STATE OF MARYLAND
DEPARTMENT OF AGRICULTURE
BEFORE THE STATE BOARD OF VETERINARY MEDICAL EXAMINERS

IN THE MATTER OF:	*	
KIM HAMMOND, D.V.M.	*	DOCKET NO. 01-007
LICENSE NO: 2388	*	

* * * * * * * * * * * * *

ORDER OF DISMISSAL

In accordance with the Order and Memorandum Opinion issued on December 16, 2019 by the Circuit Court for Baltimore Count in Case No. 03-C-04-4482, copies of which are attached hereto and incorporated by reference, it is this 5th, day of February, 2020, hereby ORDERED by the State Board of Veterinary Medical Examiners, that the case against Dr. Hammond in Docket No. 01-007, be, and hereby is dismissed.

STATE BOARD OF VETERINARY
MEDICAL EXAMINERS

Elizabeth Callahan, D.V.M.
President
State Board of Veterinary Medical Examiners
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PETITION OF KIM HAMMOND, D.V.M.	*	IN THE
Petitioner,	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE DECISION OF THE BOARD OF REVIEW OF THE MARYLAND DEPARTMENT OF AGRICULTURE	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-04-4482
Agency Respondent.	*	
BOARD OF REVIEW DOCKET NO. 01-007		

* * * * * * * * * * * * *

ORDER

For the reasons set forth in this Court's Memorandum Opinion dated December 16, 2019, the decision of the State Board of Veterinary Medical Examiners dated November 20, 2001 is REVERSED, and this matter is remanded with direction that it be dismissed.

12/16/19
Date

Judge Kathleen Gallogly Cox

Clerk, please send copies to all parties.

PETITION OF KIM HAMMOND, D.V.M.	*	IN THE
Petitioner,	*	CIRCUIT COURT
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* * * * * * * * * * * * *

MEMORANDUM OPINION

This matter was before the Court for a hearing on November 14, 2019, on an administrative appeal from the decision of the State Board of Veterinary Medical Examiners (SBVME) concluding that Dr. Kim Hammond violated COMAR 15.14.01.04. The Court has considered the memoranda of the parties, the record of the proceedings below, and oral arguments of counsel, in rendering its opinion.

I. BACKGROUND

This case arises from an incident that occurred on July 11, 2000 at Falls Road Animal Hospital, which was owned and operated at the time by Dr. Hammond. On this date, Dr. Hammond observed a veterinary technician, Shannon Gallagher, attempting to draw blood from a cat utilizing a hold that caused the cat to choke. Dr. Hammond immediately stopped Ms. Gallagher. Dr. Hammond then attempted to demonstrate how uncomfortable Ms. Gallagher's hold had been on the cat by placing his hand in a comparable spot on her neck and applying pressure to her trachea.

On March 9, 2001, the SBVME notified Dr. Hammond in writing that he was charged with violating COMAR 15.14.01.04, which provides:

> The principal objectives of the veterinary profession are to render service to society, to conserve our livestock resources, and to relieve suffering of animals. A veterinarian shall act in relation to the public, the veterinarian's colleagues, and their patients, and the allied professions so as to merit their full confidence and respect.

A contested hearing, was held August 23, 2001. Ms. Gallagher, her husband, Dr. Hammond, and two other Falls Road Animal Hospital employees testified concerning the incident. On November 20, 2001, the SBVME issued a Decision and Order concluding that Dr. Hammond's conduct violated COMAR 15.14.01.04 and suspended his veterinary license for one year with all but two weeks stayed, assessed a civil penalty of $500, and placed him on probation for five years.

