11-20-1985

Colorado Soc. of Community & Institutional Psychologists, Inc. v. Lamm

SUPREME COURT, STATE OF COLORADO

Case No. 85SA149

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the City and County of Denver
Case No. 82CV3295, RAYMOND DEAN JONES, Judge

COLORADO SOCIETY OF COMMUNITY AND INSTITUTIONAL PSYCHOLOGISTS, INC., a Colorado nonprofit corporation;
RICHARD ALDRICH;
ERNEST L. ARAGON;
LEO PAUL ARGUELLO;
DIANE GLASS BAILS;
NANCY K. BUCKLEY;
BRENDA KAY BYERS;
JOHN REGAN CONNOR;
PRUDENCIO ARANBULA COSYLEON;
ROBERT M. CROWLEY;
DAVID T. DANIEL;
IRENE N. ELMER;
ANTHONY RAYMOND GRADISAR;
MICHAEL HNATIOW, JR., Ph.D.;
DAVID DENNIS HOLT;
WILLIAM ALEXANDER HOWARD;
ROBERT JAMES;
LEO JOHN KELLER II;
ROBERT GARY KEPPLINGER;
FRANK C. LEE;
EDWARD JOSEPH LEMOINE, JR., Ed.D.;
MIKE MARES, JR.;
RICHARD ALLEN MARR, Ed.D.;
SeETTA R. MOSS;
WILLIAM CHAUNCEY MUSE;
PATRICIA DONICE NEAL;
JOHN S. PICKUP;
NEFELI H. SCHNEIDER;
LARRY DEAN SELEY;
WALLACE ELLIS SMITH, Ph.D.;
WAYNE AUSTIN SMYER;
INGO STANGE;
CURTIS FRANKLIN STENSRUDE, Ph.D.;
JANICE E. TEMPLE;
CURTIS B. TUFFIN,

Plaintiffs-Appellees,

v.

RICHARD D. LAMM, in his official capacity as Governor of Colorado;
THE COLORADO DEPARTMENT OF REGULATORY AGENCIES;
WELLINGTON E. WEBB, in his official capacity as Executive Director of the Department of Regulatory Agencies; and
COLORADO STATE BOARD OF PSYCHOLOGIST EXAMINERS, in its official capacity,

Defendants-Appellants.

INTRODUCTION

Defendants present the following arguments and authorities in response to the answer brief of plaintiffs. Defendants address arguments 1, 2 and 3 of their opening brief in this reply brief and rely on their opening brief with respect to issues 4 and 5.

ARGUMENT

I.

The trial court erred in declaring sections 12-43-109 and 12-43-114, C.R.S. (1973) as amended by House bill 1289 (1981) and Senate bill 52 (1982) unconstitutional on their face and as applied.

This is a case of legislative, not agency, action. The State Administrative Procedure Act (APA) does not apply. Section 24-4-101 to 108, C.R.S. (1982). Section 24-4-102(2), C.R.S.

(1982) defines "agency" as any board, bureau, commission, department, institution, division, section, or officer of the state, except those in the legislative branch or judicial branch...." (Emphasis added.) Plaintiffs and the trial court cite the APA in support of the finding that plaintiffs were unconstitutionally deprived of their property right to practice psychology as "psychologists. The trial court states that plaintiffs' "licenses cannot be lost without hearing, C.R.S. 24-4-104 and 24-4-105." (Answer Brief, p. 14; v. 1, p. 193.) Yet those sections provide:

> 24-4-104 (2) Every agency decision respecting the grant, renewal, denial, revocation, suspension, annulment, limitation, or modification of a license... shall be based solely upon the ... statute, or regulations ... and case law ....
>
> 24-4-105 (1) In order to assure that all parties to any agency adjudicatory proceeding are accorded due process of law, the provisions of this section shall be applicable.

Thus, the order of March 6, 1985, appears to stand for the proposition that if the legislature repeals a statutory exemption to licensure, due process requires that the licensing agency conduct a hearing pursuant to sections 24-4-104 and 24-4-105, C.R.S. (1982) before such statutory exemption may be repealed.

"There is no such thing as an irrepealable statute." Davis v. People, 78 Colo. 158, 240 P. 942 (1925). "When the statute upon which an entitlement is based is repealed, then absent some constitutional entitlement, the entitlement disappears with it.

The legislative process is not affected by the due process considerations expressed in Goldberg v. Kelly, supra (397 U.S. 254, (1970))", Ferguson v. Weinberger, 389 F. Supp. 759 (Mont. 1975). In Art Neon Co. v. City & County of Denver, 488 F.2d 118 (10th Cir. 1973), cert. denied, 417 U.S. 932 (1973), a case analyzing an ordinance concerning nonconforming signs, the court stated:

> The decision to terminate nonconforming uses, and the method to be used, is made by the appropriate legislative body. It is reached by a comparison or balancing of the burden or loss which will be placed on the individual by the ordinance with the public good sought to be achieved. cites omitted. Such a legislative decision under the police power is prima facie a valid factual determination. The parties attacking such an ordinance have to meet a heavy burden.... The legislative determination must only meet the test of "reasonableness," that is the plan for termination must be reasonable.... (W)here the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

II.

> The trial court exceeded its jurisdiction by granting relief to plaintiffs "and all others similarly situated."

Plaintiffs contend that the order of the trial court affected a "finite number of professionals," "approximately 200 known people" (Answer Brief, p. 25). Yet the only evidence in

the record concerning these individuals who presumably are the "all others similarly situated" is in the testimony of plaintiff Lee (v. II, pp. 68-69). He stated "the number of individuals that would be subjected to this type of deletion of exemption in particular is probably no less than 200 by my own research ... I believe the figure is approximately 60 or 70 in state services." (v. II, p. 68).

