

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE BOARD OF DENTAL EXAMINERS**

In the Matter of:)
)
 TROY BURNS, DDS)
 _____)

OAH No. 12-0995-DEN
Agency No. 1200-08-002, C1200-09-002

DECISION GRANTING SUMMARY ADJUDICATION

The Alaska Board of Dental Examiners, in accordance with AS 44.64.060(e)(3), adopts the proposed decision granting summary adjudication with the following revision:

The Summary Suspension of Dr Burns' license to practice dentistry is upheld without modification, inasmuch as the evidence in this case demonstrates that Dr. Burns' practice of dentistry as a whole poses a "clear and immediate danger to the public health and safety."¹

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 3rd day of May, 2013.

By: Signed
Signature
Thomas J. Wells, D.D.S.
Name
Chairperson
Title

¹ AS 08.01.075(c)

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I. Introduction

Dr. Troy Burns is a dentist, whose license to practice dentistry was summarily suspended by the Board of Dental Examiners (Board). Dr. Burns requested a hearing to challenge the summary suspension.

While the hearing on the summary suspension has been pending, the Division of Corporations, Business and Professional Licensing (Division) has also pursued an accusation against Dr. Burns seeking final disciplinary sanctions. That matter is scheduled for hearing beginning May 13, 2013, and will likely come before the Board during its September 6, 2013 meeting. The summary suspension is an interim measure pending resolution of the disciplinary case.

Dr. Burns and the Division sought to resolve the interim suspension case by means of a proposed Interim Consent Agreement. The agreement would have lifted the summary suspension and placed a number of conditions on Dr. Burns' dental practice, which would remain in place until the Board takes final action in the discipline case. The parties presented the agreement to the Board, which declined to adopt it.

The Division and Dr. Burns remain largely in agreement that the suspension ought to be lifted, with conditions. Each party has now moved for summary adjudication again requesting that the Board lift the suspension, subject to the terms of the Interim Consent Agreement.

For the Board to summarily suspend a dentist's license, there must be a "clear and immediate danger to the public health and safety."³ In connection with the motions for summary adjudication, Dr. Burns has elected not to contest certain facts. Those facts must be considered established (albeit for purposes of the summary suspension case only). Dr. Burns has also agreed to be bound by the restrictions that were proposed in the Interim Consent Agreement. Finally, both parties have stipulated that if those conditions are imposed, Dr. Burns can practice

² This decision corrects a clerical error contained in the original April 9, 2013 decision. That decision erroneously identified the Division's expert as Dr. Kirk Baumgartner. As pointed out in the Division's April 15, 2013 Proposal for Action, the Division's expert is Dr. John Baumgartner.

³ AS 08.01.075(c).

dentistry without posing a “clear and immediate danger to the public health and safety.”

This decision finds the uncontested facts to be established for purposes of summary suspension. It finds that there are, accordingly, no contested issues of fact on which to hold a hearing, and that the summary suspension case may be adjudicated summarily. Applying the law to the uncontested facts, this decision finds that the Board’s existing suspension order is supported by the record and may remain in place. However, the Board has discretion to amend that order to permit Dr. Burns to practice under restrictions, including the restrictions proposed in the Interim Consent Agreement. Such an amendment would be consistent with one prior action of this Board. The precise terms of such an amendment are a matter of Board discretion, and would appear in a related order that the Board could issue if it adopts this decision.⁴

II. Facts

The following facts were established through the agency record and the exhibits and affidavits submitted by the parties as part of the summary adjudication pleadings.

Dr. Burns has been licensed to practice dentistry in the State of Alaska since 1993. He was disciplined in 1999 for allowing dental assistants to perform crowns. He was then placed on probation for three years. He was also disciplined in 2007 for substandard patient care involving work performed in 2002. He was placed on probation for one year, with conditions.⁵

The Division then received a complaint from S. L. against Dr. Burns in 2007 for dental procedures provided between 2002 and 2004. It received another complaint in 2009 from J. H. for dental procedures provided between 2006 and 2008. The Board ordered an audit of Dr. Burn’s practice. That audit was conducted on August 24, 2012, and resulted in the records of S. L., J. H. and thirteen other patients being selected for review. John Baumgartner, DDS, PhD. reviewed those records for the Division.⁶ His review resulted in this statement:

