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IN THE
COURT OF APPEALS OF INDIANA

Indiana Board of Pharmacy,
Appellant-Respondent,

v.

Paul J. Elmer,
Appellee-Petitioner

June 8, 2021

Court of Appeals Case No.
20A-PL-2200

Appeal from the Marion Superior
Court

The Honorable Patrick J. Dietrick,
Judge

Trial Court Cause No.
49D12-2001-PL-104

Crone, Judge.

Case Summary

- [1] The Indiana Board of Pharmacy (the Board) appeals the trial court's order reversing the Board's decision to revoke Paul J. Elmer's expired pharmacist's license. The Board argues that the trial court erred in concluding that the Board

exceeded its statutory authority by attempting to revoke an expired license. We conclude that the Board does not have the statutory authority to revoke an expired license, and therefore we affirm and remand.

Facts and Procedural History

[2] Elmer was a licensed pharmacist in Indiana and was the founder and sole owner of Pharmakon Pharmaceuticals, Inc., a compounding company. In 2016, Elmer sold all the assets of all his companies. On June 20, 2017, Elmer was indicted by a federal grand jury in the Southern District of Indiana (Criminal Case) for allegations related to his use and/or alleged misuse of his pharmacy license in his capacity as president and owner of Pharmakon. Appellant’s App. Vol. 2 at 24-37.¹ Specifically, he was indicted for one count of conspiracy to prevent the FDA and the public from finding out that Pharmakon was compounding and distributing numerous drugs that were under- and over-potent, three counts of introducing adulterated drugs into interstate commerce, and six counts of adulterating drugs while holding for sale after shipment in interstate commerce. *Id.* at 31-32, 35, 36. Later, a superseding indictment added an obstruction charge. *Id.* at 49.

¹ Indiana Appellate Rule 50(A)(1) requires appendices in civil appeals to contain a table of contents, and Rule 50(C) requires that the table of contents “specifically identify each item” contained in the appendix. Here, although the Board provided a table of contents for its five-volume appendix, it failed to identify all the documents contained therein, which greatly hindered our review. For example, this indictment is not listed in the table of contents, nor are the certified jury verdict forms from the Criminal Case or even the Board’s order revoking Elmer’s license, which is the decision we are asked to review in this appeal.

[3] On July 5, 2017, the State of Indiana (the State) filed with the Board a petition for summary suspension of Elmer’s license based on the federal indictment, alleging that Elmer represented a clear and immediate danger to public health and safety. Appellant’s App. Vol. 3 at 148. On July 10, 2017, the Board held a hearing on the State’s petition, at which the only evidence presented by the State was the federal indictment. Elmer objected to the admissibility of the indictment on hearsay grounds. On August 9, 2017, the Board summarily suspended Elmer’s license. *Id.* at 119.

[4] On September 6, 2017, Elmer filed under cause number 49D07-1709-PL-34090 (Suspension Case) a petition for judicial review of the Board’s decision to summarily suspend his pharmacist’s license.² Appellant’s App. Vol. 4 at 89. On June 30, 2018, while the proceedings in the Suspension Case were ongoing, Elmer failed to renew his pharmacist’s license, and as a result, his license automatically expired and became invalid pursuant to Indiana Code Section 25-26-13-14(b). On December 10, 2018, following a hearing, Special Judge Michael D. Keele issued an order finding that the Board’s decision was unsupported by substantial evidence because the sole evidence presented by the State was the federal indictment, which was hearsay evidence to which Elmer had objected. *Id.* at 91. Special Judge Keele vacated the Board’s suspension order and remanded the case to the Board for dismissal. On April 18, 2019, the

² This petition is not in the record before us.

Board issued an order dismissing the summary suspension of Elmer's license, effective January 14, 2019.

