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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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Alabama State Board of Pharmacy

v.

Demetrius Yvonne Parks et al.

Appeal from Montgomery Circuit Court
(CV-16-901576)

THOMPSON, Presiding Judge.

The Alabama State Board of Pharmacy ("the board") appeals from a judgment of the Montgomery Circuit Court ("the circuit court") that reduced the punishment the board had imposed on pharmacist Demetrius Yvonne Parks and certain pharmacies that

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Parks owned. The circuit court upheld the board's determination that Parks and the pharmacies had violated numerous provisions of the Alabama Pharmacy Practice Act ("the PPA"), § 34-23-1 et seq., Ala. Code 1975, however.

This is the third time that these parties have come before this court in connection with this matter. The first time they appeared before us, this court issued a writ of mandamus directing the circuit court to vacate an order amending a previous stay order without first providing the board an opportunity to present evidence challenging the propriety of the changes in the amended stay order. The amended stay order had eased restrictions against Parks and the pharmacies put in place by the initial stay order. Ex parte Alabama State Bd. of Pharmacy, 240 So. 3d 594 (Ala. Civ. App. 2017).

Subsequently, in Ex parte Alabama State Board of Pharmacy, 253 So. 3d 972, 974 (Ala. Civ. App. 2017), this court concluded that the circuit court had exceeded its authority when it ordered the board to void a report required by federal law advising of the disciplinary action that had

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been taken against Parks and the pharmacies pending a final judicial review of the board's decision.

In this appeal, we address the board's appeal of the circuit court's judgment that upheld the board's decision determining that Parks and the pharmacies had violated the PPA but reduced the sanctions the board imposed against Parks and the pharmacies. Specifically, the board contends that the circuit court erred by substituting its judgment for that of the board in easing those sanctions, even though the circuit court had found that substantial evidence supported the charges the board had levied against Parks and the pharmacies and the discipline imposed by the board was within the board's statutory authority.

The evidence presented at the hearing before the board demonstrated that Parks operated a pharmacy with a proper permit at a location in Hayneville. She also operated two pharmacies in Montgomery and another in Gadsden. All of those pharmacies had obtained the proper permits from the board.

The Hayneville pharmacy closed because its building was condemned. Parks then operated from a new location in Hayneville. However, she did not obtain a permit for that

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location. The new location had a sign over the door reading "Parks," and a sign on the door said: "All medications will be mailed out." A telephone number was provided for people needing assistance with prescriptions.

The board received a complaint regarding the new Hayneville location from the Alabama Medicaid Agency. On May 6, 2015, in response to that complaint, board inspector Glenn Wells visited the Hayneville location. Libby Burke was the only employee present at that location; no pharmacist or pharmacy technician was there at the time of Wells's inspection. At the new location, Wells found a stockroom containing prescription drugs in stock bottles. There was also a box of filled prescriptions in the stockroom. Wells also discovered patient records, a patient signature log, pharmacy records, and prescriptions that had been faxed to the Hayneville location. The fax number for the Hayneville pharmacy location had been transferred from the original Hayneville location to the new location. Burke told Wells that she would forward the prescriptions she received to one of Parks's pharmacies in Montgomery, where she would later pick up the filled prescriptions and deliver them to patients.

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When Wells visited, Burke's vehicle was parked in front of the Hayneville location. When Burke gave Wells permission to look in the trunk of her vehicle, he found prescription medications inside it. He also found labels to apply to medicine bottles when they were delivered to patients. Wells said that Burke told him she would sometimes meet people inside the building or in the parking lot of the Hayneville location for them to pick up their prescriptions. Burke would also process payments for prescriptions at the Hayneville location. While Wells was there, he said, a woman arrived to pick up prescription medication for her husband and herself.

In Montgomery, Parks operated two pharmacies--one on Mulberry Street and one on Adams Avenue. In November 2014, Parks notified the board that she was closing both locations, and the permits for both locations were ended. Within the month, Parks then reopened the Mulberry Street pharmacy using the permit from the Adams Avenue location, which was no longer valid. The Mulberry Street pharmacy purchased controlled substances from a wholesale drug provider after the permit had been ended. The board concluded that the actions were taken

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in an effort to avoid having to repay Medicaid more than \$300,000 as part of a recoupment order.

