

No. _____

In the Supreme Court of the United States

APPEAL OF SANDRA BROWN, DVM,

Petitioner,

*On Petition for Writ of Certiorari to the
Supreme Court of New Hampshire*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Lack of Subject Matter Jurisdiction. Whether the New Hampshire Supreme Court erred in failing to find that the New Hampshire Board of Veterinary Medicine (the “BVM”), an administrative agency under the New Hampshire Department of Agriculture, lacked subject matter jurisdiction to inspect and make findings of violations under the New Hampshire Controlled Drug Act (the “Controlled Drug Act”), where the New Hampshire Legislature (the “Legislature”) directs that the duty “to enforce all provisions of [the Controlled Drug Act]” rests solely with “the department of health and human services, [and its agents]; the pharmacy board [and its agents]; and of all peace officers within the state, and of all county attorneys,” Revised Statutes, Annotated (“RSA”) 318-B:23, violations of the Controlled Drug Act are criminal in nature, RSA 318-B:26, and where the New Hampshire Legislature has specifically directed, that “[a]ll physicians, *veterinarians*, dentists, advanced registered nurse practitioners, physician assistants, and clinics . . . *shall be subject to inspection and regulation by the board of pharmacy with regard to the storage, labeling, distribution, and disposal of prescription drugs*,” RSA 318:8-a (emphasis supplied); *see also* RSA 318-B:25 (inspections authorized under Controlled Drug Act).

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PETITION FOR WRIT OF CERTIORARI

Dr. Sandra Brown, who practices small and large animal veterinary medicine in the northern rural area of New Hampshire outside Conway, N.H., petitions this court for a writ of certiorari to review the decision of the New Hampshire Supreme Court.

OPINIONS BELOW

The decision of the New Hampshire Supreme Court, dated February 9, 2018, denied Dr. Brown's separate motion to dismiss for lack of subject matter jurisdiction filed coincident with the Notice of Appeal. The New Hampshire Supreme Court then denied Dr. Brown's appeal, including the subject matter jurisdiction grounds. Appendix ("App.") at 2, *Appeal of Brown*, ___A.3d ___, ___ (N.H. Nov. 1, 2018). The New Hampshire Supreme Court denied Dr. Brown's Motion for Reconsideration by order of November 27, 2018. All opinions below are attached at Appendix ("App.") at 1-15.

JURISDICTION

The New Hampshire Supreme Court denied Dr. Brown's motion for reconsideration on November 27, 2018. Dr. Brown invokes this Court's jurisdiction under 28 U.S.C. Sec. 1257, having timely filed this petition for a writ of certiorari within ninety days of the New Hampshire Supreme Court's final judgment.

STATUTORY PROVISIONS INVOLVED

The Relevant Statutory Provisions are set forth in the Appendix at App. 17-33.

STATEMENT OF THE CASE

Consistent with its obligations under RSA 318, RSA 318-B, and RSA 318-B, the Board of Pharmacy (the “Pharmacy Board”) performed controlled drug inspections, of Dr. Brown’s veterinary clinic on February 24, 2014, August 13, 2014, and October 18, 2016. App. at 43-57. Dr. Brown passed all three controlled drug inspections.

Pursuant to the February 24, 2014 Pharmacy Board inspection, the inspector, Mr. Robert Elder, made some recommendations, but noted as “Satisfactory” all the inspected areas, including the General Facility, Exam Rooms, and Controlled Drug Records. App. at 43. On August 13, 2014, the Pharmacy Board inspector, Ms. Margaret Clifford, conducted another inspection of Dr. Brown’s facility. App. at 51. Likewise, the inspector made some recommendations, but noted as “Satisfactory” all the inspected areas. *Id.* The Pharmacy Board issued no violations from the inspection. *Id.* (Note 37) (8/13/14 inspection). Specifically, the Pharmacy Board inspector noted during the August 13, 2014 inspection that she “found Dr. Brown to be cooperative, professional, and courteous.” App. at 54. The inspector stated further that “[i]n the medication room I found both a DEA Binder and a Controlled Substance record book. I was able to readily retrieve records of receipt and distribution. This was a marked improvement over our first visit last year when the records could not be found.” *Id.* (memorandum of Pharmacy Board inspector Ms. Clifford). The inspector noted that outdated medication she found is kept in a

“quarantined area” and Dr. Brown noted “she would only use an outdated medication in an emergency situation.” *Id.* at 55.

The October 18, 2016 Pharmacy Board, inspection resulted, once again, in some recommendations, but noted as “Satisfactory” all the inspected areas, including the General Facility, Exam Rooms and Controlled Drug Records. App. at 57-61. The Pharmacy Board issued no violations. *Id.*

The BVM inspected Dr. Brown’s practice on May 27, 2016. One inspection took place on September 9, 2016. App. at 34. Another inspection took place on December 22, 2016. App. at 39. The BVM inspector, Dr. Stowe, alleged Dr. Brown to be in violation of various elements of the Controlled Drug Act as a result of the inspections. *Id.* at 41-42.

RSA 318-B, known as the New Hampshire Controlled Drug Act, provides that it shall be the duty of the Pharmacy Board, operating under the Department of Health and Human Services “to enforce all the provisions of [the Controlled Drug Act]”:

It is hereby made the duty of the department of health and human services, its officers, agents, inspectors, and representatives; the pharmacy board, its officers, agents, inspectors and representatives; and of all peace officers within the state, and of all county attorneys, to enforce all provisions of this chapter, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the

laws of the United States, of this state, and of all other states relating to controlled drugs.