Dr. Burns did not examine, diagnose, document, and effectively treat [S. L.]. Bite wing radiographs and panoramic films are inadequate for diagnosis and treatment of endodontic disease. Periapical radiographs needed for the appropriate diagnosis and treatment were not always presented. Pulpal and periradicular diagnoses were not given for the teeth to be treated (teeth #3, #19, #30). Follow-up radiographs by other dentists showed poor length determination

⁴ The parties advocate that the administrative law judge should incorporate the terms of the proposed Interim Consent Agreement in a proposed decision to be presented to the Board. Because those terms are not the only terms the Board could use within the scope of its legal discretion, and because the Board has already expressly rejected those terms, the terms of any amended suspension order are left to a separate order. This order is limited to resolution of the factual and legal issues that establish the range of the Board’s discretion.

⁵ Gary Keiser Affidavit, para. 4 - 5.

⁶ Gary Keiser Affidavit, para. 2 - 3, 7 - 8.

with poorly compacted root canal fillings (voids). Voids are usually associated with poor chemomechanical debridement (cleaning and shaping) of the root canals. Poor chemomechanical debridement results in a reservoir of infected debris in the root canals leading to failure of healing of the periradicular tissues. Dr. Troy Burns does not demonstrate the competency needed to provide on-going endodontic treatment for his patients. Of the 13 cases audited August, 2012, virtually every case had an inadequacy of endodontic treatment. They included filling short, filling past the root end, voids in the filling material, single cone filling, possible instrument fragments, and missed canals (MB2). Dr. Troy Burns should not be allowed to provide endodontic treatment to his patients without successfully demonstrating competency to the Board.^[7]

Dr. Baumgartner's conclusions with regard to patient J. H. were similar, including a statement that Dr. Burns "appears" to have provided her prescriptions for pain "without clinical examination."⁸ He also stated that one of the teeth Dr. Burns treated "probably was a misdiagnosis and did not require endodontic treatment."⁹

Dr. Baumgartner's "overall recommendation was for Dr. Troy Burns to have his license suspended as he poses an immediate danger to his patients."¹⁰

Both S. L. and J. H. filed malpractice cases against Dr. Burns. S. L.'s case resulted in a jury verdict against Dr. Burns.¹¹ J. H.'s malpractice case was settled by the parties.¹²

The Division petitioned the Board for summary suspension of Dr. Burns' license, based upon Dr. Baumgartner's review of Dr. Burns' patient files. At the same time the Division filed a separate disciplinary action against Dr. Burns.¹³ The Board granted the Division's petition and summarily suspended Dr. Burns' license. The separate disciplinary action is pending and scheduled for hearing beginning May 13, 2013.

After the Board summarily suspended Dr. Burns' license, Dr. Burns and the Division entered into an Interim Consent Agreement wherein Dr. Burns and the Division agreed, pending the outcome of the disciplinary action, that the summary suspension would be lifted and Dr. Burns would be permitted to practice dentistry with the following conditions:

A. He would not perform "any endodontic dental procedures, as set forth in the current American Dental Association CDT Codes, D3230 – D3920, D3999." However, he

⁷ Dr. Baumgartner Affidavit, p. 2, para. 10.

⁸ Dr. Baumgartner Affidavit, p. 3, para. 3.

⁹ Dr. Baumgartner Affidavit, p. 3, para. 10.

¹⁰ Dr. Baumgartner Affidavit, p. 4.

¹¹ Division Exs. 5 – 6.

¹² Division Motion for Summary Adjudication, p. 3.

¹³ OAH Case No. 13-0008-DEN.

would be allowed to “perform pulp capping and pulptomy procedures (D3110 – D3222) as well as canal preparation and fitting of preformed dowel or post (D3950).”

