

IN THE SUPREME COURT OF FLORIDA

WILLIAM N. TAYLOR, M.D.,

Petitioner,

vs.

Case No. 69,343

DEPARTMENT OF PROFESSIONAL  
REGULATION, BOARD OF  
MEDICAL EXAMINERS,

Respondent.

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**Answer Brief for Respondent**  
**Department of Professional Regulation**

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POINT ON APPEAL  
(REINSTATED)

BECAUSE AN ADMINISTRATIVE AGENCY HAS THE  
INHERENT POWER TO MODIFY ITS ORDERS FOR  
THE PURPOSE OF CORRECTING AN INADVERTENT  
CLERICAL ERROR, A REQUEST FOR SUCH  
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PRELIMINARY STATEMENT

Throughout this brief the parties will be referred to by their status before this court, i.e., Petitioner or Dr. Taylor and Respondent, the Department or the Agency.

STATEMENT OF THE CASE AND THE FACTS

The Petitioner's statements are essentially correct although in excess of those contained in the District Court's opinion. While Respondent accepts Petitioner's statement the following dates and times are material and may be dispositive in this court.

Final Order of the Board of Medical Examiners rendered on June 26, 1985.

Dr. Taylor's July 13, 1985 (17 days subsequent to rendition of the Final Order).

Amended Final Order of the Board of Medical Examiners rendered August 7, 1985.

Notice of Administrative Appeal dated September 6, 1985. (Filed exactly 30 days from rendition of the Amended Final Order).

## SUMMARY OF THE ARGUMENT

### I

The parties agree this is a case of correcting an inadvertant clerical error. Respondent maintains the issue is one of simple correction, nunc pro tunc, and the time to appeal is not tolled to effect such a correction.

### II

Systems Management Associates, Inc. v. State Dept. of Health & Rebbab. Services is still good law and should be reaffirmed. The First District's opinion dealt with the issue of timeliness and finality which are absolutes whether a non-lawyer is representing himself or is simply proceeding with some legal advice.

### III

To engraft exceptions to established law because a litigant proceeds without counsel would raise a multitude of additional problems. State agencies face thee issues daily and any positive statements, either way, by the Judicial Branch are gratefully received.

POINT ON APPEAL  
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BECAUSE AN ADMINISTRATIVE AGENCY HAS THE  
THE INHERENT POWER TO MODIFY ITS ORDERS  
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CLERICAL ERROR, A REQUEST FOR SUCH CORRECTION  
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DOES NOT SUSPEND RENDITION UNTIL ENTRY OF THE  
AMENDED FINAL ORDER.

ARGUMENT

Respondent has entitled this as a POINT ON APPEAL in that it is not the question certified from the District Court below. Respondent, however, agrees with the Petitioner that this is the issue which was before the District Court of Appeal. Concisely stated the facts are, that a doctor, representing himself, received a Final Order dated (and rendered) June 26, 1985, in which he discovered an inadvertent clerical error. Seventeen days later he wrote (rather than telephoned) the Board offices asking that the correct number be inserted so that the order would reflect the agreed disposition of his probationary period. On August 7th the Board corrected its clerical mistake by issuing an Amended Final Order changing five years to three years as the agreed period of probation. Petitioner's "Point On Appeal" is based upon this set of factual circumstances.

It is difficult to sort out from Petitioner's argument which cases support the clerical error issue from those which deal with an agency's implied authority to rehear or clarify its orders.

More importantly however, the real issue in either version must be whether or not the agency's action tolls rendition so as to enlarge the time for filing an appeal. To develop a consistent evaluation of the various cases cited it's important to keep in mind the following distinctions. To amend, alter, modify, or change an order means substantive revision and was the basis for the question certified here. On the other hand, to correct means in essence, nunc pro tunc; translated it means, now for then. It is a phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, i.e., with the same effect as if regularly done. Black's Law Dictionary, revised fourth edition, West Publishing Company.

A situation somewhat similar to the case at bar is reflected in the Supreme Court's decision in Bartlett & Sons Co. vs. Pan-American Studios, Inc., 198 So. 195, 144 Fla. 531 (Fla. 1940). In that case a final decree was erroneously dated January 14, 1938 rather than January 14, 1939 and appeals in chancery had to be filed within six months from the entry of the decree. In September the prospective appellant filed several motions with the court below. They were subsequently denied but an order did correct the date of the final decree from 1938 to 1939. The orders themselves were dated October 2nd. The Supreme Court was without jurisdiction to consider or pass on the assignments of error because the appeal was taken more than six months after the entry of the decree appealed from. It was held that the fact that one of them corrected, nunc pro tunc, the date of entry of the final decree did not render the original order null and void

ab initio. By definition of nunc pro tunc revisions, the correction related back to the January 14th entry date making the appeal untimely.

