

1997

Leo N. Taylor v. Department of Commerce, State of Utah, and Division of Occupational and Professional Licensing : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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COURT OF APPEALS

STATE OF UTAH

LEO N. TAYLOR,

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Petitioner,

:

v.

:

Case No. DOPL-95-19

(Court of Appeals

DEPARTMENT OF COMMERCE,
STATE OF UTAH, AND DIVISION OF
OCCUPATIONAL AND
PROFESSIONAL LICENSING,

:

Case No. 970030 CA)

:

:

Respondent.

REPLY BRIEF OF PETITIONER

Petition to Review the Final Order of Department of Commerce

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ARGUMENT

The State at best exalts form over substance, and at worst misleads the Court by arguing that petitioner's appeal should be denied for focussing only on the Veterinary Board and Administrative Law Judge's Findings and Conclusions rather than on the Department's Order on Review. This argument overlooks the fact that the only factual findings which have been made were made at an evidentiary hearing before the Veterinary Board, which Findings and Conclusions were adopted by the Division and affirmed *in toto* by the Department. Any challenge to factual sufficiency such as here, must necessarily be directed at the substantive factual findings and legal conclusions. In fact, the Petition for Review is of the Department's Order adopting the Findings and Conclusions of the Veterinary Board. Because petitioner has exhausted his administrative remedies, he is entitled to be heard before this Court on all issues presented.

Petitioner has also carried its marshalling burden, in that it has successfully marshalled the evidence in support of the Department's findings, and has established that notwithstanding this evidence, the Department's findings are not supported by substantial record evidence.

Petitioner has adequately preserved the issues of due process and substantial evidence as those issues relate to the Division's findings of aggravating circumstances. On administrative review,

the Department was confronted with both issues, as evidenced by the Order on Review. Accordingly, petitioner has adequately preserved the issues for review.

I. TAYLOR HAS PROPERLY CHALLENGED THE DEPARTMENT'S ORDER ON REVIEW.

The rule governing judicial review of final agency action provides that "[a] party aggrieved may obtain judicial review of final agency action" Utah Code Ann. § 63-46b-14(1) (Supp. 1996). Related to this provision is R151-46b-14 of the Utah Administrative Code. This provision sets forth the rule that an aggrieved party may only seek judicial review after other administrative remedies are exhausted. See Utah Administrative Code R151-46b-14(1) (1996). In this regard, judicial review is justified once there has been final agency action. See R151-46b-14(2) (1996). Thus, in accordance with section 63-46b-14(1), judicial review of an agency decision is allowed once an order on review has been issued by the particular agency.

In this case, Dr. Taylor has fully complied with these provisions, insofar as he has exhausted his administrative remedies in challenging the findings and conclusions of the Division of Occupational and Professional Licensing, which have been affirmed by the Department of Commerce in their entirety. Now that a final order on review has been issued by the Department of Commerce, Dr. Taylor is now entitled to have his case judicially reviewed by this Court. See Utah Code Ann. § 63-46b-14(1).

The State contends that Dr. Taylor's brief on appeal makes no mention of the Department's Order on Review, and only focusses on the Division's findings and conclusions. This argument misses the point of Dr. Taylor's appeal.

As is apparent from his appellate brief, a significant issue on appeal in this case concerns the argument that the Division's Findings of Fact are not supported by substantial evidence. These findings are the identical findings made by the Board, and subsequently adopted by the Director of the Division of Occupational and Professional Licensing. These findings were then "incorporated as the findings of the Executive Director" in the Department's Order on Review affirming the Division's Order. Significantly, Dr. Taylor challenges the findings of the Department incorporated in its Order on Review. As the Veterinary Board's Findings and Conclusions are the substantive facts and law applied, any challenge must of necessity be directed at that document. The State's tortured argument otherwise, at best, seeks to exalt form over substance.

II. DR. TAYLOR HAS SUFFICIENTLY MARSHALLED THE EVIDENCE IN THIS CASE, AND THUS SUCCESSFULLY CHALLENGED THE DIVISION'S FINDINGS OF FACT.

In order to successfully challenge the agency's findings of fact, an aggrieved party has the burden of marshalling "all of the evidence supporting the findings and show[ing] that despite the supporting facts, and in light of the conflicting or contradictory

evidence, the findings are not supported by substantial evidence." King v. Industrial Comm'n of Utah, 850 P.2d 1281, 1285 (Utah Ct. App. 1993). Accord Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah Ct. App. 1989). See also Heinecke v. Dep't of Commerce, 810 P.2d 459, 464 n.7 (Utah Ct. App. 1991) (stating 'substantial evidence viewed in light of the whole record' test does not obviate need to marshal evidence).

In this case, Dr. Taylor has sufficiently marshalled the evidence in support of the findings below, and has established that, despite such supporting facts, and in light of the conflicting and contradictory evidence, the agency's findings are not supported by substantial evidence. The marshalling performed by Dr. Taylor in his first brief speaks for itself. Thus, rather than perform again its marshalling act, Dr. Taylor seeks in the instant brief to reply to the State's arguments concerning Dr. Taylor's failure to marshal the evidence.

