

IN AND BEFORE THE OKLAHOMA STATE BOARD
OF MEDICAL LICENSURE AND SUPERVISION
STATE OF OKLAHOMA

FILED

FEB 21 2023

OKLAHOMA STATE BOARD OF
MEDICAL LICENSURE & SUPERVISION

STATE OF OKLAHOMA, *ex rel.*)
OKLAHOMA STATE BOARD)
OF MEDICAL LICENSURE)
AND SUPERVISION,)
)
Plaintiff,)
)
v.)
)
HENRY NDEKWE, M.D.,)
LICENSE NO. MD 21147,)
)
Defendant.)

Case No. 17-12-5525

**PLAINTIFF’S OBJECTION TO DEFENDANT’S
REQUEST FOR DISMISSAL OF VSJ**

Plaintiff objects to Defendant’s Request for Dismissal of VSJ. In support thereof, Plaintiff offers the following:

I. BACKGROUND

Defendant made a deal, in the form of a Voluntary Submittal to Jurisdiction (“VSJ”), to avoid a hearing on the Verified Complaint (“Complaint”) for unprofessional conduct against him. Defendant was at all relevant times represented by various counsel. All of Defendant’s counsel are extraordinarily skilled and experienced in representing physicians in all manner of legal matters including matters before the Board. In doing so, he gave up the right to a hearing and to ask for a potentially more lenient order than that stated in the agreed-to discipline he received. In return, the State gave up the chance to present its case and ask for a more severe order than that contained in the settlement agreement. Both sides compromised. By way of example, the Complaint filed against Defendant contained eleven (11) violations, whereas he was allowed to admit to only three (3). Now, having received the benefit of the bargain, and

avoided further prosecution, Defendant seeks to undo his deal because he does not like the consequences of his settlement agreement. Defendant does this through a “Request for Dismissal of VSJ” he filed on January 26, 2023, pro se. Dismissals are typically filed on Petitions, not Orders. For that reason, Plaintiff is treating Defendant’s pleading as a Motion for Rehearing, Reopening or Reconsideration of Agency Decision in accordance with 75 O.S. § 317. Defendant’s position finds no support in the law, and his motion should be denied accordingly.

In March 2021, the Complaint was filed against Defendant alleging significant violations of state law and state administrative rules, including, but not limited to, gross or repeated negligence, multiple prescribing violations, deficient record keeping/charting and incompetence. Instead of going to a hearing, Defendant chose to settle. He executed a Voluntary Submittal to Jurisdiction which he had presented to the Board. In the VSJ Defendant admits the allegations contained therein. This Board accepted the VSJ on March 10, 2022. In pertinent part, Defendant represented:

“By voluntarily submitting to jurisdiction and entering into this Order, Defendant admits to the allegations herein contained and further acknowledges that a hearing before the Board could result in some sanction under the Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act ("Act"). 59 O.S. § 480, *et seq*”.

“Defendant, Henry Ndekwe M.D., states that he is of sound mind and is not under the influence of, or impaired by, any medication or drug and that he fully recognizes his right to appear before the Board for an evidentiary hearing on the allegations made against him. Defendant hereby voluntarily waives his right to a full hearing, submits to the jurisdiction of the Board and agrees to abide by the terms and conditions of this Order. Defendant acknowledges that he has read and understands the terms and conditions stated herein, and that this Agreement may be reviewed and discussed with him by legal counsel prior to execution.”

Defendant now claims, in essence, the collateral consequences of his decision to settle are unfair. Defendant waived his right to make such complaints, and since there is no mutual mistake made by the parties here, the VSJ that Defendant executed should remain in full force and effect.

II. DISCUSSION

A. Defendant presents no legal reason to undo the VSJ

First, this Board was acting well within its authority in accepting the VSJ. This Board is statutorily authorized to accept agreed settlements of disciplinary proceedings under the Administrative Procedures Act. *See* 75 O.S. 2011, § 309(E) (stating “informal disposition may be made of any individual proceeding by stipulation, agreed settlement, consent order, or default”). This Board passed a regulation regarding the same. “Th[is] Board may accept a Voluntary Submittal to Jurisdiction entered into by staff and defendant.” Okla. Admin. Code § 435:5-1-5.1(a) (effective 21 August 1995); *see* 13 Okla. Reg. 1567.