The digests are replete with cases involving nunc pro tunc corrections. In Boggs v. Wainwright, 223 So.2d 316 (Fla. 1969) the defendant was convicted of forgery and sentenced to two years in prison. Thereafter he was convicted of auto larceny for which a sentence of eight months was imposed. The sentence provided confinement "for a period of eight (8) months, from the date of your delivery thereto". Based on that emphasized language the defendant contended that the sentences were to run concurrently. However, the sentencing judge entered an order nunc pro tunc, correcting the clerical error so as to strike the part that read "from the date of your delivery thereto." In his order the judge stated that he did not use the stricken language in sentencing the defendant but that it was mistakenly added by the clerk. Rather than running concurrently his sentences were governed by statute requiring that where there is no direction the sentences would be served consecutively. The court's action was within the definition previously set out from Black's Law Dictionary to the effect that such correction relate back and are held to take effect as of the date of judgment.

Respondent agrees fully that administrative agencies in the exercise of their quasi-judicial power have the right to correct CLERICAL ERRORS in previously entered orders. Our disagreement arises when Petitioner further claims that such corrections are similar to those which or AMEND a previously entered order.

In Marks v. Wertakala, 475 So.2d 273 (Fla. 3d DCA 1985) the Third District Court of Appeal reversed the trial court which had granted a motion to "correct and amend" a two year old judgment to add 2 additional names as judgment debtors. The motion alleged that in typing of the final judgment, the names were inadvertently omitted. The reversal was based on a construction of the two subdivisions of Rule 1.540, Fla. R. Civ. P. Subsection (1) dealing with clerical mistakes includes only errors or mistakes arising from an accidental slip or omission and not errors or mistakes in the substance of what is decided by the judgment or order. If the actual names had been stated on the record relief would be available at any time under Rule 1.540(a) but when they may have agreed but failed to so state in open court relief is available through Rule 1.540(b) only.

There are three primary types of judicial errors. Rule 1.540(a) deals with these clerical mistakes. Rule 1.540(b) corrects an error where the judge fails to order that which he meant to order. Finally, the court may intentionally order something which, is legally erroneous. These are simply mistakes of law and are properly corrected on direct appeal. See Keller v. Belcher, 256 So.2d 561 (Fla. 3d DCA 1971).

Some of the more obvious questions in hindsight review of the proceedings below would be, what would happen if the Board simply did not correct its clerical mistake? Would mandamus lie? How would counsel advise this doctor some 43 days later if, on August 8th, there was no Amended Final Order to appeal from? The brief indicates, although the record does not reflect, that Dr.

Taylor employed counsel just prior to the expiration of the thirty day period following the Amended Final Order. Presumably however, if the board neglected or failed to correct this error the mistake could be corrected up to the time that the record on appeal was docketed in the Appellate Court and even thereafter with leave of the Appellate Court. See Rule 1.540(a) Fla. R. Civ. P. Where the record reflects that 3 years is the correct probationary period the clerical mistake can always be corrected. A second-bite for tardy legal counsel arose recently with the Department of Professional Regulation in Xerox Corp. v. Florida Dept. of Professional Reg., 489 So.2d 1230 (Fla. 1st DCA 1986). The case was actually a bid protest but the facts were that upon posting of bid results Xerox filed its statutory Notice of Protest indicating that it would file its formal protest within the ten days prescribed in the statute. During the next ten days Xerox engaged in unofficial conversations with several members of the agency but failed or neglected to file the formal protest. Subsequently and inadvertently the agency mailed one of its form letters to Xerox that it was awarding the bid to the low bidder. The agency immediately corrected its oversight but Xerox opportunistically filed another Notice of Protest and its formal written protest shortly thereafter. Naturally they maintained the Department's letter was actual notice on the bid question and the ten day limitation should run from the date of this letter. The fact patterns are similar in that in each case counsel argue they were not retained until after the required time had elapsed. State agencies meet this scenario in a multitude of varying situations.

II

Page 18 of Petitioner's brief indicates the District Court of Appeal did not consider the authorities discussed in the earlier portion of Petitioner's brief. The reason for that of course is that the District Court of Appeal was not dealing with the nunc pro tunc issue being raised in Petitioner's initial brief. The decision below and indeed the question certified from the court below arises out of the vitality, or lack thereof, in Systems Management Associates, Inc. v. State Dept. of Health & Rehab. Services, 391 So.2d 688 (Fla. 1st DCA 1981).

Whether rendition was tolled was, and I guess still is, the ultimate issue. Rule 9.020(g) Fla. R. Civ. P. provides that an order is not deemed rendered until disposition of a authorized and timely motion for new trial or rehearing. The court's attention was directed to Dr. Taylor's letter of July 13th (mailed July 15th) and whether it could be treated as an appropriate motion for new trial or rehearing thereby tolling the jurisdictional appeal time. Even though the letter/motion was not filed within the ten days required (if the rule somehow applied) by the rule the court appears to feel that their inability to treat the letter as a motion for rehearing brings about an unduly harsh result because Dr. Taylor did not have legal counsel. In any event, they certified the question as one of great public importance to determine if there is an inherent authority in an agency to change, alter, modify or otherwise

(substantively) revise a previously issued final order.

