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*** Filed ***
05/02/2016 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000444-001 DT 04/29/2016

CLERK OF THE COURT
THE HON. CRANE MCCLENNEN J. Eaton
Deputy

DIANE GREGG JULIE R GUNNIGLE

v.

ARIZONA DEPARTMENT OF HEALTH SERVICES (001) PATRICIA C LAMAGNA

OFFICE OF ADMINISTRATIVE HEARINGS
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Appellant Diane Gregg (Gregg) asks this Court to review the Decision, dated October 14, 2015, wherein Appellee the Arizona Department of Health Services (AzDHS) suspended Gregg's Midwife License for 1 year. For the following reasons, this Court vacates and reverses that Decision.

I. FACTUAL BACKGROUND.

On January 31, 2013, Gregg received a telephone call from a registered nurse with whom she had worked for 10 years, who told her he was driving his pregnant wife from their home in Sierra Vista to a hospital in Tucson for delivery. He said her water had broken and she had the sudden urge to push. Gregg had not previously provided care to this woman, but she told them to meet her at the birth center. When they all arrived, Gregg saw the woman appeared ready to deliver. The delivery was uncomplicated, and Gregg delivered healthy twins.

After delivery, Gregg offered the parents the opportunity to transfer care, but they declined. Gregg provided services on February 1 and 21, 2013, apparently weighing the twins and taking their pulse, and providing nutritional information.

On April 2, 2015, AzDHS issued a Notice of Intent To Suspend Midwife's License for 1 Year based on a violation of Arizona Administrative Code (A.A.C.) R9–16–111(B)(2), which provides, "A midwife shall not accept for midwifery services or continue midwifery services for a client who has or develops . . . [m]ultiple fetuses," and based on a violation of A.A.C. R9–16–111(E), which requires a transfer of care. Gregg requested a hearing, and on August 24, 2015, the Administrative Law Judge (ALJ) held an Administrative Hearing. On September 10, 2015, the ALJ issued his Decision wherein he found Gregg had provided postpartum care on February 3 and 21, 2013. (Finding of Fact #6.) The ALJ concluded Gregg had violated A.A.C. R9–16–111(B)(2) and (E) (Conclusion of Law #13), and recommended that Gregg's Midwife License be suspended for 1 year.

On October 14, 2015, Cara Christ, Director of AzDHS, issued her Decision wherein she adopted the ALJ's Findings of Fact, except for modifying Finding of Fact #6 to show February 1, 2013. She then ordered that Gregg's Midwife License would be suspended for 1 year. On October 21, 2015, Gregg filed a timely Notice of Appeal for Judicial Review of Administrative Decision. This Court has jurisdiction pursuant to A.R.S. § 12–124(A) and A.R.S. § 12–905(A).

II. GENERAL STANDARDS FOR REVIEW.

The Arizona statutory authority and case law define the scope of administrative review:

> In reviewing an agency's decision pursuant to the Administrative Review Act, the superior court ***must*** affirm the agency action unless it is "not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion."

Carlson v. Arizona St. Pers. Bd., 214 Ariz. 426, 153 P.3d 1055, ¶ 13 (Ct. App. 2007) (emphasis added), quoting A.R.S. § 12–910(E).

> The court must defer to the agency's factual findings and affirm them if supported by substantial evidence. If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion.

Gaveck v. Arizona St. Bd. of Podiatry Exam., 222 Ariz. 433, 215 P.3d 1114, ¶ 11 (Ct. App. 2009) (citations omitted).

> [I]n ruling on the sufficiency of the evidence in administrative proceedings, courts should show a certain degree of deference to the judgment of the agency based upon the accumulated experience and expertise of its members.

Croft v. Arizona St. Bd. of Dent. Exam., 157 Ariz. 203, 208, 755 P.2d 1191, 1196 (Ct. App. 1988).

> A trial court may not function as a "super agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.

DeGroot v. Arizona Racing Comm'n, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (Ct. App. 1984).

> [The reviewing court must] view the evidence in a light most favorable to upholding the Board's decision and "will affirm that decision if it is supported by any reasonable interpretation of the record."

Baca v. Arizona D.E.S., 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998) (cites omitted).

> A question of statutory interpretation involves a question of law, and [the reviewing court] is not bound by the trial court's or the agency's conclusions [about] questions of law.

Siegel v. Arizona St. Liq. Bd., 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (Ct. App. 1991).

> On appeal, [the reviewing court] is free to draw its own conclusions in determining if the Board properly interpreted the law; however, the Board's interpretation of statutes and . . . regulations is entitled to great weight.

Baca, 191 Ariz. at 45–46, 951 P.2d at 1237–38.

> Judicial deference should be given to agencies charged with the responsibility of carrying out specific legislation, and ordinarily an agency's interpretation of a statute or regulation it implements is given great weight. However, the agency's interpretation is not infallible, and courts must remain the final authority on critical questions of statutory construction.

U.S. Parking Sys. v. City of Phoenix, 160 Ariz. 210, 211, 772 P.2d 33, 34 (Ct. App. 1989) (cites omitted).

III. ISSUE: WAS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE ACTION OF THE AGENCY, AND WAS THE ACTION OF THE AGENCY CONTRARY TO LAW, ARBITRARY AND CAPRICIOUS, OR AN ABUSE OF DISCRETION.