Dr. Hammond requested the SBVME to reconsider the decision, which was denied. On January 14, 2002, Dr. Hammond appealed the SBVME's Decision and Order to the Secretary of the Department of Agriculture seeking reversal based on the fact that the agency did not prove the validity of the charge by a preponderance of the evidence and there was no statutory or regulatory authority to support the charge brought against him. On June 5, 2002, Dr. Hammond supplemented his statement and set forth five additional reasons for reversal: (1) the sanction imposed was arbitrary and unjust; (2) the regulation is void for vagueness and violates his right to due process; (3) there are no legal grounds for sanctioning Dr. Hammond for his alleged conduct; (4) the SBVME imposed an unreasonable standard for consent; and (5) the SBVME's investigation and decision to charge Dr. Hammond was arbitrary and unreasonable. The Secretary ultimately affirmed the decision of the SBVME, but vacated the sanctions imposed against Dr. Hammond. Instead, the Secretary issued a reprimand for his conduct and placed him on probation for one year.

On October 21, 2002 Dr. Hammond appealed to the Department of Agriculture Board of Review, advancing the same arguments. Dr. Hammond amended his first argument to assert that the Secretary erred in determining that the SBVME's decision was supported by substantial evidence. A hearing was held on October 16, 2003. Thereafter, the Board of Review issued a Decision and Order affirming the Secretary's decision. The Board held that (1) the Secretary properly deferred to the SBVME on the credibility of witnesses and properly ruled that the SBVME's decision was supported by substantial evidence; (2) the Secretary correctly determined that the SBVME had the authority to charge Dr. Hammond; (3) the sanction was justified; and (4) COMAR 15.14.01.04 is not void for vagueness. The Board of Review adopted the "response and reasons given in the Secretary's decision of September 23, 2002," in regard to Dr. Hammonds final three issues.

Dr. Hammond then appealed to the Circuit Court for Baltimore County with the following contentions: (1) the agency's legal conclusions were wrong and therefore, not entitled to deference by the Circuit Court; (2) the factual decisions of the agency were not supported by substantial evidence; (3) the Board of review and the Secretary applied the wrong standard of review; (4) Dr. Hammond's colleagues were not present during the teaching demonstration; and (5) the regulation is unconstitutional because it fails to provide fair notice of prohibited acts or provide adequate guidelines for those who enforce the regulation. In its response, the Department of Agriculture (the Department) argued that the record contained substantial evidence to support finding that Dr. Hammond violated the regulation. Additionally, the Department argued that Dr. Hammond was required to conduct himself in a professional and respectful manner under COMAR 15.14.01.04, and that the regulation is not unconstitutionally vague.

A hearing was held before Judge Thomas Bollinger, who issued a Memorandum Opinion and Order on February 28, 2005 reversing the decision of the Board of Review. Judge Bollinger held that an appeal to the Board of Review is de novo and therefore the Board of Review erred by basing its decision only on the record before the SBVME. The Circuit Court did not rule on whether the decision of the SBVME was lawful and supported by substantial evidence. Following this decision, Dr. Hammond filed an appeal to the Court of Special Appeals (Hammond I).

The Court of Special Appeals reversed the decision of the Circuit Court, finding that the proceeding before the Circuit Court is an administrative appeal on the record, not a de novo review. Therefore, the scope of review is narrow. The Court must determine whether there is substantial evidence in the record as a whole to support the SBVME's decision and whether the SBVME's decision is premised on an erroneous conclusion of law. *Hammond I*, 170 Md. App. 344 (2006). The case was remanded to the Circuit Court for further review.

On March 23, 2007 Judge Bollinger conducted another hearing and reversed the SBVME's decision. Judge Bollinger determined that Ms. Gallagher was not a colleague of Dr. Hammond within the meaning of COMAR 15.14.1.04, and therefore the violation could not be sustained. Judge Bollinger reasoned that a veterinary assistant is not of equal rank to a veterinarian, and therefore is not a colleague. Judge Bollinger also held that the Department of Agriculture was bound by its original argument that Ms. Gallagher was a colleague, as opposed to a member of the public, so its theory of the case was limited to that provision of the COMAR regulation. The Circuit Court did not address any of the other issues raised in Dr. Hammond's appeal.