Defendants submit that the trial court erred in failing to identify and join all individuals for whom relief was granted in the order of March 6, 1985 (v. 1, p. 196). Even if defendants had the power to carry out the provisions of that order, they cannot take the affirmative action called for by the court without knowing to whom it applies.

III.

Even if sections 12-43-109 and 12-43-114, C.R.S. (1973) as amended by House bill 1289 (1981) and Senate bill 52 (1982) are held to be unconstitutional, the trial court erred in the relief granted plaintiffs.

All plaintiffs should have been required to show that they had a right to practice psychology in Colorado as a prerequisite to the trial court finding that they were unconstitutionally deprived of such right. The doctrine of unconstitutional application requires demonstration that application of the statute to individuals under the circumstances of the case would directly

interfere with their rights arisings under the federal or state constitution. Heninger v. Charnes, 613 P.2d 884 (Colo. 1980).

Plaintiffs contend that defendants in their opening brief raised for the first time the issue of standing to sue with respect to some plaintiffs (answer brief, p. 27). However, a review of the record demonstrates that defendants maintained at all stages of this case that plaintiffs must meet their burden of proof in order to prevail (defendants' trial brief, v. 1, pp. 77-79) and that all 10 nonstate-employed plaintiffs failed to meet their burden of proof (Defendants' Motion for New Trial or, in the Alternative, Motion to Alter or Amend Judgment, and Memorandum in Support Thereof, v. 1, pp. 146, 151-158).

Prior to the legislative enactments in question, section 12-43-114(1)(a) provided:

> (1) (a) Nothing in this article shall be construed to limit:
>
> The activities, services, and use of an official title on the part of a person in the employ of a federal, state, county, or municipal agency, or of other political subdivisions or any educational institution chartered by the state, insofar as such activities, services, and use of an official title are a part of the duties of his office or position with such agency, institution, private agency or business, or a private agency or business in which the psychological services performed are the requirement of a salaried position, if such private agency or business does not charge a fee for such services; or the employment of a person certified according to this article by a private nonprofit agency exempt

> from federal income tax under section 501(c)(3) of the "Internal Revenue Code of 1954", as amended, or the corresponding provision of any future United States internal revenue law; or the employment of a person certified according to this article by a person licensed to practice medicine who has been certified by the American board of psychiatry and neurology; (emphasis added)

Therefore, section 114(1)(a) had four exemptions:

a. Persons employed in government agencies.

b. Persons employed in private agencies if the agency did not charge a fee for its psychological services.

c. A certified person employed by a private nonprofit agency.

d. A certified person employed by a licensed physician.

Despite the clear language of that section, plaintiffs continue to assert that the nonstate-employed plaintiffs practiced psychology (1) "as employees of '... private nonprofit agenc(ies) exempt from federal income tax....' and because their employers do not always charge service fees, or do not charge those financially unable to pay them" or (2) "as persons '... in the employ of (a) licensed and Board-certified psychiatrist'." (Answer Brief p. 6, para 3; p. 7, para. 4; p. 11, para B.4.; pp. 20, 28). These plaintiffs continue to ignore the fact that the third and fourth exemptions under 12-43-114(1)(a) applied only to "a person certified according to this article," a status no plaintiff could

claim. (See Opening Brief, p. 7.)

Whether characterized as an issue of burden of proof or of standing, it is clear that defendants have always maintained that the nonstate employed plaintiffs failed to prove their right to practice psychology pursuant to section 12-43-114(1)(a), C.R.S. (1973) and, therefore, failed to prove that they have suffered any harm by the repeal of that section.

Plaintiffs complain that the defendant Board of Psychologist Examiners "speaks ... out of both sides of its mouth" concerning its jurisdiction (answer brief, p. 17). Pursuant to section 12-43-111, C.R.S. (1985), the board has the power to "deny, revoke, suspend or refuse to renew any license, or to place on probation a licensee" upon certain proof. Pursuant to section 12-43-113, C.R.S. (1985) the board may ask the court to enjoin any person not licensed under article 43 from practicing psychology in Colorado or from representing himself as a psychologist without complying with article 43.

Defendants submit that there is a difference between the board's jurisdiction to discipline a licensee and the board's authority to seek an injunction against an unlicensed person. To the extent that the trial court's order subjects plaintiffs and all others similarly situated "to lawful regulation by the Board, or otherwise," the board would for the first time be asserting jurisdiction over unlicensed individuals (v. 1, p. 196).

The arguments of plaintiffs notwithstanding, the order of March 6, 1985, substantially increases the rights of plaintiffs when compared to their status before July 1, 1982 (v. 1, p. 196). The mandatory injunction portion of that order appears to grant plaintiffs relief tantamount to licensure. Such relief is clearly impermissible. Colorado State Department of Health v. Geriatrics, Inc., 699 P.2d 952 (Colo. 1985). If plaintiffs are entitled to any relief, it should be limited to a restoration of their status prior to the enactments in question.

CONCLUSION

For the reasons expressed herein and in the opening brief, the trial court's order granting relief to plaintiffs on their first, second and fourth claims for relief should be reversed, and judgment should enter for defendants. If this court reverses the trial court, the trial court's award of attorneys fees to plaintiffs as the prevailing party should also be reversed.

Respectfully submitted this 20th day of November, 1985.

FOR THE ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing APPELLANTS' REPLY BRIEF was duly served this 20th day of November, 1985, by U.S. Mail, postage prepaid, addressed to:

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