. 39-11, Principle 4, in that he "announced his services as a general dentist in a manner that implies specialization and is false or misleading in a material respect, as evidenced by his prominent use of 'Orthodontics' in his practice name and advertising thus implying that he is a licensed orthodontist." S.C. Code Ann. § 40-15-190(A)(9) provides that:

Misconduct which constitutes grounds for revocation, suspension, probation, reprimand, or other restriction of a license or certificate or a limitation or other discipline of a dentist, dental hygienist, or dental technician occurs when the holder of a license or certificate: . . . (9)has violated the principles of ethics in the practice of dentistry as promulgated in the regulations of the State Board of Dentistry[.]

Further, Reg. 39-11, Principle 4(D) provides that:

General dentists who wish to announce the services available in their practices are permitted to announce the availability of those services so long as they avoid any communications that express or imply specialization. General dentists shall also state that the services are being provided by general dentists. No dentist shall announce available services in any way that would be false or misleading in any material respect. The phrase “practice limited to” shall be avoided.

South Carolina permits general dentists to perform all dental services and procedures, including orthodontics, without licensure as a specialist. However, in order for a dentist to hold himself out to the public as limiting his practice to, being a specialist in, or giving special attention to any special area of dentistry, licensure as a specialist is required. S.C. Code Ann. § 40-15-220 (Supp. 2005). Nonetheless, general dentists are not prohibited from limiting their practices to any particular area of dentistry, including specialty procedures, as the volume of business in a limited area of dentistry or a general dentist’s restriction of his practice to one or more limited areas of dentistry does not in itself constitute a holding out to the public that the dentist is a specialist. *Id.* Licensed specialists, however, who announce specialization to the public must limit their practice to the published specialty. S.C. Code Ann. Reg. 39-11(4)(C).

Appellant argues that the Board’s application of Regulation 39-11 amounts to an outright ban on the use of the term “orthodontics” by a general dentist, and as such, it violates Appellant’s constitutional right to free commercial speech. Commercial speech is speech that involves an “expression related solely to the economic interests of the speaker and its audience.” Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 561, 100 S.Ct. 2343, 2349 (1980). Commercial speech is protected from unwarranted governmental regulation by the First Amendment, as applied to the State through the Fourteenth Amendment. *Id.* However, commercial speech is entitled to less protection under the First Amendment than other constitutionally protected expression. *Id.* at 562 -563, 2350.

Although an administrative law judge is prohibited from ruling on the constitutionality of a law, the ALJ may rule on whether a party’s constitutional rights have been violated. Evans v. State, 344 S.C. 60, 66, 543 S.E.2d 547, 550 (2001) (citing Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000) (“[A]n . . . ALJ can still rule on whether a party’s constitutional rights have been violated . . . Merely asserting an alleged constitutional violation will not allow a party to avoid an administrative ruling.”)); Video Gaming Consultants, Inc. v. S.C. Dep’t of Revenue, 342 S.C. 34, 38, 535 S.E.2d

642, 644 (2000).

In this case, the commercial speech in question is the advertisement of orthodontic services by a general dentist licensed in South Carolina. The Board found that Appellant's advertisement, by including the word "Orthodontics" in his practice name, was misleading by implying that he is a licensed orthodontist. In response, Appellant maintains that his advertisements are truthful and that there is nothing in the regulations or the South Carolina Dental Practice Act, § 40-15-10 et seq., which would lawfully prohibit him from using the term "orthodontics" within an advertisement that announces the services that are provided by his office. The facts of this case are virtually identical to the facts of Parker v. Commonwealth of Kentucky, Board of Dentistry, 818 F.2d 504 (1987), in which the Sixth Circuit United States Court of Appeals dealt with the issue of whether a general dentist's use of the term "orthodontics" in advertisements was afforded protection as commercial speech under the First Amendment. In that case, Dr. Parker was a licensed general dentist in the State of Kentucky and under the law in Kentucky, Dr. Parker could practice orthodontics while licensed as a general dentist provided he did not hold himself out to the public as a specialist in the field of orthodontics. Dr. Parker placed an advertisement in the Yellow Pages under the heading, "Dentists." The ad was headed by the phrase "COMPLETE DENTAL CARE" and then listed a variety of services offered by Dr. Parker, including orthodontics. Based upon the advertisement, the Kentucky Board of Dentistry instituted disciplinary proceedings against Dr. Parker for holding himself out to the public as a specialist in the field of orthodontics.¹ Specifically, the Board found that the use of the words "orthodontics," "braces," and "brackets" in the advertisement were misleading in that they implied specialization in orthodontia.

In reviewing the dental board regulations at issue in Parker, the Court of Appeals found that the regulation which prohibited general dentists from "inserting the name of a specialty" into an advertisement was unconstitutional under the First and Fourteenth Amendments. The Court of Appeals also found that other regulations at issue which prohibited Dr. Parker from using words or "phrases customarily used by qualified specialists" were unconstitutional as applied to Dr. Parker because they prevented him from using terms to describe his practice which were not misleading or deceptive, i.e. the term "orthodontics." Specifically, the Court of Appeals in Parker found that the use of particular terms in the orthodontic field are not inherently misleading:

¹ In Parker, the relevant statute specifically prohibited a general dentist from "inserting the name of a specialty, or using other phrases customarily used by qualified specialists that would imply to the public that he is so qualified." Id. at 506.