The Department appealed to the Court of Special Appeals (Hammond II), which again reversed the decision of the Circuit Court. The Court of Special Appeals held that Ms. Gallagher was both a colleague and a member of the public within the meaning of COMAR 15.14.01.04. The Court of Special Appeals also held that the Circuit Court should have reviewed the decision of the SBVME rather than the decision of the Board of Review in its analysis. The case was again remanded to Baltimore County Circuit Court for further proceedings.

Although a Mandate was issued, and this case was remanded for further proceedings, no action was taken for over nine years. It is unclear why the matter was never set for hearing by this Court. Neither party requested that any action be taken. In the spring of 2019, Dr. Hammond's counsel mentioned to me that this case was inexplicably dormant. A conference call was scheduled with counsel May 10, 2019 and a Scheduling Order was issued.

The Department filed the following preliminary motions: (1) Motion to Dismiss for Laches, or in the Alternative, Motion to Issue a Notification of Contemplated Dismissal; (2) Motion to Have Petitioner Establish His Arguments Before this Court are Preserved for Judicial Review; and (3) Motion to Declare the Scope of the Record on Appeal. Essentially the Department sought to limit and define the scope of the remaining appeal, particularly because the record of the proceedings could not be found at the time the motions were filed. Since the transcript of the original proceedings was later located, issues pertaining to the underlying record were moot. Following a hearing on October 7, 2019, the scope of the remaining appeal was limited to the arguments that the Petitioner raised orally or in writing before the SBVME.

On November 14, 2019, argument was heard on the issues that remained following remand.

II. ISSUES

Dr. Hammond asserts the following issues:

1. Whether the investigation was flawed and the penalties assessed for the alleged violation of COMAR 15.14.01.04 were far more egregious than those assessed to other veterinarians who had violated the same regulation.
2. Whether the Agency's legal conclusions were correct and entitled to deference by the Court.
3. Whether the factual decisions of the Agency were supported by substantial evidence in the record.
4. Whether the regulation is unconstitutionally vague because it fails to afford fair notice of prohibited acts or provide adequate guidelines for those who enforce the statute.

III. STANDARD OF REVIEW

Judicial review of the decision of an administrative agency in a quasi-judicial proceeding is quite narrow. *Adventist Health care, Inc. v. Md. Health Care Comm'n*, 392 Md. 103, 120 (2006); See also, *Hammond II*, p. 11. The issue of statutory or regulatory construction is one of law, which is reviewed *de novo*. Further, in deference to the expertise of the agency in its own field, the reviewing Court must accord great deference to the position of the agency in the construction of the statute at issue. *Young v. Anne Arundel County*, 146 Md. App. 526, 570, cert. denied, 372 Md. 432 (2002). In *Board of Physician Quality Assurance v. Banks*, 354 Md. 59 (1999), the Court of Appeals stated:

> Despite some unfortunate language that has crept into a few of our opinions, a court's task on review is **not** to substitute its judgment for the expertise of those persons who constitute the administrative agency.... Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts.

Id. at 68-69 (emphasis in original) (internal quotations and citations omitted).

As articulated by the Court of Special Appeals in Hammond II, the degree of deference accorded to the agency depends on whether the contested interpretation is of a statute the agency administers or of a regulation promulgated by the agency. See also, *Md. Transp. Auth v. King*, 369 Md. 274, 288-90 (2002). When the construction relates to an administrative regulation rather than a statute, the Court has recognized that deference is even more clearly in order. As recognized in Hammond II:

> [A]gency rules are designed to serve the specific needs of the agency, are promulgated by the agency, and are utilized on a day-to-day basis by the agency. A question concerning the interpretation of an agency's rule is as central to its operation as an interpretation of the agency's governing statute. Because an agency is best able to discern its intent in promulgating a regulation, the agency's expertise is more pertinent to the interpretation of an agency's rule than to the interpretation of its governing statute.

Md. Comm'n on Human Relations v. Bethlehem Steel Corp., 295 Md. 586, 593 (1983).