AzDHS contends Gregg violated several of its rules and regulations. The applicable statute provides as follows:

> A. Except as provided in subsection B of this section, no person may act as a midwife without being licensed pursuant to this article.
>
> B. The following persons are exempt from the licensure requirements of this section:
>
> . . . .
>
> 5. A person who has no prearranged agreement to provide delivery assistance, but who delivers a baby as a result of an emergency situation.

A.R.S. § 36–752(A) & (B)(5). AzDHS agrees that Gregg was "[a] person who [had] no pre-arranged agreement to provide delivery assistance, but who deliver[ed] a baby as a result of an emergency situation." As such, she was "exempt from the licensure requirements of this section." Because Gregg was "exempt from the licensure requirements of this section," she was also exempt from the rules and regulations promulgated pursuant to that section. Because she was exempt from the rules and regulations promulgated pursuant to that section, AzDHS did not have the authority to suspend her license for what it perceived as a violation of those rules and regulations.

AzDHS contends, however, that exemption provided in A.R.S. § 36–752(B)(5) lasts only as long as the emergency lasts, thus once Gregg delivered the infants (and presumably some indeterminate period after that), Gregg was then under the applicable rules and regulations. AzDHS reads the statute as though it contained the following additional language:

> B. The following persons are exempt from the licensure requirements of this section:
>
> . . . .
>
> 5. A person who has no prearranged agreement to provide delivery assistance, but who delivers a baby as a result of an emergency situation***, but is no longer exempt once the emergency is over***.

A.R.S. § 36–752(B)(5) (language in ***bold italic*** added). The Arizona Court of Appeals has said, however:

> Our Legislature did not choose this particular language, however, and we are "not at liberty to rewrite the statute under the guise of judicial interpretation."

New Sun Business Park, LLC v. Yuma County, 221 Ariz. 43, 209 P.3d 179, ¶ 16 (Ct. App. 2009), *quoting State v. Patchin*, 125 Ariz. 501, 502, 610 P.2d 1062, 1063 (Ct. App. 1980). This Court thus is not at liberty to add this language to the statute.

Accepting AzDHS's contention that a person is no longer exempt once the emergency is over, it would be as though someone other than Gregg had delivered the infants on January 31, 2013, and then Gregg provided care on February 1 and 21, 2013. AzDHS's contention is that, as of February 1, 2013, Gregg's conduct was prohibited by A.A.C. R9–16–111(B)(2), which provides, "A midwife shall not accept for midwifery services or continue midwifery services for a client who has or develops . . . [m]ultiple fetuses." The applicable rule has the following definitions:

> 15. "Fetus" refers to the infant in the mother's uterus.
>
> 17. "Infant" means a human being between birth and two years of age.

A.A.C. R9–16–101(15) & (17).[1] On February 1, 2013, each "infant" was no longer in Gregg's uterus, thus each infant was no longer a "fetus," and therefore on February 1, the mother was not "a client who has or develops . . . [m]ultiple fetuses." As such, Gregg was not precluded from providing services to the mother.

AzDHS contends, however, that the present tense language of the rule should be interpreted to include the past tense, thus the rule should be interpreted as having the following additional language:

> A midwife shall not accept for midwifery services or continue midwifery services for a client who has or develops***, or who has had or has developed,*** . . . [m]ultiple fetuses.

A.A.C. R9–16–111(B)(2) (language in ***bold italic*** added). As noted above, The Arizona Court of Appeals has said that a court is "not at liberty to rewrite the statute under the guise of judicial interpretation." *New Sun Business Park* at ¶ 16. For the same reason, this Court believes it is "not at liberty to rewrite the [rule] under the guise of judicial interpretation." If AzDHS would like to have its own rule rewritten, it will have to do so itself.

In arguing her position, Gregg has provided to this Court authorities and arguments in support of her position. In arguing its position, AzDHS has provided to this Court authorities and arguments in support of its position. This Court concludes the authorities and arguments provided by Gregg are well-taken, and this Court adopts those authorities and arguments in support of its decision.

. . . .

. . . .

[1]Combining these two definitions would give the following definition:

> "Fetus" refers to the human being between birth and two years of age in the mother's uterus.

It appears this would lead to a somewhat complicated pregnancy.

IV. CONCLUSION.

Based on the foregoing, this Court concludes that, because this was an emergency situation, Gregg was exempt from the licensure requirements of the statute. Because Gregg was exempt from the licensure requirements of the statute, she was exempt from the rules and regulations promulgated pursuant to the statute, thus those rules and regulations did not apply to her. Further, even assuming the rules and regulations promulgated pursuant to the statute did apply to her on and after February 1, 2013, the mother was not "a client who has or develops . . . [m]ultiple fetuses" on February 1, thus the prohibition did not apply to Gregg. For those reasons, AzDHS acted contrary to law in suspending Gregg's license. This Court further determines there is no just reason to delay entry of judgment and no further matters remain pending, and thus this judgment is entered pursuant to Rule 54(c).

IT IS THEREFORE ORDERED vacating and reversing the Decision, dated October 14, 2015, of the Arizona Department of Health Services (AzDHS) suspending Gregg's Midwife License for 1 year.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT 042920161420•

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