[5] Meanwhile in the Criminal Case, on April 11, 2019, a jury found Elmer guilty of one count of conspiracy, three counts of introduction of adulterated drugs into interstate commerce, and six counts of adulterating drugs while holding for sale after shipment in interstate commerce. Appellant's App. Vol. 2 at 53-62. The jury found Elmer not guilty of obstruction of justice. A judgment of conviction was not entered until September 23, 2019.³

[6] In June 2019, the State filed an administrative complaint with the Board to revoke Elmer's pharmacist's license, alleging that he had been convicted of crimes that have a direct bearing on his ability to continue to practice competently pursuant to Indiana Code Section 25-1-9-4(a)(2)(A). In August 2019, Elmer filed a motion to dismiss the State's complaint, arguing that his pharmacist's license had expired and the Board had no statutory authority to discipline the holder of an expired license. *Id.* at 154. The Board held a hearing on the State's complaint and Elmer's motion to dismiss. In support of its complaint, the State submitted the following evidence from Elmer's Criminal Case: the original grand jury indictment, the superseding indictment, and certified copies of the jury verdict forms. *Id.* at 24, 38, and 53. Elmer objected

³ Elmer was sentenced to thirty-three months' imprisonment. His convictions and sentence were affirmed on appeal. *United States v. Elmer*, 980 F.3d 1171, 1178 (7th Cir. 2020).

to the admissibility of the evidence on hearsay grounds. In September 2019, the Board issued an order denying Elmer’s motion to dismiss.

[7] In October 2019, before the Board issued a decision on the State’s complaint, Elmer filed an amended complaint and a motion to reopen the docket in the Suspension Case. The Board filed a motion to dismiss Elmer’s amended complaint.⁴ On December 17, 2019, Special Judge Keele issued an order granting the Board’s motion to dismiss Elmer’s amended complaint on the basis that the Board’s denial of Elmer’s motion to dismiss was not a final agency action as required for judicial review. Appellant’s App. Vol. 4 at 77. Elmer filed a motion to correct error, which Special Judge Keele denied. *Id.* at 92.

[8] On December 19, 2019, the Board issued its final order revoking Elmer’s pharmacist’s license (Revocation Order). *Id.* at 82. Specifically, the Board concluded that as Elmer had been found guilty of one count of conspiracy, three counts of introduction of adulterated drugs into interstate commerce, and six counts of adulterating drugs while holding for sale after shipment in interstate commerce, “[he] has been convicted of crimes that have a direct bearing on his ability to practice competently” pursuant to Indiana Code Section 25-1-9-4(a)(2)(A). *Id.* at 85.

[9] On January 2, 2020, Elmer initiated the action underlying this appeal by filing a petition for judicial review of the Board’s Revocation Order pursuant to the

⁴ Neither the amended complaint nor the motion to dismiss is in the record before us.

Administrative Orders and Procedures Act (AOPA), an action for mandate/prohibition, and a claim under 42 U.S.C. § 1983. *Id.* at 4.

Subsequently, he filed an amended complaint. *Id.* at 59. The parties filed a joint motion to bifurcate the Section 1983 claim from the other claims, which the trial court granted. The Board filed a motion to dismiss the action for mandate/prohibition. *Id.* at 40. In February 2020, the trial court issued an order dismissing Elmer's request for mandamus on the basis that it was barred by res judicata. *Id.* at 96.

[10] On August 13, 2020, following briefing and a hearing, the trial court granted Elmer's petition for judicial review. *Id.* at 161. The Board filed a motion to reconsider and correct error. *Id.* at 169. Following a hearing on the motion, on October 29, 2020, the trial court issued a partial final judgment granting Elmer's petition for judicial review on three grounds. Pursuant to the AOPA and the Indiana Prohibition Statute, Indiana Code Section 34-27-2-1, the trial court concluded that the Board exceeded its authority by attempting to revoke Elmer's expired pharmacist's license. *Appealed Order* at 9. The trial court also concluded that under the AOPA, the Board's decision was unsupported by substantial evidence because it was based solely on hearsay evidence. *Id.* The trial court reversed the Revocation Order and remanded the matter to the Board for dismissal. The trial court also determined that there was no just reason for delay and deemed its order a final judgment. This appeal ensued.

Discussion and Decision

[11] This is an appeal of an order on a motion to correct error, which seeks our review of an administrative agency decision. Typically, we review a decision on a motion to correct error for an abuse of discretion. *Ind. Bureau of Motor Vehicles v. McClung*, 138 N.E.3d 303, 307 (Ind. Ct. App. 2019). “An abuse of discretion occurs if a ruling is clearly against the logic and effect of the facts and circumstances or if the trial court erred on a matter of law.” *Patrick v. Painted Hills Ass’n*, 134 N.E.3d 518, 520 (Ind. Ct. App. 2019). When the resolution of a motion to correct error rests on an issue of statutory interpretation, we review the trial court’s ruling de novo. *McClung*, 138 N.E.3d at 307.