Presumably if the agency had adopted a rule Dr. Taylor's letter would be treated as a motion for rehearing which would toll the running of the appeal time. Presupposing that the agency's rule would be similar to the Rule of Civil Procedure, we have already pointed out that Dr. Taylor's letter would not have been filed within the time limitation. Again, presumably, if it was only inherent there would be no time limitation. Without a limitation on time Dr. Taylor's letter could possibly be considered as a motion for new trial or rehearing. As it is argued by Petitioner and Respondent however, Dr. Taylor's letter realistically asks only to correct an inadvertent clerical error.

That point was the issue in the Systems Management opinion where they were urged to find that because of deleted language the Administrative Model Rules in effect authorized motions for rehearing of administrative orders. The court reasoned as follows:

The omission does not created a rule authorizing a petition for rehearing. Even if we construed the omission as authorizing such a motion, we would then be confronted with the problem of timeliness. How long would a litigant have to file a petition for rehearing to an administrative order? If we adopted this view, every administrative order would remain open for an indeterminate period for the filing of a petition for rehearing. There would be no finality to any administrative order to which a petition for rehearing was not filed, or, at best, there would be an open question of timeliness of the filing

of such a motion under many varying circumstances. The appellate court's jurisdiction should not hinge upon such uncertainty. (391 So.2d 690)

It seems abundantly clear the the facts of this case do not lead to a conclusion that Dr. Taylor or the Board of Medical Examiners treated his letter as a request for rehearing or any other substantive change to the previously issued Final Order. But in the case of Garcia v. Department of Professional Regulation, 443 So.2d 278 (Fla. 3d DCA 1983) the Board and that doctor both recognized an intermediate motion as a request for reconsideration. In that case the doctor's Notice of Appeal was filed subsequent to the denial, after hearing, of his request for reconsideration and the court held that it did not have jurisdiction since the Notice of Appeal was not filed within the thirty day period. There was no authorization for the proceeding, even though it was actually held, to toll the thirty day appeal period. The Garcia decision may seem harsh and it probably had the appropriate facts to certify this same question to the Supreme Court but those simply are not the underlying facts in this case.

Petitioner then cites the case of Reedy Creek Utilities v. Fla. Public Serv., 418 So.2d 249 (Fla. 1982) for the proposition that an agency has the inherent power to modify an erroneous order. That case, however, did not deal with the jurisdiction of an appellate court but was involved with the agency's ability to correct an obvious error in its order. While the appellate opinion does not use the nunc pro tunc verbiage they did find that from a review of the record it was obvious that an error had

been committed to the prejudice of the public. Addressing the doctrine of administrative finality they agreed that the commission had the inherent power to modify its orders. In Dr. Taylor's case the error was simply a clerical one of inserting the wrong number; similar to 1938 instead of 1939. In the Reedy Creek case the error was not so obvious except that it could be computed subsequently by utilizing the procedures agreed upon in open court. Further, where the Appellant complied with commission rules permitting reconsideration of orders there was no question of jurisdiction of the Appellant Court.

### III


Finally, it's necessary to address the question of harshness. It's often difficult to defend procedural legality in the face of presumed morality. I suppose the question reoccurs frequently whether it is appropriate to engraft exceptions for litigants representing themselves without benefit of trained legal counsel. Agencies face it every day and, as here, it frequently arises in the judicial branch. It is not a legal issue as such, but one must wonder if a lawyer read one or two medical books and proceeded to diagnose and treat himself would his physician subsequently feel liable for the deteriorating physical condition of the lawyer? Is it necessary for legal treatises to contain the exculpatory warning that use of these books by the untrained could be detrimental to their wellbeing? Additionally, if the court considers different rules for a litigant, pro se, equal consideration must be given to the advantage to allowing a client to proceed independently to the

point where is unable to obtain a desired result despite a shadow lawyers counsel; another situation faced frequently by the states agencies.

CONCLUSION

Based upon the apparent and agreed facts of this case the Petition for Review should be dismissed. On the other hand, and based on the facts and circumstances from which the certified question developed and from the authorities and the arguments contained herein the decision in Systems Management Associates, Inc. v. Department of Health and Rehab. Services, 391 So.2d 688 (Fla. 1st DCA 1981) should be reaffirmed and the petition for review denied.

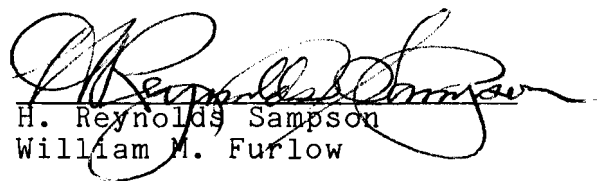
Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Julian Clarkson, Esquire and Michale L. Rosen, Esquire, P.O. Drawer 810 Tallahassee, Florida 32302, this 7th day of November, 1986.

  
H. Reynolds Sampson  
William M. Furlow