

Key Regulatory Decisions: Did the Case Unravel?



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FORMAT

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RULES!



- **Six cases appealing regulatory board decisions**
- **Background, board finding and court decision**
- **Discussion**



The Cases

1) Jeannie Owens v. Missouri State Board of Nursing, 474 S.W. 3d. 607; (2015).

2) James Tate, Jr. v. State of Nevada Board of Medical Examiners, 356 P.3d 506; (2015).

3) State of West Virginia ex rel. Lisa Miles v. Board of Registered Professional Nurses, 777 S.E.2d 669 (2015)

4) Maryland Board of Nursing v. Mabinty Sesay, A.3d 140; (2015)

5) Kourtney Rodgers v. State of Louisiana Board of Nursing, 2015 U.S. Dist. LEXIS 169338.)

6) Keith Westphal, et al. v. David Northcutt, III, et al, 2015 Ala. LEXIS 73

Owens v. Missouri

- **In 2011 Owens plead guilty to driving while intoxicated (DWI), a Class B misdemeanor**
- **Owens failed to include the conviction on two subsequent license renewal applications**
- **BON charged Owens with committing an offense involving moral turpitude related to her duties as a nurse and failing to notify the BON of the conviction**

Owens v. Missouri

- **After hearing, BON determined the conviction was for a crime of moral turpitude reasonably related to her qualifications as a nurse; license revoked**
- **Owens appealed maintaining the conviction was neither a crime of moral turpitude nor related to her work as a nurse**
- **Circuit Court reversed revocation; BON appealed**

Session Poll Question #1

Is a misdemeanor driving while intoxicated conviction a crime involving moral turpitude?

A. Yes

B. No



Owens v. Missouri

Holding

- **DWI is not a crime of moral turpitude, especially when it is a first offense and the conviction is for a misdemeanor**
- **DWI does not involve the qualifications, functions or duties of a nurse**
- **The BON was without authority to revoke the license; circuit court judgment reversing the revocation affirmed**

Tate v. Nevada

- **In February 2010, while preparing for the surgery members of the surgical team smelled alcohol on Tate's breath.**
- **Tate submitted to an alcohol test and registered 0.06 % blood alcohol level**
- **Board action: (i) 6-month license suspension, (ii) public reprimand, (iii) drug diversion program, (iv) \$5,000 fine, (v) \$35,564 in costs, and (vi) continuing education on the subject of alcohol**

Tate v. Nevada

- **Tate appealed Board's decision and requested a preliminary injunction to stay the sanctions while the review was pending**
- **District court stated that while the injunction was warranted, cited state law prohibiting the stay of board decisions while under appeal**
- **Tate appealed arguing the statute violated the separation of powers doctrine**

Session Poll Question #2

Should a court be allowed to stay a board sanction while the action is under appeal?

A. Yes

B. No

C. Under some circumstances



Tate v. Nevada

Holding

- **The statute violates the separation of powers doctrine**
- **Once a court gains jurisdiction of a case, it is empowered to determine whether an aggrieved party is entitled to the relief sought and to preserve the status quo**
- **To bar a court's ability to grant injunctive relief while judicial review is pending effectively renders the appeal a meaningless process**

Miles v. West Virginia

- **On 4/02/2013 Miles is terminated for violating hospital's narcotic waste policies; the termination is self-reported to BON**
- **BON subsequently issued a Notice of Complaint**
- **Statutory time limits**
 - **Within six months of the complaint being filed, must send a status report to the complainant**
 - **Within one year of the status report must issue a final ruling, unless the complainant and the board agree in writing to extend the time for the final ruling**

Miles v. West Virginia

- **BON letters:**
 - 8/14/2013 status report to hospital (complainant) stating that the matter was under continued investigation and review
 - 3/25/2014 status report letter indicating the case was currently being negotiated for settlement
 - 10/10/2014 letter citing the time limit and requesting agreement to extension (Second letter sent on 12/12/2014)
- **2/17/2015 Miles files a Writ of Prohibition citing the BON's failure to meeting the statutory time limits**
- **BON argues the time-based statutory requirements are not mandatory**

Session Poll Question #3

Are mandatory time limits for regulatory board disciplinary actions appropriate?