[12] In general, the AOPA provides the exclusive remedy for judicial review of administrative or agency action. *Carter v. Carolina Tobacco Co.*, 873 N.E.2d 611, 623 (Ind. Ct. App. 2007). In reviewing administrative or agency action, this Court applies the same standard as the trial court. *Gray v. Med. Licensing Bd. of Ind.*, 102 N.E.3d 917, 921 (Ind. Ct. App. 2018). Pursuant to the AOPA, we may set aside an agency’s action only if it is:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to constitutional right, power, privilege, or immunity;
- (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (4) without observance of procedure required by law; or
- (5) unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14(d).

[13] Our supreme court has described our standard of review as follows:

Our review of agency action is intentionally limited, as we recognize an agency has expertise in its field and the public relies on its authority to govern in that area. We do not try the facts de novo but rather defer to the agency’s findings if they are supported by substantial evidence. On the other hand, an agency’s conclusions of law are ordinarily reviewed de novo. While we are not bound by the agency’s conclusions of law, an interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself. In fact, if the agency’s interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation.

Moriarity v. Ind. Dep’t of Nat. Res., 113 N.E.3d 614, 619 (Ind. 2019) (citations, quotation marks, and brackets omitted). “Substantial evidence is more than a scintilla, but something less than a preponderance of the evidence.” *Ind. Dep’t of Nat. Res. v. Prosser*, 132 N.E.3d 397, 401 (Ind. Ct. App. 2019), *trans. denied* (2020). “Reviewing courts must consider the record in the light most favorable to the administrative proceedings, and may not reweigh the evidence or assess the credibility of witnesses.” *Pendleton v. McCarty*, 747 N.E.2d 56, 61 (Ind. Ct. App. 2001), *trans. denied*. The burden of demonstrating the invalidity of the agency action is on the party challenging the action. *Gray*, 102 N.E.3d at 921 (citing Ind. Code § 4-21.5-5-14(a)).

[14] The Board argues that the trial court erred in concluding that the Board lacked the statutory authority to revoke an expired license. In addressing this argument, we apply our well-established rules of statutory interpretation.

Our goal in statutory interpretation is to determine and abide by the legislature’s intent. In doing so, we aim to determine and give effect to the intent of the legislature. We start with the plain language of the statute, giving its words their ordinary meaning and considering the structure of the statute as a whole. No word or part of the statute should be rendered meaningless if it can be reconciled with the rest of the statute. As we interpret the statute, we are mindful of both what it does say and what it does not say. To the extent ambiguity exists, we determine and give effect to the intent of the legislature as best it can be ascertained. We may not add new words to a statute which are not the expressed intent of the legislature.

Ind. Alcohol & Tobacco Comm’n v. Spirited Sales, LLC, 79 N.E.3d 371, 376 (Ind. 2017) (citations and quotation marks omitted).

[15] We begin with a review of the applicable statutes. The Board’s authority and the licensure of pharmacists are governed by Indiana Code Chapter 25-26-13. Pursuant to Section 25-26-13-4(a)(3), the Board is authorized to “refuse to issue, deny, suspend, or *revoke a license* or permit or place on probation or fine any licensee or permittee under this chapter.”⁵ (Emphasis added.) In addition, Section 25-26-13-4(a)(9) empowers the Board “to perform such other duties and functions and exercise such other powers as may be necessary to implement and enforce this chapter.”

⁵ “License” is defined as a “written certificate from [the Board] for the practice of pharmacy or the operation of a pharmacy.” Ind. Code § 25-26-13-2.

[16] To receive a pharmacist’s license, an applicant must file an application and meet certain requirements. Ind. Code § 25-26-13-11. Once issued, “a pharmacist’s license expires biennially ... unless renewed before that date.” Ind. Code § 25-26-13-14(a). “[I]f an application for renewal is not filed and the required fee paid before the established biennial renewal date, *the license expires and becomes invalid* without any action taken by the [B]oard.” Ind. Code § 25-26-13-14(b) (emphasis added). The Board may “reinstate the license” if the person meets certain requirements, which differ depending on whether the license has been expired for more than three years. Ind. Code § 25-26-13-14(e)-(f). Further, “the [B]oard may require a person who applies for a license under subsection (e) to appear before the [B]oard and explain the reason the person failed to renew the person’s license.” Ind. Code § 25-26-13-14(g).