Specifically, the State contends that, in marshalling the evidence, Dr. Taylor fails to consider his own testimony concerning the care and services rendered to Hillary, the English bulldog. In regards to the care rendered to Hillary, the only evidence at hearing supporting the agency's findings came from the testimony of Hillary's owner and Dr. Mayling Chinn.¹

¹Dr. Chinn is the veterinarian visited by Hillary after she was seen at the Brookside Animal Hospital. Her testimony runs from pages 150 to 215 of the transcript.

The testimony from Hillary's owner indicated that two of the pups were delivered before Hillary was brought into the clinic. At the clinic, the evidence indicated that Dr. Taylor "felt [Hillary's] stomach," examined the puppy that was stillborn and explained that the puppies were all premature, and that Hillary was passing them fine by herself and no cesarian section would be required. (Transcript, 161:5 - 162:15) Other puppies were passed at the clinic, but, notwithstanding this, Hillary's owner became impatient and took Hillary home where labor continued. (Transcript 168:4 - 170) Yet another stillborn pup was born at home, whereupon, after being unable to contact Dr. Taylor's clinic, the owner took Hillary to Dr. Chinn, who removed the remaining stillborn pups by way of cesarian section.

Dr. Chinn testified regarding the propriety of palpating an English bulldog to determine the number and size of the litter. In her testimony, Dr. Chinn stated that "[p]alpation is always something you do on an exam." Dr. Chinn testified, however, that if the dog is of a larger breed, then a radiograph is more appropriate to determine the number and size of the dog's litter. Because no radiograph was taken by Dr. Taylor, Dr. Chinn opined that Dr. Taylor's standard of care fell below the accepted standard. (Transcript 204:14 to 205:7) This was the only evidence regarding Hillary's care supporting the agency's findings.

The State argues that in marshalling the evidence, Dr. Taylor

has failed to draw on examples from his own testimony that support the agency's findings of gross negligence and unprofessional conduct vis-a-vis Hillary. See State's Brief, at 15 n.2. The first example deals with Dr. Taylor's statement that he would have performed a cesarian section on Hillary. The second example is Dr. Taylor's statement that, given the structure of an English bulldog, palpating is not always effective and, therefore, he always offers to take an x-ray of the dog. These examples misrepresent Dr. Taylor's testimony. In context, Dr. Taylor testified that he did not take care of Hillary during her stay at the Brookside Animal Clinic. Moreover, the testimony reveals that Dr. Taylor only spoke with Hillary's owner on one earlier occasion, and that the conversation concerned the scheduling of a cesarian section. (Transcript 371:4 - 11) Indeed, Dr. Taylor's testimony concerning the palpating of dogs to secure an idea of the number and size of the litter, and the limits imposed by the size of particular breeds in conducting such palpations, is corroborated by Dr. Chinn, who, as explained above, indicated that palpating can be difficult given the size of some dogs, and that an x-ray is a more appropriate method when larger dogs are involved. This evidence in no way adds to the other evidence concerning the care received by Hillary, to support the agency's findings. Dr. Taylor's testimony at bottom was that he did not treat Hillary. Including his testimony in marshalling the evidence will not help the Division as argued in

their brief. Otherwise, Dr. Taylor relies on the marshalling performed in his opening brief, and maintains that he has successfully fulfilled his marshalling burden.

III. PETITIONER HAS ADEQUATELY PRESERVED THE ISSUES RAISED IN HIS FIRST BRIEF.

The State contends that Dr. Taylor has waived his right to appeal the issues of due process and substantial evidence, as those issues relate to the Division's findings regarding aggravating circumstances.

As the State points out, questions that are not raised below in an administrative tribunal are not subject to judicial review, except in exceptional circumstances. See Alvin G. Rhodes Pump Sales v. Industrial Comm'n, 681 P.2d 1244, 1249 (Utah 1984); Brinkerhoff v. Schwendiman, 790 P.2d 587, 589 (Utah Ct. App. 1990). This rule, however, is inapplicable to the facts of this case, and contrary to the State's contention, petitioner has adequately preserved the issues below.

To understand Dr. Taylor's preservation of the issues of due process and substantial evidence, it is essential to consider the issues examined below by the Department together with the issues raised by Dr. Taylor on appeal. In the instant case, Dr. Taylor challenges the Division's findings of aggravating circumstances, including the finding that Dr. Taylor failed to acknowledge the wrongful nature of his conduct, or to undertake good efforts to retribute or rectify the consequences of his misconduct. Dr.

Taylor argues that the Division failed to notify him that such lack of contrition, or recalcitrance, might constitute unprofessional conduct or aggravate the sanction ultimately imposed.