In reviewing factual determinations by the agency, the court must apply the substantial evidence test. The reviewing court should not substitute its judgment for the expertise of the agency. However a court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency. In that regard, the court's role is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions. *Finucan v. Maryland Board of Physician Quality Assurance*, 380 Md. 577, 590 (2004); *United Parcel Serv., Inc. v. People's Counsel*, 336 Md. 569, 576077 (1994); See also, *Belvoir Farms v. North*, 355 Md. 259, 267-268 (1999); *Eberle v. Bell*, 103 Md. App. 160, 166 (1975).

IV. LEGAL ANALYSIS

A. Was the investigation flawed and the penalties assessed for the alleged violation of COMAR 15.14.01.04 far more egregious than those assessed to other veterinarians who had violated the same regulation?

Alleged flaws within the investigation are not an appropriate basis for relief on administrative appeal in this matter. This Court is charged with reviewing the case based on the record of the proceedings that took place before the SBVME. Any alleged defect in the investigation was appropriate fodder for testimony at that hearing. There is nothing in the existing record to suggest that the process was so flawed as to be unreliable, or that there is any other basis for relief. Further, there was no contention before the SBVME that the investigation was flawed in some manner that warranted dismissal. Review on administrative appeal is limited to the questions that were presented to the administrative agency. Matters not presented to the agency may not ordinarily be raised for the first time in an action for judicial review. *Finucan v. Maryland Board of Physician Quality Assurance*, 380 Md. at 589 (2004).

The issue concerning the penalty assessed is also without merit on appeal. The original sanction imposed on Dr. Hammond by the SBVME was a suspension of his veterinary license for one year with all but two weeks stayed, a civil penalty of $500, and probation for five years. On appeal to the Secretary of Agriculture, Dr. Hammond argued that the SBVME suspension was excessive.[1] As a consequence, the sanction was reduced to a reprimand and a one year period of probation. There is nothing in the record on appeal to suggest that this is disproportionate, or that it constitutes an abuse of discretion.

B. Were the factual decisions of the agency supported by substantial evidence in the record?

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[1]. Dr. Hammond provided an analysis of the Disciplinary Actions of the SBVME from January 1997-March 2002, to include the following: Docket Number 99-007 ($300 civil penalty with no suspension or probation for euthanizing the wrong animal), Docket Number 98-006 ($500 civil penalty, no suspension, no probation, for failing to conform to minimal standards of care), Docket Number 98-046 ($500 civil penalty, no suspension, no probation for administering contraindicated medicine), Docket Number 00-024 (censure for failing to perform an ordered test and otherwise care for the animal), Docket Number 99-030 (no formal charges filed, case dismissed, and letter of admonishment for performing a substandard physical exam and being unable to distinguish between a neutered male cat and a female cat). Pet. Memorandum of Law, 16, n.8.

The SBVME heard testimony of several witnesses including the complainant, Ms. Gallagher, her husband, Dr. Hammond, Karen Nichols and Lori Zellefrow. Ms. Nichols and Ms. Zellefrow were both Falls Road Animal Hospital employees who were present during the incident. The SBVME made specific factual findings including credibility determinations in its Decision and Order, to include the following:

Paragraph 4:

Ms. Gallagher's testimony of the incident was substantial and credible. Describing how Josie came into her possession, Ms. Gallagher noted the following:

(a) On July 11, 2000, she was assigned to work in the hospital's treatment area;
(b) Near the end of her shift, she sought out Noah Cluster to hand him a list of supplies that she determined would be needed to restock the treatment area;
(c) She observed Noah Cluster in the X-ray room, attempting to obtain a blood sample from Josie; and
(d) After several failed attempts to obtain this sample, Mr. Cluster directed Ms. Gallagher to take Josie to the treatment area, and she complied.

Describing the subject incident, Ms. Gallagher noted:

(a) Dr. Hammond observed her in the treatment area holding Josie, and appeared irritated when she told him that the staff, despite several attempts, had not obtained a blood sample from the cat;
(b) Dr. Hammond appeared even more irritated when he failed in his own attempt to draw the blood sample;
(c) She was holding Josie during Dr. Hammond's attempt, but the cat flinched, and Dr. Hammond dropped the needle on the floor, yelling: "I need a better holder, I need a better holder"; and immediately thereafter,
(d) Dr. Hammond approached her, and, to show her how uncomfortable her hold had been, and, without her consent, pushed up on her jaw with his hand, placed his fingers on her trachea, and applied pressure, stating: "You would flinch too if someone held you like that."