- B. Dr. Burns agreed to hire, at his own expense, a dentist, licensed and practicing in Alaska, who is approved by the Board, to “conduct chart reviews of [his] records, including patient records, which in any way involve current dental procedures performed on patients.” The reviews, which are to “assure that [he] is not providing endodontic treatments to his patients,” would be conducted at least once a week, and all records would be reviewed for the first 30 days that the Agreement was in effect. After the first 30 days, the reviewing dentist would “randomly select one in ten records” for review. The reviewing dentist would immediately notify the Board’s agent “of any condition or indication that [Dr. Burns] is unable to practice dentistry in a manner consistent with public safety or that [Dr. Burns] is in violation” of the agreement.
- C. The Board’s agent would be allowed to make unannounced visits to Dr. Burns’ “office, interview staff, tour the premises and review patient records and appointment books.” In addition, Dr. Burns agreed to “full and promptly cooperate with requests from the Board’s agent for additional documents and information relevant” to the agreement.
- D. If Dr. Burns violated the agreement, the Division, without requiring a Board action or a prior hearing, could immediately suspend his license.¹⁴

The agreement was signed by Dr. Burns and by Quinten Warren, the Chief Investigator for the Division.¹⁵ It was subsequently presented to the Board for approval. As noted above, the Board declined to adopt the agreement.¹⁶

After the Board rejected the agreement, the Division and Dr. Burns each moved for summary adjudication, arguing that the Board should lift the summary suspension and allow Dr. Burns to practice, subject to the terms of the agreement.¹⁷

III. Discussion

The Division and Dr. Burns have both moved for summary adjudication. Summary

¹⁴ Ex. A to Dr. Burns’ Motion for Summary Adjudication.

¹⁵ *Id.*, p. 7.

¹⁶ Dr. Burns Affidavit, para. 4.

¹⁷ “[T]he Division recommends that the Board consider a resolution of the summary suspension matter along the lines of the consent agreement.” Division Motion for Summary Adjudication, p. 18. “[T]he [administrative law judge] . . . should therefore recommend in the strongest possible terms that the Board vacate the order of summary suspension against Dr. Burns’ dental license and return his license to practice dentistry under the terms set forth in Dr. Burns’ Affidavit (and the Consent Agreement) until such time as the underlying Accusation case is fully resolved.” Burns’ Motion for Summary Adjudication, pp. 13 – 14.

adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.¹⁸ It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. Under these circumstances, the evidentiary hearing is not required.¹⁹

For purposes of this summary suspension case, there are indeed no factual disputes between the parties. The Division has presented a set of facts, primarily through Dr. Baumgartner, and Dr. Burns has chosen to present no contrary evidence at this time for purposes of the suspension proceeding.²⁰ Accordingly, holding a hearing would resolve no factual disputes, and the case may be resolved summarily based on the legal implications of the uncontested facts.

Alaska Statute 08.01.075(c) provides that “a board may summarily suspend a licensee from the practice of the profession before a final [disciplinary] hearing is held . . . if the board finds that the licensee poses a clear and immediate danger to the public health and safety.” The same provision goes on to provide for a special, expedited hearing process to determine whether the summary suspension was properly imposed. This special process—which is not the same as the ultimate disciplinary hearing²¹—tests whether the required “clear and immediate danger” is present. That is the only issue presently before the Board.

Dr. Baumgartner’s affidavit establishes, for purposes of this special proceeding only, that Dr. Burns performs endodontic dental procedures in a substandard and dangerous way. Endodontic procedures are within the scope of practice authorized by a license to practice dentistry. Accordingly, the licensee poses a clear and immediate danger to the public health and safety, and his license may be suspended.

Alaska Statute 08.01.075(c) does not mention partial suspensions, whereby the Board might, in effect, suspend only a portion of a licensee’s practice and permit him or her to go

¹⁸ See, e.g., *Schikora v. State, Dept. of Revenue*, 7 P.3d 938, 940-41, 946 (Alaska 2000).

¹⁹ See *Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); 2 Pierce, *Administrative Law Treatise* § 9.5 at 813 (5th ed. 2010).

²⁰ Dr. Burns has presented one affidavit, his own March 1, 2013 affidavit, which is attached to his motion for summary adjudication. That affidavit does not dispute the facts contained in Dr. Baumgartner’s affidavit. Dr. Burns’ pleadings state that he “disagrees with and fully contests the conclusions reached by Dr. Baumgartner and the Board, and does not admit that his treatment of any patient fell below the standard of care.” See Dr. Burns’ motion for summary adjudication, n. 1 at p. 2. However, that assertion in his pleading is insufficient to raise a factual issue. Cf. 2 AAC 64.250(b); “assertions of fact in unverified pleadings and memoranda cannot be relied on in denying a motion for summary judgment.” *Jennings v. State*, 566 P.2d 1304, 1309-10 (Alaska 1977).