A. Yes

B. No



Miles v. West Virginia

Holding

- **The plain language of the statute requires an interim status report within six months of complaint being filed and from that date the Board has one year to resolve the complaint unless an extension is obtained**
- **These requirements are mandatory and jurisdictional**
- **The BON exceeded its jurisdiction by failing to comply with the statute governing the procedural handling of complaints**

Maryland v. Sesay

- **Assigned to provide in-home, overnight nursing care over two nights; fired before the end of the second night**
- **Complaint subsequently file with the BON**
- **Used four different addresses over the course of BON's investigation and disciplinary action**
- **After requesting hearing, Sesay moved from the third to the fourth address without informing the Board**

Maryland v. Sesay

- **Notice of hearing sent to the third address and returned as undeliverable; hearing held without Sesay present**
- **After hearing Sesay renewed license and provided the fourth address**
- **BON issued a Final Decision and Order of Probation imposing six-month probation other license restrictions**
- **Notice of Final Order sent to fourth address**

Maryland v. Sesay

- **Sesay appealed; asserting that she heard nothing from the BON in the two years since she requested a hearing**
- **Argued the BON was required to do more when the notice of hearing was returned as undelivered**
- **BON's position is that its efforts to give Sesay notice complied with due process.**
- **Circuit Court vacated final order**

Session Poll Question #4

Should a regulatory board be required to do take additional steps when a notice is sent “certified mail, with return receipt requested” and it is returned “undeliverable?”

A. Yes

B. No



Maryland v. Sesay

Holding

- **Issue: Is the Board required to engage in additional measures beyond those required by the statute**
- **Sesay did not provide change of address within 60 days of the change**
 - **BON mailed the notice to the address provided by Sesay in her request for a hearing via first class mail, in addition to the statutorily required certified mail**
 - **BON did not have actual notice of Sesay's change of address before sending the hearing notice**
- **Judgment of the Circuit Court reversed**

Rodgers v. Louisiana

- **BON established criteria for accrediting and terminating the accreditation status of nursing schools**
- **A nursing education program must have a pass rate of 80% or greater by the candidates taking the licensure examination for the first time in any one calendar year**
- **After three consecutive years of not meeting the pass rate, a program's accreditation is terminated**

Rodgers v. Louisiana

- **In 2015 BON terminated Grambling State University School of Nursing (GSU) for failing to meet the pass rate for three consecutive years**
- **Rodgers had been a nursing student at GSU enrolled since 2012**
- **Filed action claiming violation of Antitrust Acts asserting that the reliance on the pass rate as sole basis for termination created a restraint on trade**

Rodgers v. Louisiana

- **BON filed Motion to Dismiss for Lack of Subject Matter Jurisdiction**
- **Eleventh Amendment bars suits by private citizens against a state unless the state consents to suit**
- **Immunity extends to any agency or other political entity deemed to be an arm of the state**
- **Query: Is the Louisiana BON an arm of the state**

Session Poll Question #5

Should a regulatory agency established by state law be considered as an “arm of the state” that created them?

A. Yes

B. No

C. It depends on several factors



Rodgers v. Louisiana

Holding

- **No bright line test; must considering six factors:**
 1. **Whether state statutes and case law characterize as an arm of the state**
 2. **The source of funds for the entity**
 3. **The degree of local autonomy the entity enjoys**
 4. **Whether the entity deals primarily with local rather than statewide problems**
 5. **Whether the entity has authority to sue and be sued in its own name**
 6. **Whether the entity has the right to hold or use property**
- **After weighing the six factors, the Court found that the BON is an arm of the state**
- **BON is entitled to Eleventh Amendment immunity**

Westphal v. Northcutt

- Practice of dentistry under Alabama law expressly included teeth bleaching or whitening
- Westphal and Wilson each wanted to operate a teeth-whitening businesses in Alabama; neither was a licensed dentist, nor did they have any dental training
- Filed action asserting the Alabama provision violated due process guarantees of the state's Constitution as an unreasonable and arbitrary exercise of police power

Westphal v. Northcutt

- **Westphal/Wilson position**

(i) generally safe and effective, potential side effects that are mild and temporary, and (ii) risks of non-dentist teeth whitening are the same as those of unregulated teeth-whitening products sold directly to consumers for home use

- **Board position**

(i) studies demonstrate adverse effects of compounds on dental restorations, (ii) variations among the products and procedures used by non-dentist create uncertainty and risks, and (iii) non-dentists lack the educational foundation to make an informed decisions

- **Circuit court granted Board's motion for summary judgment; Westphal/Wilson appealed**

Session Poll Question #6

Should a license as a dentist be required to provide teeth-whitening services to the public?

A. Yes

B. No



Westphal v. Northcutt

Holding

- **Legislature has expressly provided that teeth-whitening falls within the practice of dentistry; a presumption of constitutionality attaches**
- **Evidence in the record indicates that the procedure is relatively safe but not without potential adverse effects**
- **The requirement that teeth-whitening services be performed by licensed dentists does not violate the due-process protections of the Alabama Constitution**

Questions?





Thank You!