Describing the pressure applied, and her reaction to the incident, Ms. Gallagher indicated:

(a) The pressure was not enough that she could not breathe, "but...enough to make her uncomfortable," and "scare" her;
(b) She was "shaken," "surprised," and "embarrassed by the incident;"
(c) She did not say anything to Dr. Hammond because she was "stunned;" and

(d) After the incident, she left the treatment area, finished her shift, went home, and called her father, her mother, and her husband, and told each about the incident.

Paragraph 6:

In the report that Greg Girardin, the Board's investigator, submitted in this matter (Joint Exhibit 3), he reported that in speaking to Dr. Hammond about Ms. Gallagher's complaint, Dr. Hammond described his reaction to Ms. Gallagher's hold on Josie as follows: "I was angry – but I was advocating for the cat." Mr. Girardin also reported that Dr. Hammond stated that he placed his forefinger, middle finger, and ring finger to Ms. Gallagher's trachea, and pressed, to "show her how uncomfortable…it is, it creates anxiety."

Paragraph 8:

Dr. Hammond acknowledged that he placed his hand upon Ms. Gallagher's neck, and applied pressure to her trachea. Dr. Hammond also acknowledged that he applied enough pressure with his fingers to make her feel uncomfortable. In addition, Dr. Hammond acknowledged that before touching Ms. Gallagher in this manner, he needed her consent, specifically noting that unwanted veterinary demonstrations on a person are unacceptable.

Paragraph 11:

Dr. Hammond disputed that he did not have Ms. Gallagher's permission to touch her in the manner he did. In his account of the event, Dr. Hammond noted the following:

(a) He observed that Ms. Gallagher had her hand firmly, completely around Josie's throat;
(b) He believed that Ms. Gallagher was choking Josie and that the cat was cyanotic;
(c) He grabbed Ms. Gallagher's hand, and the cat fell over, breathing with its mouth open;
(d) Ms. Gallagher informed him that Josie had been stuck multiple times;
(e) He could see the trachea sticks, and assumed that Ms. Gallagher had been holding Josie on each attempt;
(f) He immediately explained to Ms. Gallagher that she was choking the cat;
(g) He held two fingers up and requested her permission to push on her trachea (although, he initially testified that he held two fingers up and stated he was going to push on her trachea);
(h) He applied pressure to her trachea, stating afterwards: "Do you see how uncomfortable that is, that's the windpipe?"
(i) The pressure he applied never compromised Ms. Gallagher's breathing, but was enough to be uncomfortable.

Paragraph 12:

> On the issue of consent, however, Ms. Gallagher's testimony was more compelling than the evidence Dr. Hammond offered. When questioned about consent, Ms. Gallagher specifically stated she did not give Dr. Hammond permission to touch her trachea, much less apply any pressure to it – particularly to the point of making her feel uncomfortable. Dr. Hammond's assertion to the contrary, he did not request Ms. Gallagher's permission to apply pressure to her trachea. Several employees, and one former employee, testified on Dr. Hammond's behalf, and none heard Dr. Hammond expressly request Ms. Gallagher's consent to apply pressure to her trachea. Moreover, even assuming Dr. Hammond did request Ms. Gallagher's consent to touch her in this manner, he never received her permission to do so. While the evidence showed that Ms. Gallagher did not tell Dr. Hammond that he could not apply pressure to her trachea, the evidence, more importantly, also showed that she did not tell him that he could touch her in this manner. Ms. Gallagher testified she did not say anything to Dr. Hammond because she was "stunned" and "surprised" by his action. The entire incident occurred in a very brief period of time. Ms. Gallagher did not have an opportunity to respond to Dr. Hammond's demonstration before he performed it.