Dr. Taylor also argues that the finding of aggravating circumstances is not supported by substantial evidence. In this regard, Dr. Taylor argues that no record evidence supports such findings, and that the only statements that could support such findings were made by opposing counsel during closing statements. See Appellant's Brief, at 43-44. Those statements do not constitute evidence, and were not based on any evidence in the record. Thus, the findings of recalcitrance, lack of contrition, and failure to rectify or make restitution is not supported by substantial evidence. The State's argument, however, as a prefatory matter misses the point. Preservation of issues occurs, if at all, during the evidentiary phase of a proceeding, not during the course of administrative review. As surely as the factual issues are found and legal conclusions reached during the course and at the conclusion of the evidentiary proceeding, so must a record be made by the complaining appellant, if at all, during that evidentiary proceeding. Indeed, in this case when Dr. Taylor sought review by the administrative agency as a prerequisite to filing the instant petition for review, the Department merely reviewed the Findings of Fact and Conclusions of Law of the Veterinary Board, the memoranda of the parties, and without more,

affirmed the Findings of Fact and Conclusions of Law. No hearing was held, no evidence was taken, and no additional Findings made.

To follow the State's argument to its logical conclusion with respect to the question of the sufficiency of the Division's Finding of aggravating circumstances and the impact of that finding on Dr. Taylor's due process would be to require Dr. Taylor to anticipate during the course of the evidentiary hearing below that a factual finding would be made not based on substantial evidence, indeed, not based on any evidence at all but merely the statements of counsel, and to anticipate that the Division would act in such a way as to violate his due process. Dr. Taylor would then have been required to produce evidence and sustain the burden of proving his contrition and of his due process rights. Similarly, Dr. Taylor cannot have waived his right to challenge the inadequacies of the substantial evidence supporting the Division's Finding of aggravating circumstances or the Veterinary Board's violation of his due process, since such right was not at that time known to exist. See generally Soters, Inc. v. Deseret Federal Savings & Loan Ass'n, 857 P.2d 935 (Utah 1993).

Moreover, the issues raised by Dr. Taylor in the instant appeal were sufficiently preserved below before the Department of Commerce. This is evidenced by the Department's Order on Review. Several references are made in the Department's Order, relating to the Division's definition of "unprofessional conduct," and the

challenges made by Dr. Taylor to those definitions. Specifically, the Department stated that "[Dr. Taylor] challenges the finding that [he] engaged in unprofessional conduct by setting forth the proposition that the terms 'gross negligence,' 'gross incompetence,' and 'pattern of incompetency or negligence' must be defined before they can, in turn, be used to define 'unprofessional conduct.'" See Order on Review, at 56. Dr. Taylor also asserted before the Department that "the terms 'gross incompetence' and 'gross negligence' are unconstitutionally vague as used in the licensing act and are therefore of no legal force or effect upon [him]." See Order on Review, at 58. Similarly, Dr. Taylor in the instant appeal challenges the failure of the Division to adequately define the term "unprofessional conduct" given its failure to notify him that recalcitrance and lack of contrition can amount to unprofessional conduct. Although not couched exactly in terms used below before the Department, Dr. Taylor's argument regarding due process in this case should nonetheless be well-taken by this Court. See generally Indian Village Trading Post v. Bench, 929 P.2d 367, 369 (Utah Ct. App. 1996) (regardless of appellee's failure to specifically couch issue in exact terms relied upon by appellate court in affirming, issue, as couched by appellate court, was nonetheless appropriate for review).

Dr. Taylor argued the specific issue of "substantial evidence" before the Department, as that issue relates to the general

findings of unprofessional conduct. As stated by the Department, "[Dr. Taylor]'s primary argument, or at least most extended exposition in his brief, is to the proposition that the findings of the Board are either not founded upon substantial evidence or that the finding conflicts with evidence [Dr. Taylor] deems more substantial in providing support to his contentions." See Order on Review, at 9. Like the due process issue, Dr. Taylor in the instant appeal challenges the Board's factual findings regarding the aggravating circumstances that amount to unprofessional conduct. As discussed in his first brief, the only statements made in the record which could directly support the Board's findings in this regard are the statements of counsel for the Division in his closing argument. Although not couched in exactly the same terms as found in the Order on Review, the issue was nonetheless adequately preserved for the instant appeal. See generally id. at 369.

CONCLUSION

Petitioner has adequately challenged the Department's Order on Review, and has complied with the statutory language requiring the exhaustion of his administrative remedies. Petitioner has also successfully marshalled the evidence in this case. The examples cited to by the State misrepresent Dr. Taylor's testimony, and do not support the Department's findings vis-a-vis Hillary. Petitioner has also adequately preserved all issues appealed to

this Court. The administrative bodies below have had the opportunity to hear the issues as presented by petitioner in the instant appeal, and have ruled on those issues. Accordingly, it is time for this Court to consider all issues presented by petitioner.

Respectfully submitted this 14th day of August, 1997.

STIRBA & HATHAWAY

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 1997, I caused to be hand delivered a true and correct copy of **REPLY BRIEF OF PETITIONER**, to the following, by the method indicated:

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