

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

In the Matter of License No. 703,)
Douglas G. Ness, D.D.S.,)
Appellant,)
vs.)
Alaska State Board of)
Dental Examiners,)
Appellee.)
_____)
Case No.3AN-06-8587CI

DECISION AND ORDER AFFIRMING
FINDINGS AND CONCLUSIONS OF
THE BOARD OF DENTAL EXAMINERS AND AFFIRMING
THE SANCTIONS IMPOSED, IN PART, BUT REVERSING
THE ORDER OF SUSPENSION

I: Introduction

This is an appeal from a May 2, 2006, Decision and Order of the Board of Dental Examiners adopting the proposed decision of the Administrative Law Judge (ALJ) in its entirety under AS 44.62.500(b). That decision found that Appellant, Dr. Douglas Ness, violated AS 08.36.315(6) because:

- (1.) His performance of surgery on R.R. and his post-operative treatment did not conform to the minimum professional standard;
- (2.) His treatment was unnecessary and the patient was not an appropriate candidate for the surgery;
- (3.) The surgery was performed in a manner that fell below minimum standards of performance in the field of dentistry; and
- (4.) His aftercare for R.R. fell below minimum standards when he failed to timely refer his patient to an appropriate specialist when the need arose.

The Board also adopted the sanctions proposed by the ALJ as follows:

- (1.) A four month suspension, to be followed by five years of probation with his practice subject to random audit by the Board or its designee during each of the one-year periods after suspension;
- (2.) Fines totaling \$20,000.00 with \$5,000.00 suspended on the condition that Ness attend eight hours of continuing education on ethics, to be approved in advance by the Board.

Dr. Ness appealed the Board's decision to this court, and oral argument was held on October 24, 2007. Because this Court understands that a higher court upon further review owes this Court no deference in its assessment of the findings and conclusions reached by the ALJ and adopted by the Board, this Decision and Order will not include an exhaustive review of those individual findings and conclusions. Having said this, this Court wants to make it very clear to the parties and to any reviewing court that it has spent hours reviewing and considering the original Board Decision and Order, as well as the briefing and oral argument presented on appeal.

In sum, while this Court has some concerns (which are expressed below) about the administrative process followed in this action, it finds that there is substantial evidence in the record to support the Board's decision to adopt a majority of the ALJ's findings and conclusions.

But this Court finds that the sanction of a four-month suspension for a first case of improper procedure in a seventeen year career constitutes an unwarranted punishment which does not assist in achieving the goal of instilling the respect and confidence of the public.

II: Discussion

On appeal, Dr. Ness presented the following three issues for review:

- (1.) Whether the state erred under AS 08.01.075(f) in revoking Dr. Ness' license for 120 days and imposing a \$20,000.00 fine for a single act of negligence involving one patient one time, where no other licensee in the history of the state (or the territory) was ever so severely disciplined, and whereas state law mandates "consistency in application of disciplinary sanctions."
- (2.) Whether the ALJ applied the wrong standard of proof.
- (3.) Whether there was a lack of evidence supporting the state's decision.

In response the Board identified the following as issues on appeal:

- A. Whether the administrative law judge and the Board properly followed procedures under the Administrative Procedure Act?
- B. Whether substantial evidence supports the Board's findings?
- C. Whether the Board imposed a consistent disciplinary sanction pursuant to AS 08.01.075(f)?
- D. Whether the administrative law judge applied the proper burden of proof?
- E. Whether the administrative law judge or the Board erred at the May 2, 2006, teleconference meeting?

Substantial Evidence Supports the Board's Findings

The ALJ in this matter conducted a hearing which took place over a period of six days. Seventeen witnesses testified, and the hearing record consists of nineteen audiocassette tapes and a number of exhibits.

The essence of much of Appellant's argument on appeal is that the ALJ ignored and/or omitted a great deal of evidence and testimony which was favorable to Appellant. But a fair reading of the ALJ's forty-two page Decision and Order reveals that the ALJ considered and weighed the testimony and evidence presented to him, and that generally

the ALJ stated his reasons for giving greater or lesser weight to certain testimony and evidence. Therefore, this Court finds that there is substantial evidence in the record to support the ALJ's decision.

The ALJ Applied the Proper Burden of Proof

Although Appellant recognizes that the general Administrative Procedure Act standard for burden of proof is a "preponderance of the evidence," he argues that the standard in his case should have been by "clear and convincing evidence." Both parties cite AS 44.62.460(e)(1) which states that "unless a different standard of proof is stated in applicable law, the (1) petitioner has the burden of proof by a preponderance of the evidence if an accusation has been filed under AS 44.62.360 or if the renewal of a right, authority, license, or privilege has been denied."