E. 385-386.

SG § 10-222 requires that an agency's findings be supported by "competent, material, and substantial evidence in light of the entire record as submitted." The substantial evidence test requires a court to determine whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. *Finucan*, supra.

The SBVME's factual conclusions were summarized in Paragraph 17 of its Decision and Order as follows:

> In summary, Dr. Hammond intentionally applied pressure with his fingers to Ms. Gallagher's trachea to show her how uncomfortable her hold had been, and how it created anxiety. Dr. Hammond did not obtain Ms. Gallagher's consent before touching her in this manner. Dr. Hammond's action in placing his fingers upon Ms. Gallagher's trachea, and more importantly, applying pressure to it, was offensive, not simply because it was taken in anger, but also because it was needless, and done to make her feel uncomfortable and anxious. Dr. Hammond's action reasonably upset and embarrassed Ms. Gallagher. She was "shaken," "stunned," and "scared," by Dr. Hammond's action, and shortly thereafter, because of it, resigned from her position at the hospital, a job she enjoyed.

The record of the proceedings before the SBVME demonstrates that there was substantial evidence in the record as a whole to support these factual findings. The SBVME made detailed findings, based upon credibility assessments that were fully articulated and supported by the record. The appeal on this ground must be denied.

C. Were the Agency's legal conclusions correct and entitled to deference by the Court?

The SBVME found that Dr. Hammond did not conduct himself in relation to the public, his colleagues, and the allied professions so as to merit their full confidence and respect, thus violating COMAR 15.14.01.04. The underlying incident took place at the veterinary hospital, during work hours, and was unquestionably related to the practice of veterinary medicine. In Hammond II, the Court of Special Appeals determined that Ms. Gallagher was a colleague of Dr. Hammond, and thus fell within the scope of the regulation.

Dr. Hammond argues that the Agency did not consider apparent consent by Ms. Gallagher to the offensive contact. It is undisputed that Ms. Gallagher did not verbally consent to the contact by Dr. Hammond. It is also undisputed that she did not voice any objection to the demonstration on her. Dr. Hammond asserts that because a reasonable person in this situation would object to the contact if they were uncomfortable, the SBVME should have addressed the issue of apparent consent.

In testimony before the SBVME, Dr. Hammond admitted that his demonstration on Ms. Gallagher would be unacceptable without her consent. (T. 183-184). This admission completely undermines the argument on appeal that the Board failed to consider the doctrine of apparent consent. Both Karen Nichols and Lori Zellefrow testified that they did not hear Dr. Hammond request Ms. Gallagher's permission to demonstrate the technique on her. (T. 276-7, T. 291-2). At

best, Ms. Zellefrow testified that Dr. Hammond said, "Let me show you," but without any indication of how he intended to demonstrate the technique. (T. 291-2).

Ms. Gallagher testified that she was "shaken," "stunned," and "scared" and did not consent to the demonstration (T. 42-60). The SBVME found Ms. Gallagher's testimony to be more credible than that of Dr. Hammond. The SBVME was not required to address the doctrine of apparent consent, as there is a dearth of evidence to suggest that Ms. Gallagher was ever apprised that Dr. Hammond intended to demonstrate the technique on her.

The conclusions that Dr. Hammond engaged in offensive conduct, and that there was no implied consent by Ms. Gallagher, are supported by the record. The issue that remains is whether COMAR 15.14.01.04 can be fairly construed to regulate this conduct.

D. Is COMAR 15.14.01.04 unconstitutionally vague because it fails to afford fair notice of prohibited acts or provide adequate guidelines for those who enforce the statute?

At the time of the incident at issue, COMAR 15.14.01.04 provided:

> The principal objectives of the veterinary profession are to render service to society, to conserve our livestock resources, and to relieve suffering of animals. A veterinarian shall act in relation to the public, the veterinarian's colleagues, and their patients, and the allied professions so as to merit their full confidence and respect.