It is argued that such words as ‘orthodontics,’ ‘brackets,’ and ‘braces’ are either inherently or potentially misleading in that the general public will believe that such a dentist is a ‘specialist’ in the area of orthodontics. We cannot agree that such terms are inherently misleading. Such terms are not false, but actually describe procedures which a general practicing dentist is permitted to perform under state law. If a state permits a dentist to perform orthodontic services, we do not believe a state can justify an outright ban on the use of particular terms relating to orthodontics on the theory that such terms inherently mislead the public.

Parker, 818 F.2d at 510.

While the regulation at issue in Parker completely banned the use of the word “orthodontics” in advertisements by general dentists not licensed as orthodontists, the Board’s application of 39-11 to Appellant in the instant matter reaches a similar result. The Board found that his use of the word “orthodontics” was misleading and required specialization in the field of orthodontics. I disagree. Regulation 39-11, Principle 4 only requires general dentists to refrain from using the phrase “practice limited to.” It does not prohibit Appellant from using terms associated with any areas of specialization within the field of dentistry. This is especially true as Appellant, a licensed general dentist, is permitted by the Board to perform and provide services within any area of specialization in dentistry.

Counsel for the Board also argues that Appellant’s advertisement of his dental practice in Beaufort “places[s] an overabundance upon his practice of orthodontics versus his being a general practitioner” and that the word “orthodontics” is in much larger font when compared to the remaining information in Appellant’s advertisement. This argument must fail for two reasons. Regulation 39-11, Principle 4 contains no reference or guidelines as to the number of times a particular area of specialization may be referenced within the general dentist’s advertisement. Regulation 39, Principle 4 simply mandates that general dentists “state that the [specialization] services are being provided by general dentists” and that a general dentist “avoid any communications that express or imply specialization.” Like the situation in Parker, I find that the terms used by Appellant in his advertisement are descriptive of the services and procedures he offers in his dental practice and do not express or imply specialization. Id. (“[A] term such as ‘orthodontics’ is not in and of itself deceptive; rather, it conveys information regarding dental procedures which either a general practicing dentist or a dentist specializing in orthodontia may perform.”) Id. And while counsel for the Board argues that the size font of the word “orthodontics” in his advertisement is misleading, there are no guidelines in Regulation 39-11, Principle 4 which

specifies or places any limitation upon the size typeset to be used within general dentists' advertisements.

In fact, the United States Supreme Court addressed a similar issue concerning an advertisement run by an attorney that contained a listing in large capital letters that he was admitted to practice before "THE UNITED STATES SUPREME COURT." In re R.M.J., 455 U.S. 191, 197, 102 S.Ct. 929, 934 (1982). Although the Supreme Court found the listing to be in bad taste and that it could be misleading to the general public unfamiliar with the requirements for admission to the bar of the Supreme Court, it declined to find it misleading as there was nothing in the Record from the court below to indicate that it was misleading. Furthermore, the Supreme Court stated that "[s]tates may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. . . . [as the Supreme Court in] Bates suggested that the remedy in the first instance is not necessarily a prohibition, but preferably a requirement of disclaimers or explanation." Id. at 203; Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691 (1977) (stating that in the context of advertisements of legal services by lawyers, a disclaimer might be required to ensure that consumers are not misled). Similarly, the Court of Appeals in Parker suggested that a disclaimer that the services were being performed by a licensed general dentist would address the state's concern that the public would be misled into thinking that the orthodontic services offered were being offered by a licensed orthodontist. In this matter, there is sufficient evidence in the Record to demonstrate that the listing of Appellant's dental practice in Beaufort complies with the requirements set forth in Regulation 39-11, Principle 4 as Appellant did insert a disclaimer in some of the advertisements: "Dr. Wagner is a general dentist who has been practicing Orthodontics & Disorders of the TMJ for over 10 years." Further, he listed the ads in the yellow pages under the heading of "Dentists" as opposed to "Orthodontists." Even if Appellant's use of larger typeset within the advertisement may have been misleading to the general public, Appellant's disclaimer presented such information in a non-deceptive and informative fashion. Furthermore, Appellant listed other dental services – in addition to any orthodontic services – offered by him to be performed at the Beaufort location.

Essentially, in Parker and RMJ, the Court held that the States can't place an absolute prohibition on certain types of potentially misleading information, such as the listing of practice areas, if the information can be presented in a way that is not deceptive. Here, the information is listed in a way that is not deceptive, by listing other areas of practice than orthodontics. Moreover,

Appellant has complied with every requirement mandated within Regulation 39-11, Principle 4-D: 1) he did not use the phrase “practice limited to” within his advertisements; 2) he included a disclaimer within his advertisements to limit any misconceptions the public may have regarding such advertisements; and, 3) Appellant listed other areas of dental practice within his advertisements. While other professionals within the dental field may disagree with Appellant’s choice of wording within his advertisements, there is nothing contained within Appellant’s advertisements that would violate Regulation 39-11, Principle 4. Because Appellant may lawfully practice in the field of orthodontia, the Board cannot subsequently prohibit Appellant from using such terminology within his advertisements. As such, I find that the Board’s determination must be reversed as there is insufficient evidence in the Record to support the Board’s determination in this matter.

As a result of this Court’s conclusion, it is not necessary to determine any remaining issues raised by the parties. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when determination of prior issue is dispositive).

ORDER

For all the foregoing reasons,

IT IS HEREBY ORDERED that the Board’s Order dated July 28, 2006 is **REVERSED**.

AND IT IS SO ORDERED.

Marvin F. Kittrell
Chief Administrative Law Judge

January 7, 2008
Columbia, South Carolina