

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

MAR 11 2014

Cheshire Superior Court
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NOTICE OF DECISION

**Michael J. Tierney, ESQ
Wadleigh Starr & Peters PLLC
95 Market Street
Manchester NH 03101**

Case Name: **Betty Buzzell, et al v New Hampshire Board of Pharmacy**
Case Number: **213-2013-CV-00271**

Enclosed please find a copy of the court's order of March 05, 2014 relative to:

Order on Respondent's Motion to Dismiss

March 07, 2014

James I. Peale
Clerk of Court

(555)

C: Catherine Glenn Foster; Mary Ann Dempsey, ESQ; Lynmarie C. Cusack, ESQ

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS.

No. 13-CV-271

BETTY BUZZELL, ROBERT J. CARBONE, AND NEW HAMPSHIRE RIGHT TO LIFE

v.

NEW HAMPSHIRE BOARD OF PHARMACY

ORDER ON RESPONDENT'S MOTION TO DISMISS

The Petitioners—Betty Buzzell, Robert J. Carbone, and New Hampshire Right to Life—filed a declaratory judgment action against the Respondent, New Hampshire Board of Pharmacy, asserting that the Respondent unlawfully granted licenses to Planned Parenthood of Northern New England's ("Planned Parenthood") six abortion clinics. The Respondent now moves to dismiss the Petitioners' action, asserting that the Petitioners do not have standing. The Petitioners object. Based on the following, the Respondent's motion to dismiss is GRANTED.

"Generally, in ruling upon a motion to dismiss, the trial court must determine whether the allegations contained in the [petitioner's] pleadings sufficiently establish a basis upon which relief may be granted." Atwater v. Town of Plainfield, 160 N.H. 503, 507 (2010). "[W]hen the motion to dismiss does not challenge the sufficiency of the [petitioner's] legal claim but, instead, raises certain defenses, the trial court must look beyond the [petitioner's] unsubstantiated allegations and determine, based on the facts, whether the [petitioner] has sufficiently demonstrated his right to claim relief." Id. at 507.

"A jurisdictional challenge based upon lack of standing is one such defense." Baer v.

N.H. Dep't of Educ., 160 N.H. 727, 729 (2010) (citing Ossipee Auto Parts v. Ossipee Planning Board, 134 N.H. 401, 403-04 (1991)).

In their declaratory judgment action, the Petitioners assert that the Respondent violated RSA 318 when it granted licenses to Planned Parenthood. In the Respondent's motion to dismiss, it first argues that the Petitioners do not qualify for automatic standing as taxpayers under RSA 491:22, I. Second, it argues that even if the Petitioners do have taxpayer standing, there was a procedure for appealing the Respondent's decision under RSA 541, and the Petitioners did not have standing to bring that appeal. Thus, according to the Respondent, the Petitioners cannot attempt to circumvent the requirements in RSA 541 through a declaratory judgment action based on their taxpayer status under RSA 491:22.

In response, the Petitioners assert that the Respondent has misapprehended the scope of RSA 491:22. According to the Petitioners, the statute broadly confers standing on any taxpayer to bring an action against an agency when that taxpayer pays a tax to the State. Additionally, the Petitioners argue that the Respondent cannot now assert that there are appellate rights under RSA 541:6 when the Respondent took the position, in prior litigation, that in granting a license there is no adjudicative proceeding giving rise to an administrative appeal.

Even if this Court were to assume, without deciding, that the Petitioners have taxpayer standing under RSA 491:22, the Petitioners' declaratory judgment action is nonetheless barred. RSA 491:22, I provides as follows:

The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this

section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced. The preceding sentence shall not be deemed to convey standing to any person . . . to challenge the decision of any board, commission agency, or other authority of the state or any municipality, school district, village district, or county if there exists a right to appeal the decision under RSA 541 or any other statute and the person seeking to challenge the decision is not entitled to appeal under the applicable statute.

In this case, the actions taken by the Respondent were subject to appeal pursuant to RSA 541. Under RSA 541:3, when an agency renders a decision or order, a party may file a motion for rehearing. Within 30 days of the order, "any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action" If the request for rehearing is denied, the applicant may file an appeal with the New Hampshire Supreme Court. See RSA 541:6. Accordingly, the statutory scheme also states that "[a]ny person or corporation whose rights may be directly affected by said appeal may appear and become a party, or the court may order such persons and corporations to be joined as parties as justice may require." RSA 541:8.

To prove standing under RSA 541, the New Hampshire Supreme Court has determined that an individual must show injury in fact. Appeal of Richards, 134 N.H. 148, 156 (1991). "No individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general . . ." Id. Further, an association must have more than just an "interest in a problem" to seek review of an agency's action. Id. (citing Sierra Club v. Morton, 405 U.S. 727, 739 (1972)).

Here, the Petitioners were not parties to the licensing procedure between the Respondent and Planned Parenthood. Additionally, they did not assert that they had a direct interest in the matter or an injury in fact that would allow them to appeal the Respondent's decision to grant licenses to Planned Parenthood. While a right to appeal a decision under RSA 541 existed in this situation, the Petitioners could not show that they were entitled to appeal. For this Court to allow the Petitioners to bring their declaratory judgment action would be contrary to the express language of RSA 491:22. Therefore, the Petitioners' declaratory judgment action is barred.

The Petitioners assert that the Respondent should be judicially estopped from taking the position that a right of appeal existed pursuant to RSA 541. This argument also fails. "The doctrine of judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." In re Pack Monadnock, 147 N.H. 419, 425–26 (2002).

Typically, there are three factors that "inform the decision whether to apply the doctrine in a particular case." New Hampshire v. Maine, 532 U.S. 742, 750 (2001).

One factor to consider in deciding whether to apply the doctrine of judicial estoppel is whether the party's later position is clearly inconsistent with its earlier position. Courts also regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Pack Monadnock, 147 N.H. at 426.

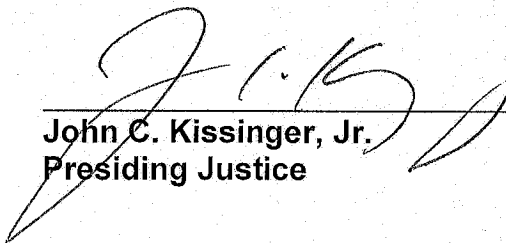
As an initial matter, the position taken before the New Hampshire Supreme Court appears to be that New Hampshire Right to Life lacked standing to become a party before the agency. The Court fails to see how this position is clearly inconsistent with

the one advanced here—that broad taxpayer standing under RSA 491:22 does not apply when a right to appeal, by another person or party, exists. Moreover, to the extent any inconsistency exists, nothing before this Court shows that the Respondent has succeeded in these arguments. Thus, the position taken by the Respondent in this case simply does not threaten judicial integrity. See New Hampshire v. Maine, 532 U.S. at 750 (“Absent success in a prior proceeding, a party’s later inconsistent position introduces no ‘risk of inconsistent court determinations’ . . .”). As a result, the Court cannot find that the Respondent’s arguments are barred by the doctrine of judicial estoppel.

Based on the foregoing, the Respondent’s motion to dismiss is GRANTED, as a right to appeal the granting of licenses existed under RSA 541 and the Petitioners failed to show that they were entitled to appeal via those provisions.

SO ORDERED.

3/5/14
Date



John C. Kissinger, Jr.
Presiding Justice