The Board therefore possesses the authority to accept (or reject) an agreed-to resolution of a case by way of a settlement agreement. That authority encompasses taking any range of statutorily authorized actions to which the parties may agree, including the agreed-to order stated in the VSJ. *See* 59 O.S. 2011, § 509.1 (providing range of disciplinary action). This Board possesses the authority to accept the VSJ for which Defendant asked.

Second, absent fraud, duress or mistake, the VSJ must remain in force. “[A] settlement agreement constitutes a contract between the parties which should not be set aside absent fraud,

duress, undue influence, or mistake.” *Coulter v. Carewell Corp. of Okla.*, 2001 OK CIV APP 36, ¶ 13, 21 P.3d 1078, 1081-82 (quotes and cit. omitted). Defendant does not claim undue influence or duress. Indeed, he expressly stated he was under no undue influence or duress when executing the VSJ. Defendant also makes no claim of fraud, and it is safe to assume neither party was acting fraudulently here.

As such, the only possible legal basis upon which Defendant’s request may stand is urging the VSJ was the result of a mistake. The plain terms of the VSJ do not evidence the parties made some mistake. “The intention of the parties to the settlement, as with any written contract, must (1) be ascertained, if possible, from the writing, . . . (2) taken as a whole so as to give effect to every part and using each clause to help interpret the others, . . . and (3) interpreted so as to make it capable of being carried into effect without violating the intention of the parties.” *Arvest Bank v. SpiritBank, N.A.*, 2008 OK CIV APP 55, ¶ 23, 191 P.3d 1228, 1234, *as corrected* (cits. omitted).

In light of the acts of unprofessional misconduct stipulated to by Defendant, the agreed-to discipline may hardly be said to be a mistake. Further, the plain terms of the VSJ expressly state the agreed-to discipline, just above Defendant’s signature. *Id.* at p. 8. There is no mistake evidenced by the VSJ.

In the absence of a legally cognizable basis for Defendant’s requested relief, this Board lacks the authority to grant the relief Defendant requests. There is no statute or regulation governing this Board expressly or impliedly authorizing it to modify a settlement agreement made by the parties and accepted by this Board.

B. Defendant may not unilaterally request modification of the VSJ

First, Defendant cannot change his position simply because it now suits him to do so. See e.g. *Bank of Wichita v. Ledford*, 2006 OK 73, 151 P.3d 103, 112-13 (discussing and applying judicial estoppel). “Where one voluntarily assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he will not thereafter, because his interests have changed, be permitted to assume a contrary position, to the prejudice on a party who acquiesced in the position formerly taken by him.” *Territory v. Cooper*, 11 Okla. 699, 69 P. 813 (1902) (Syl. No. 2). In his settlement agreement, Defendant expressly represented that he voluntarily submits to the Board’s jurisdiction and that a hearing before the Board would result in some sanction against him. He voluntarily waived his right to a full hearing, and agreed to abide by the terms and conditions of the VSJ. Based on those express representations the Board accepted the VSJ.

Defendant’s “mid-stream reversal of position is precisely the type of machination that judicial estoppel serves to prevent.” *Ledford*, 2006 OK 73, 151 P.3d at 113. To find otherwise prejudices Board staff and the State. Board staff gave up the right to further prosecute Defendant and ask for a more severe disciplinary order. Board staff relied upon Defendant’s representation that he would abide by the terms of the VSJ when resolving this disciplinary matter. Now that the disciplinary matter has been resolved, both the State and the Board staff would be prejudiced by granting Defendant’s requested relief. Further action may not be brought against Defendant to seek more severe sanctions for his misconduct. “[O]ne cannot complain of a judgment, order, or ruling that [one’s] own procedure or conduct procured or aided in causing.” *Am. Nat. Holding Corp. v. EMM Credit, LLC*, 756 S.E.2d 1, 5 (Ga. Ct. App. 2013).