²¹ Other provisions of AS 08.01.075—subsections (a), (b), and (d)—address the imposition and lifting of final disciplinary measures, including suspensions imposed as discipline. The suspension at issue in this proceeding is a preliminary suspension, not a disciplinary suspension.

forward with a conditional license, performing aspects of the practice for which no evidence of substandard practice has been presented. Certainly, the statute does not require the Board to entertain partial suspensions. However, it has been interpreted in the past to permit the Board to craft a limited suspension.

This Board has lifted a comprehensive summary suspension order, and imposed conditions on a license, in one prior case.²² Dr. Greenough was on probation for three years due to concerns over his prescription practices. He violated the terms of his probation and his license was summarily suspended. After a hearing on the summary suspension, the Administrative Hearing Officer found that Dr. Greenough had violated the terms of his probation by writing prescriptions for one person in particular, but other than those prescriptions, “there was [not] any reason to believe that Dr. Greenough’s activities present a ‘clear and immediate danger to the public health and safety.’”²³ The Administrative Hearing Officer recommended that Dr. Greenough be allowed to practice dentistry under a number of conditions, including a cessation of all contact with one specific person for whom he had undisputedly written prescriptions, and a prohibition from writing controlled substance prescriptions. There was also apparently a separate disciplinary proceeding pending because the proposed decision also contained the requirement that “[a]n administrative hearing will be held not less than three months, preferably sooner, in this case.”²⁴ This Board adopted the proposed decision without change.²⁵

Dr. Burns’ case may be analogous to Dr. Greenough’s case. Dr. Baumgartner’s affidavit identifies the areas of concern as endodontic procedures. Dr. Burns agrees not to engage in endodontic procedures, to have his patient records subject to review, to have his premises toured, staff interviewed, and records inspected, all without notice, pending the outcome of his separate disciplinary action, and to have the remainder of his license immediately suspended if he violates the agreement. These conditions would remain until the Board issues its decision in the separate disciplinary proceeding. A hearing in that separate disciplinary proceeding is scheduled for the week of May 13, 2013.

The evidence the parties have presented does not establish how the Board should exercise its discretion in this instance. The evidence does not show, for example, whether endodontic

²² *In the Matter of Harry Greenough*, Case No. 1200-90-009; 1200-94-006 (Board of Dental Examiners 1994).

²³ *Greenough*, p. 7.

²⁴ *Greenough*, pp. 9 – 10.

²⁵ *Greenough*, p. 12.

procedures are so fundamental to dentistry that competence in that area should be deemed essential to holding any kind of license. It does not show whether Dr. Burns' prior disciplinary issues or the malpractice cases have a bearing on whether a restricted license should be considered in this case. These are issues the Board, with its special expertise in the practice of dentistry, is uniquely in a position to answer.

What this decision establishes is that the summary suspension presently in effect meets the single legal criterion imposed by the summary suspension law. It also establishes that the Board may, if the Board finds it appropriate, modify the suspension so as to permit Dr. Burns to practice all aspects of dentistry other than endodontics under the conditions Dr. Burns has agreed to have imposed on him, or under other conditions devised by the Board.²⁶

IV. Conclusion

There are no genuine issues of material fact in this case. The summary suspension of Dr. Burns is supported by a showing of clear and immediate danger to public health and safety. The Board has discretion to modify the summary suspension to permit Dr. Burns to practice dentistry subject to restrictions, including a restriction from endodontic procedures. If the Board decides upon a modified summary suspension, it will set forth the terms of that summary suspension in a separate order.

The separate disciplinary proceeding pending with regard to Dr. Burns is not affected by this decision.

DATED as of this 9th day of April, 2013.

By: Signed
Lawrence A. Pederson
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]

²⁶ For example, as was done in *Greenough*, the Board may wish to impose a time limit on any such special arrangement. The Board could impose the additional condition that the separate pending disciplinary action proceed to hearing as scheduled for the week of May 13, 2013.