[17] Indiana Code Chapter 25-1-9 governs the standards of practice for health professions and provides specific grounds for and types of disciplinary sanctions. Here, the Board revoked Elmer’s license pursuant to Indiana Code Section 25-1-9-4(a)(2)(A), which provides,

A practitioner shall conduct the practitioner’s practice in accordance with the standards established by the board regulating the profession in question and is subject to the exercise of the disciplinary sanctions under section 9 of this chapter if, after a hearing, the board finds:

....

(2) a practitioner has been convicted of a crime that:

(A) has a direct bearing on the practitioner’s ability to continue to practice competently.

If the Board finds that “a practitioner is subject to disciplinary sanctions[,]” permanent revocation of “a practitioner’s license” is authorized pursuant to Section 25-1-9-9(a)(1).

[18] As used in Chapter 25-1-9, “practitioner” means an individual who holds:

(1) an unlimited license, certificate, or registration;

(2) a limited or probationary license, certificate, or registration;

(3) a temporary license, certificate, registration, or permit;

(4) an intern permit; or

(5) a provisional license;

issued by the board regulating the profession in question, including a certificate of registration issued under IC 25-20.

Ind. Code § 25-1-9-2.⁶

[19] The essence of the Board’s argument is that the applicable statutory provisions grant it expansive authority to discipline and revoke licenses, irrespective of the

⁶ As used in Chapter 25-1-9, “license” includes a license, certificate, registration, or permit.” Ind. Code § 25-1-9-3.

license's status, and none of the statutory provisions limit the Board's authority to discipline an expired license. In support, the Board cites several sections. First, the Board contends that Section 25-26-13-4(a)(3), which authorizes the Board to "revoke a license[,]" does not limit the type of license that the Board may revoke. According to the Board, one reason not to read limiting language into Section 25-26-13-4(a)(3) is the broad authority granted to the Board in Subsection 4(a)(9) to "exercise such other powers as may be necessary to implement and enforce this chapter." In addition, the Board refers to its authority to reinstate expired licenses pursuant to Section 25-26-13-14 and argues that the statute would be meaningless if the Board did not have authority over expired licenses. The Board also asserts that the definition of "practitioner" as used in Chapter 25-1-9 includes an individual who holds "an unlimited license" and argues that nothing in the statute indicates that a practitioner's license must be active and valid. *See* Ind. Code § 25-1-9-2.

[20] In determining whether the Board's interpretation of the statutes is reasonable, we turn to the unambiguous language of Section 25-26-13-14(b), which reads, "[I]f an application for renewal is not filed and the required fee paid before the established biennial renewal date, *the license expires and becomes invalid* without any action taken by the [B]oard." (Emphasis added.) An invalid license has no legal effect or authority. *See* MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/invalid> [<https://perma.cc/7R3A-7REN>] (last visited May 19, 2021) (defining invalid

as “being without foundation or force in fact, truth, or law”).⁷ Obviously, a person with an invalid license is not legally permitted to practice pharmacy.

[21] The Board argues that it “must be able to protect the public from pharmacists who commit criminal acts by sanctioning those pharmacists’ licenses, even if those licenses have expired. Otherwise, corrupt pharmacists could simply allow their license to expire in order to avoid discipline.” Appellant’s Br. at 21. If the purpose is to protect the public, we observe that regardless of whether an individual’s license expires or is revoked, that individual can no longer legally practice pharmacy. In either case, the public is no longer in danger of that individual’s practice of pharmacy. Given that the holder of an invalid license can no longer legally practice pharmacy, the Board need not initiate any revocation proceedings to stop the individual from practicing pharmacy.