On July 27, 2015, Wells inspected the Mulberry Street pharmacy. That inspection revealed incomplete, inaccurate, or incorrect records for controlled substances, as well as invoices for controlled substances that had not been signed by a pharmacist. The Mulberry Street pharmacy also filled prescriptions using labels showing that they were from a Parks pharmacy in Selma that had closed two years before.

Wells inspected the Gadsden pharmacy on January 28, 2015, and on May 21, 2015. Although the pharmacy was open on both occasions, a pharmacist was not present. Nonetheless, the pharmacy received prescriptions from physicians, and prescriptions were filled and dispensed. Wells also found that prescription medication was stored outside the pharmacy area, that drugs were stored in excessive heat, and that a computer containing patient information was located outside the pharmacy area.

Kenneth Green, a federal inspector from the Drug Enforcement Agency ("the DEA"), also inspected the Mulberry Street pharmacy, which had two DEA registration numbers.

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During Green's inspection, the Mulberry Street pharmacy was unable to provide him with certain required documentation. He also found that the Mulberry Street pharmacy had purchased controlled substances using an invalid controlled-substance registration number on 23 occasions and that it had also purchased controlled substances using an incorrect DEA registration number.

Based upon its findings, on October 1, 2016, after a hearing on the board's complaint alleging 46 counts of improper pharmacy practices, the board entered an order finding that Parks and the pharmacies were guilty of violating the PPA, specifically, § 34-23-33(a)(2), (6), (7), (8), (12), and (13), § 34-23-30, § 34-23-70(a), (e), (k), and (l), and § 34-23-131(a); § 20-2-54(a)(4) and § 20-2-56, Ala. Code 1975, of the Alabama Uniform Controlled Substances Act ("the AUCSA"); and Alabama Admin. Code (Bd. of Pharmacy), Regulations 680-x-2.13 and -2.22(2)(d).

The board suspended Parks's license for five years and levied an administrative fine against her in the amount of \$27,000. The board also placed the pharmacy permits of two pharmacies Parks owned--one in Montgomery and one in Gadsden--

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on probation for five years. The two Montgomery pharmacies were ordered to pay separate administrative fines of \$28,000 and \$6,000 each, and the Gadsden pharmacy was ordered to pay an administrative fine of \$13,000.

Parks sought judicial review of the board's decision in the circuit court. After reviewing the record from the hearing before the board, hearing oral arguments from the parties, and reviewing the briefs in support of their respective positions, the circuit court entered a judgment in which it concluded that Parks and the pharmacies had "engaged in conduct which violated the provisions" of the PPA, as the board had charged. The circuit court also concluded that the board's decision, including its factual findings, were "supported by substantial evidence" and that the board's conclusions of law were correct "with exception to the sanctions imposed. The Court believes that the severe sanctions imposed by the Board on Parks were arbitrary, capricious, and unreasonable and are due to be modified." (Emphasis in the original.) The circuit court reduced the penalties against Parks and the pharmacies, suspending Parks's license to practice pharmacy and her controlled-substance

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permit for three months from the date of the judgment, placing the pharmacies on probation for one year, and imposing fines on the pharmacies of \$1,000 each, for a total of \$3,000. No fines were levied against Parks individually. The board filed a timely appeal to this court from the circuit court's decision.

On appeal, the board contends that, after determining that substantial evidence supported the charges brought against Parks and the pharmacies, the circuit court improperly substituted its judgment for that of the board when it reduced the penalties that had been imposed against Parks and the pharmacies. The board argues that the circuit court ignored the applicable standard of review and caselaw.

In reducing the penalties, the circuit court determined that the penalties imposed by the board were arbitrary, capricious, and unreasonable. § 41-22-20(k)(7), Ala. Code 1975. Section 41-22-20(k), Ala. Code 1975, a section of the Alabama Administrative Procedure Act, § 41-22-1 et seq., Ala. Code 1975, controls judicial review of agency decisions. In pertinent part, it provides:

"(k) Except where judicial review is by trial de novo, the agency order shall be taken as prima facie

just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. ... The court may reverse or modify the decision or grant other appropriate relief from the agency action ... if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

"....

"(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion."