The regulation then provided nine examples of conduct that would be prohibited by the statute. The regulation clearly states that the list is not intended to be exhaustive.[2]

In considering whether a regulation is void for vagueness, the Court of Appeals has delineated two criteria. First, a Court must consider whether the statute adheres to the "fair notice principle." See, *Finucan*, supra. at 591-92. In other words, "due process commands that persons of ordinary intelligence and experience be afforded a reasonable opportunity to know

[2] The examples listed all relate to the manner in which the veterinary practice is marketed or conducted, such as use by a veterinarian of a degree not obtained, or acceptance of fees in certain circumstances, or guaranteeing a cure. None of the examples listed pertain to administrative or personnel procedures within a practice.

what is prohibited, so that they may govern their behavior accordingly." *Id.* The second criteria requires that the regulation "provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact, and others whose obligation it is to enforce, apply and administer the penal laws." *Id.* The purpose of these criteria is to ensure that an average person can understand the regulation and that it is applied fairly and consistently among similar circumstances. However, it is important to note that a regulation is not unconstitutionally vague "merely because it allows for the exercise of some discretion." *Id.*

COMAR 15.14.01.04 was amended in 2005 to add subsection B, which states, "A veterinarian may not act in an unprofessional or immoral manner in the practice of medicine." Dr. Hammond references the amendment to the regulation in support of his contention that the regulation was vague and at the time of the incident and that it did not regulate the broad category of unprofessional conduct. In response, the Department argues that the Statement of Purpose for the amendment, as published in the Maryland Register on May 27, 2005, was to "clarify that the Board may discipline veterinarians for unprofessional or immoral conduct during the practice of veterinary medicine." The Department also notes that the regulation has always been captioned to denote that it is a standard for "Professional Conduct," so veterinarians were on notice that they were required to conform to certain standards of conduct, even if not expressly listed in the regulation.

Finucan reaffirmed that terms such as "unprofessional conduct" generally are sufficiently definite to withstand constitutional scrutiny if they are susceptible to common understanding by members of the regulated profession. *Id.* at 592-93. Clearly, if the vagueness challenge in this case were directed at COMAR 15.14.01.04 as amended in 2005, it would withstand scrutiny, as the terms "unprofessional" and "immoral" would easily be understood to include inappropriately

touching a subordinate in a workplace without consent. The issue is whether the prior iteration of COMAR 15.14.01.04 would be construed by a person of ordinary intelligence to govern this type of conduct.

The language of the prior version of the regulation is unusual. It starts by outlining the overall objectives of veterinary practice. The central language emphasizes that a veterinarian conduct himself so as to merit the "full confidence and respect" of members of the public, colleagues, and patients. Specific examples of prohibited conduct all focus on inappropriate behavior in rendering veterinary services, not on overall moral or personal interactions.

The mere fact that the regulation is captioned as "Professional Conduct" does not sufficiently clarify its scope. The phrase "professional conduct" can be construed simply to mean behavior in engaging in the profession of providing veterinary services. Alternatively, it could be construed to include broader principles of professionalism.

The SBVME clearly construed the regulation to encompass broader principles of professional conduct. While that interpretation must be accorded some deference, it cannot save a regulation from constitutional challenge if a person of ordinary intelligence and experience is not afforded a reasonable opportunity to know what is prohibited so that they may govern their behavior accordingly.

It is not sufficiently clear that COMAR 15.14.01.04 was intended to govern broad concepts of professionalism, as opposed to substantive professional services as a veterinarian, at the time of this incident. Additionally, the requirement that an individual's behavior "merit the full confidence and respect" of others is subject to inconsistent interpretation and application.

For the foregoing reasons, the Court finds that COMAR 15.14.01.04 was unconstitutionally vague.

V. Conclusion

For the reasons stated, this Court finds that COMAR 15.14.01.04 was unconstitutionally vague at the time of the incident giving rise to the disciplinary action against Dr. Kim Hammond. For that reason, the decision of the State Board of Veterinary Medical Examiners is REVERSED and this matter is remanded with direction that it be dismissed.

12/16/19
Date

Judge Kathleen Gallogly Cox

Clerk, please send copies to all parties.