Despite the argument made by Appellant on this issue, this court agrees with Appellee's assessment that "the Alaska Supreme Court has consistently held that the preponderance of the evidence standard, and not proof by clear and convincing evidence, is the appropriate standard in disciplinary proceeding." ¹(Appellee's Brief, p.51)

The Administrative Law Judge and the Board Properly Followed Procedures Under the Administrative Procedure Act

Appellant argues that pursuant to AS 44.64.060(e) he should have been entitled to 30 days to file a proposal for action after the ALJ's proposed action was served. While this court has concerns about the procedure that was followed, it is persuaded by Appellee's counter-argument that AS 44.64.060(e) became law after the commencement of Appellant's and is therefore not applicable to his case.

¹ Disciplinary Matter involving Walton, 676 P.2d 1078, 1085 (Alaska 1983); In re Robson, 575 P.2d 771, 776-77 (Alaska 1978).

Despite being persuaded by Appellant's counter-argument on this issue, this Court is concerned about an administrative process which seems to have stood fundamental principles of administrative procedure on their head. As stated above, the ALJ in this matter, who apparently has no particular expertise in the area of dentistry, conducted a six-day hearing on this matter. He heard the testimony of seventeen witnesses, considered a number of exhibits, and compiled a hearing record consisting of nineteen audio-cassette tapes.

On appeal, this matter was thoroughly and extensively briefed and argued to this court, which also has no particular expertise in the subject matter at issue.

But after the ALJ's Decision and Order was presented for review by the Board – the only link in the administrative chain with actual and extensive expertise in the area – Appellant does not seem to have been afforded any meaningful opportunity to provide input to the Board regarding the ALJ's Decision and Order. As Appellant pointed out on appeal, the ALJ submitted his Decision and Order to the Board on April 19, 2006. Just twelve days later, on May 2, 2006, the Board simply adopted the Decision and Order in its entirety.

While this court must concede that under the statutory and case law² applicable to Appellant's case he was apparently not entitled to make additional arguments or comments to the Board, it does not seem logical in light of his right to fully argue and brief these matters to two judges who have no expertise whatsoever in the area of dentistry. Further, the so-called "opportunity" to address the Board for only three

² *Storrs v. State Medical Board*, 664 P.2d 547, 554 (Alaska 1983); *Wendte v. State Board of Real Estate Appraisers*, 70 P.3d 1089, 1095 (Alaska 2003).

minutes seems to be simply illusory, and not a true opportunity for meaningful input at all.

While the Sanctions Imposed Were Generally Appropriate, the
Four-Month Suspension Constitutes Unwarranted and
Unnecessary Punishment Under the Circumstances.

Both parties to this action recognize that the ultimate goal in fashioning appropriate sanctions is not punishment; the goal is to protect the public and to instill public respect and confidence. To this end, this Court understands that a five year period of probation, with Appellant's practice subject to random audit by the Board or its designee, is an appropriate and effective means of protecting the public and instilling public respect and confidence. Likewise, while this Court recognizes that there is no perfect measure in fashioning sanctions, the fines imposed can also be seen to achieve the desired goals. Finally, the requirement that Appellant attend eight hours of continuing education, with the course(s) approved in advance by the Board, is an appropriate method of protecting the public and instilling public confidence.

But the sanction of a 120 day suspension under the circumstances of a single case of malpractice in a seventeen-year career seems to constitute unwarranted and unnecessary punishment, pure and simple. And this punishment focuses not only on Appellant, but also on his staff, and ultimately upon that portion of the public comprised of his patients. Of particular note in this regard, is the fact that the patient in this case clearly holds Appellant in high esteem and does not believe that Appellant should be punished in this fashion.

The nub of the ALJ's concern seems to be that Appellant has not recognized his error, and that he might choose to perform the surgery again in the future. But no fair reading of Appellant's overall comments support this conclusion. In short, while Appellant may have explained why he believes that a dentist of his skill and training is capable of performing this procedure, there is no substantial evidence to support a conclusion that Appellant has any intention of ever attempting to perform this procedure. Further, even if the ALJ had this concern, there does not seem to be any rational relationship between this concern and the sanction of a four-month suspension. Again, this sanction does not appear to constitute any goal other than pure punishment.

As Appellant stated at page 18 of his Reply Brief,

It remains undisputed that no dentist, no health care provider in this state, has ever been suspended for four months (or more) for a single incident of malpractice. It further remains undisputed that this is not a case of drugs, sex or dishonesty that has led other boards to suspend licenses for four months or more. Finally, it remains factually undisputed by the State that Dr. Ness mitigated the harm here with the patient (like the ALJ, the State refuses to recognize that the patient testified on behalf of Dr. Ness), took extraordinary measure at his own costs for hyperbaric treatment, and voluntarily resolved the matter promptly with the patient in order to make the patient whole.

III: Conclusion

Based upon a review of the briefing and argument presented by the parties to this action, and upon a review of the entire record herein,

IT IS HEREBY ORDERED that:

1. The decision by the board imposing a four-month suspension is **REVERSED** and
2. The findings and conclusions of the Board, including the decision to impose all other sanctions are **AFFIRMED**.

ENTERED this 28th day of April 2008 at Anchorage, Alaska

Signed _____
MICHAEL L. WOLVERTON
SUPERIOR COURT JUDGE