In Alabama State Board of Pharmacy v. Holmes, 925 So. 2d 203, 206 (Ala. Civ. App. 2005), this court wrote:

"Our supreme court has stated:

"This Court has further defined the standard of review of an agency ruling in Alabama as follows:

""'Judicial review of an agency's administrative decision is limited to determining whether the decision is supported by substantial evidence, whether the agency's actions were reasonable, and whether its actions were within its statutory and constitutional powers. Judicial review is also limited by the presumption of correctness which

attaches to a decision by an administrative agency.'"

"Ex parte Medical Licensure Comm'n of Alabama, 897 So. 2d 1093, 1096-97 (Ala. 2004) (quoting Ex parte Alabama Bd. of Nursing, 835 So. 2d 1010, 1012 (Ala. 2001), quoting in turn Alabama Medicaid Agency v. Peoples, 549 So. 2d 504, 506 (Ala. Civ. App. 1989)). Substantial evidence is 'evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). 'A presumption of correctness attaches to the decision of an administrative agency due to its recognized expertise in a specific, specialized area.' Hall v. Alabama Alcoholic Beverage Control Bd., 631 So. 2d 1047, 1048 (Ala. Civ. App. 1993). Further, this court reviews a trial court's judgment without a presumption of correctness because the trial court is in no better position to review an agency's decision than this court. Clark v. Fancher, 662 So. 2d 258, 261 (Ala. Civ. App. 1994)."

In Holmes, the board had revoked Holmes's license to practice as a pharmacist and imposed an administrative fine of \$16,000 against him after finding Holmes had violated several provisions of the PPA and the AUCSA and had committed a criminal offense under the Alabama Criminal Code. Id. at 204-05. On judicial review of that decision, Holmes argued that the penalty imposed was unreasonable, arbitrary, and capricious. The circuit court in that case reinstated Holmes's license to practice as a pharmacist, placed him on

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probation for no more than five years, and reduced his administrative fine to \$5,000. Id. at 205. This court reversed the circuit court's decision, pointing out that "Section 34-23-92(12), Ala. Code 1975, authorizes the Board 'to investigate alleged violations of [the PPA] ... and conduct hearings to revoke, suspend or probate any license or permit granted by the [B]oard ... and to invoke penalties not to exceed the sum of \$1,000.00 for each violation(s)....'" Id. at 207 (emphasis added). This court concluded that the board had acted within its statutory authority, stating: "The Board's punishment of Holmes, although harsh, was supported by substantial evidence, was reasonable, and was within its statutory and constitutional powers." Id.

Additionally, § 34-23-33(a) provides that, among other penalties, the board may suspend a pharmacist's license whenever it finds by a preponderance of the evidence that the pharmacist has been guilty of certain acts or offenses, including:

"(2) Violation of the laws regulating the sale or dispensing of narcotics, exempt narcotics, or drugs bearing the label 'caution, federal law prohibits dispensing without prescription,' or similar wording which causes the drugs to be classified as prescription legend drugs.

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". . . .

"(6) Gross malpractice or repeated malpractice or gross negligence in the practice of pharmacy.

"(7) Violation of any provisions contained in th[e PPA].

"(8) Employing, assisting, or enabling in any manner any unlicensed person to practice pharmacy.

". . . .

"(12) Violation of any rule or regulation of the board.

"(13) Violation of the code of professional conduct adopted by the board in the rules and regulations of the board."

In this case, the circuit court did not state a reason as to why it believed the penalties imposed were unreasonable, arbitrary, or capricious. The board found that Parks and the pharmacies were guilty of the 46 charges it had alleged against them. The board also found that, in addition to violating the PPA, Parks and the pharmacies were guilty of violating the AUCSA. The circuit court found that the board's findings as to the charges were supported by substantial evidence. The board had the statutory authority to suspend Parks's license, to place the pharmacies on probation, and to impose the administrative fines against Parks and the

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pharmacies. Under our standard of review, we cannot say that the board acted in an unreasonable, arbitrary, or capricious manner in imposing those sanctions.

Accordingly, we reverse the circuit court's judgment and remand the cause to the circuit court for the entry of a judgment consistent with this opinion.

REVERSED AND REMANDED.

Moore, Donaldson, Edwards, and Hanson, JJ., concur.