[22] The Board’s concern with protecting the public is well taken, but the Board is able to satisfy this obligation pursuant to Subsections 25-26-13-14(e) and -(f), which permit an individual with an expired license to reapply for reinstatement. We observe that reinstatement of an expired license is not initiated by the Board; it is initiated by the person applying for reinstatement. Therefore, this statute does not support the Board’s position that it is authorized to initiate disciplinary proceedings against a holder of an expired license. If and when an

⁷ The Board itself has defined an “unlicensed person” as “any individual that is not HIPAA trained and does not hold a valid license, certification, permit, or registration issued by the board.” 856 Ind. Admin. Code 1-1.1-.8.

individual with an expired, invalid license applies for reinstatement, then the Board has an obligation to determine whether reinstatement is warranted. *See* Ind. Code § 25-26-13-14(e)-(f). Significantly, the Board is authorized to delay reinstatement “to permit the [B]oard to investigate information received by the licensing agency that the applicant for reinstatement may have committed an act for which the applicant may be disciplined[,]” and the Board may deny reinstatement of the license “following a personal appearance by the applicant” before the Board. Ind. Code § 25-1-8-8(b).

[23] As for the Board’s reliance on the definition of “practitioner” in Chapter 25-1-9, we note that Section 25-1-9-2 provides a list of licenses, certificates, and permits, including “temporary” licenses and “provisional” licenses, all of which legally permit the holder to practice. One of our rules of statutory interpretation is to consider “both what [the statute] does say and what it does not say.” *Spirited Sales*, 79 N.E.3d at 376. Here, the list does not include inactive, suspended, or expired licenses, and all the listed licenses permit the holder to legally practice, and thus we infer that the legislature intended to define practitioners as individuals who are legally licensed to practice and exclude from the definition those who are not legally licensed to practice. Obviously, the Board has the authority to initiate action against an unlicensed individual who attempts to practice without a license. We do not have that situation here.

[24] Based on the foregoing, we cannot say that the Board’s interpretation of the applicable statutes is reasonable. We conclude that the applicable statutes do not authorize the Board to revoke an expired, invalid license. “An

administrative agency has only those powers that the legislature has conferred to it, and unless we find the grant of powers and authority in the statute, we conclude that no power exists.” *Musgrave v. Squaw Creek Coal Co.*, 964 N.E.2d 891, 902 (Ind. Ct. App. 2012), *trans. denied*. Accordingly, the Board’s decision to revoke Elmer’s expired license is in excess of statutory authority. Ind. Code § 4-21.5-5-14(d)(3). Therefore, we affirm the trial court’s judgment reversing the Board’s Revocation Order and remand for further proceedings.⁸

[25] Affirmed and remanded.

Riley, J., and Mathias, J., concur.

⁸ The Board also argues that the trial court erroneously concluded that the Board’s decision was unsupported by substantial evidence and that Elmer was entitled to relief pursuant to the Indiana Prohibition Statute, Indiana Code Section 34-27-2-1. Because we have found that the Board exceeded its statutory authority and that the trial court properly granted Elmer relief on this basis, we need not address these other issues. Although we need not specifically decide the evidentiary issue, we note that it would appear that there was substantial evidence to support the Board’s decision. At the Board’s hearing, Elmer objected to the indictments and certified jury verdict forms on hearsay grounds. Hearsay is admissible in administrative proceedings, but “if the [hearsay] evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence.” Ind. Code § 4-21.5-3-26(a). Elmer contends that the certified jury verdict forms do not constitute evidence that he committed *the conduct* underlying his crimes. We note that the Board revoked Elmer’s license because he was “convicted of [crimes] that ... [have] a direct bearing on [his] ability to continue to practice competently.” Ind. Code § 25-1-9-4(a)(2)(A). Elmer’s argument ignores that the certified jury verdict forms are evidence of *the existence* of his convictions and would be admissible for that purpose under Indiana Evidence Rule 803(8)(A), the public records exception to the hearsay rule. Elmer also wrongly states, “a judgment of conviction in a criminal case is not admissible in a civil case as evidence of the facts upon which it is based.” Appellee’s Br. at 32 (citing *Brooks v. State*, 259 Ind. 678, 680, 291 N.E.2d 559, 560 (1973)). Indiana no longer follows this rule. See Ind. Code § 34-39-3-1(a) (providing that evidence of final judgment entered after trial or upon guilty plea is admissible in civil action to prove fact essential to sustaining judgment and is not excluded from admission as hearsay); Ind. Evid. Rule 803(22) (providing that judgment of previous conviction is not excluded by rule against hearsay, regardless of whether declarant is available as witness).