Defendant made a deal and had that deal presented to the Board, which it accepted. Defendant cannot now complain about the settlement agreement the Board accepted at his behest. Cf. *Samedan Oil Corp. v. Corp. Commn. of State of Okla.*, 1988 OK 56, 755 P.2d 664;

accord Baker v. Fed. Exp. Corp., 224 S.W.3d 390, 394 (Tex. App. 2006); *Wiederhold v. Wheeler*, 266 Ga. App. 178, 179, 596 S.E.2d 703, 704 (2004). “To allow otherwise would be an abuse and manipulation of the judicial process.” *Samedan Oil Corp*, 1988 OK 56, 755 P.2d at 668.

Second, granting Defendant the requested relief opens the gates to chaos. If this Board grants Defendant’s request, it will see a flood of licensees asking this Board to unilaterally modify their settlement agreements. This Board should not condone such flip-flop chicanery and hold licensees to the deals they make to resolve disciplinary cases.

C. Defendant has not met the time requirements to request reconsideration

Defendant has not specifically requested a rehearing, reconsideration or reopening of the case. As previously stated, his “Request for Dismissal”, being improper”, has been treated as a Motion for Rehearing, Reopening or Reconsideration of Agency Decision per 75 O.S. §317A, which states in relevant part:

The Administrative Procedures Act at 75 O.S. § 317(A) states:

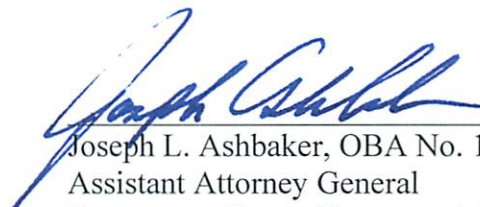
“A. A final agency order issued by an administrative head of an agency shall be subject to rehearing, reopening or reconsideration by such administrative head. Any application or request for such rehearing, reopening or reconsideration shall be made by any party aggrieved by the final agency order within ten (10) days from the date of the entry of such final agency order. ...”

The VSJ was entered into on March 10, 2022 and his current Motion was filed in January 26, 2023. Thus, Defendant is approximately 313 days too late in filing his motion. Defendant has asked to be allowed to file out of time. Defendant provides no authority for this Board to grant such a request, especially over Plaintiff’s objection. Defendant states that the VSJ should be “dismissed” because of the “unique circumstances of this case.” This case was handled as countless others have been and

in accordance with all applicable statutes and administrative rules governing disciplinary proceedings in front of this Board.

III. CONCLUSION

“The law and public policy favor settlements and compromises, entered into fairly and in good faith between competent persons, as a discouragement to litigation.” *Whitehead v. Whitehead*, 1999 OK 91, 995 P.2d 1098, 1101, *as corrected* (citing *St. Louis & S.F.R. Co. v. Chester*, 41 Okla. 369, 138 P. 150 (1914)). The parties made no mistake in executing the VSJ. Both parties compromised in reaching the settlement agreement.

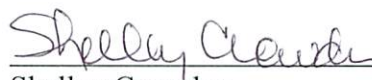


Joseph L. Ashbaker, OBA No. 19395
Assistant Attorney General
OKLAHOMA STATE BOARD OF MEDICAL
LICENSURE AND SUPERVISION
313 NE 21ST Street
Oklahoma City, Oklahoma 73105
405/522.2974
405/522.4536 – Facsimile

Certificate of Service

This is to certify that on the 21st day of February, 2023, a true and correct copy of this Order was transmitted as indicated, postage prepaid, certified to the following:

U.S. Certified Mail
Henry Ndekwe M.D.
3805 W. Gore Blvd
Lawton, OK 73505
Defendant, Pro Se



Shelley Crowder