RSA 318-B:23. Violations under RSA 318-B are punished by criminal action. RSA 318-B:26. The Legislature specifies that various professions shall be subject to inspection and regulation regarding prescription drugs, including veterinarians:

All physicians, veterinarians, dentists, advanced registered nurse practitioners, physician assistants, and clinics under contract to the department of health and human services and agricultural, technical, or industrial users of prescription drugs shall be subject to inspection and regulation by the board of pharmacy with regard to the storage, labeling, distribution, and disposal of prescription drugs.

RSA 318:8-a. The BVM is an agency of the Department of Agriculture, Markets, and Food. RSA 332-B:3, IV.

Further, under the terms of RSA 318:9-a, it is the Pharmacy Board that shall provide inspectional services for these professions, including the BVM:

The pharmacy board shall provide inspectional services under this chapter and RSA 318-B:25 to the board of medicine, the board of veterinary medicine, the board of podiatry, the board of registration in optometry, the board of dental examiners, and the board of nursing.

RSA 318:9-a. If a licensed professional, such as a veterinarian, violates the Controlled Drug Act, any conviction is addressed by referral to the appropriate

board, in the case of a veterinarian, the BVM, as follows:

[It] shall be sent by the clerk of the court to the board by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business. The board may summarily suspend, limit or revoke the license or registration of the convicted defendant to practice his profession or to carry on his business.

RSA 318-B:18. There is no corresponding reciprocal authority for the BVM to conduct inspections regarding controlled drugs and medications. *Id.*

Dr. Stowe of the BVM cited Dr. Brown for violating the controlled drug act notwithstanding the statutory limitations in place vesting exclusive jurisdiction with the Pharmacy Board, RSA 318:8-a and RSA 318:9-a, the lack of civil remedies under RSA 318-B, and the fact that Dr. Brown had satisfactorily met the standards from the Pharmacy Board inspections of the same items inspected during the same time period. *Compare* October 18, 2016 Pharmacy Board inspection with September 9, 2016 and December 22, 2016 BVM inspections. App. at 34 (BVM inspection), App. 39 (BVM inspection) and App. 57 (Pharmacy Board inspection).

As a result of the BVM hearing on the issue, Dr. Brown was suspended for six months and her license to use controlled drugs was revoked for five years except for the use of limited euthanasia products. App. at 4.

Dr. Brown raised the lack of subject matter jurisdiction before the New Hampshire Supreme Court at the time she filed her appeal. App. at 15. The Supreme Court denied the motion claiming lack of subject matter jurisdiction without prejudice to address it in the Briefs of the parties. *Id.* Following submission of the Briefs, and oral argument, the New Hampshire Supreme Court affirmed the decision of the BVM, specifically finding that the Board of Veterinary Medicine “had subject matter jurisdiction to discipline the petitioner [Dr. Brown] for violating the Controlled Drug Act.” App. at 14, *Appeal of Brown*, ___ A.3d at

— The New Hampshire Supreme Court interpreted the Veterinary Practice Act, RSA 332-B, 1-a and 14, without reference to the Controlled Drug Act and Pharmacy Board provisions, as authorizing inspections and enforcement of the controlled drug act. App. at 11-13. The decision and analysis fail to recognize the express jurisdictional limitation imposed by the Legislature directing that inspection and prosecution as to medical professions, including veterinarians, is vested exclusively in the Pharmacy Board. RSA 318:8-a; RSA 318:9-a; RSA 318-B:23; RSA 318-B:25. From the denial of reconsideration filed with the New Hampshire Supreme Court this petition for a writ of certiorari has been filed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The statutes governing inspections by the Pharmacy Board use the term “shall.” *See e.g.* RSA 318:8; RSA 318:8-a; RSA 318:9-a. As the New Hampshire Supreme Court has ruled:

The intention of the Legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof.” *Appeal of Rowan*, 142 N.H. 67, 71, 694 A.2d 1002 (1997) (quotation and citation omitted). The general rule of statutory construction is that “the word ‘may’ makes enforcement of a statute permissive and that the word ‘shall’ requires mandatory enforcement.” *Town of Nottingham v. Harvey*, 120 N.H. 889, 895, 424 A.2d 1125 (1980).

City of Rochester v. Corpening, 907 A.2d 383, 386-87 (N.H. 2006).

The New Hampshire Supreme Court correctly noted that the jurisdiction of administrative agencies in New Hampshire is limited, stating, “[a]dministrative agencies are granted only limited and special subject matter jurisdiction. That jurisdiction is dependent entirely upon the statutes vesting the agency with power and the agency cannot confer jurisdiction upon itself.” *Appeal of Campaign for Ratepayers’ Rights*, 27 A.3d 726, 731 (N.H. 2011). However, the New Hampshire Supreme Court then erred in failing to reverse and dismiss the appeal for lack of subject

matter jurisdiction exercised by the BVM beyond the scope of its statutory authority. *Id.*

The New Hampshire Supreme Court, incorrectly upheld subject matter jurisdiction in this case, stating “we conclude that the Board had subject matter jurisdiction to discipline the petitioner for violating the Controlled Drug Act,” *Appeal of Brown*, ___A.3d at _____. The reliance by the New Hampshire Supreme court on RSA 332-B ignores the obligatory, and jurisdictional, directive from the Legislature providing that all controlled drug jurisdiction, authority and inspections are to be conducted by the pharmacy board as to medical professions including the BVM. RSA 318:8; RSA 318:8-a; RSA 318:9-a; RSA 318-B:23; RSA 318-B:25.

CONCLUSION

For the foregoing reasons, Dr. Brown respectfully requests that this Court issue a writ of certiorari to review the judgment of the New Hampshire Supreme Court.

Respectfully submitted,

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