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STATE OF WISCONSIN
BEFORE THE OPTOMETRY EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY :
PROCEEDINGS AGAINST :
 :
THOMAS P. JOHNS, O.D., : FINAL DECISION
RESPONDENT. : AND ORDER

The State of Wisconsin, Optometry Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Hearing Examiner, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Hearing Examiner, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Optometry Examining Board.

The rights of a party aggrieved by this Decision to petition the Board for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information".

Dated this 12 day of December, 1989.

Lynda Farnon, O.D.

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STATE OF WISCONSIN
BEFORE THE OPTOMETRY EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	
	:	PROPOSED DECISION
THOMAS P. JOHNS, O.D.,	:	
RESPONDENT.	:	

The parties to this proceeding for purposes of s. 227.53, Wis. Stats., are:

Thomas P. Johns
540 East Grand Avenue
Beloit, WI 53511

Optometry Examining Board
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708

This matter was commenced as a Class 1 proceeding within the meaning of Wis. Stat. sec. 227.01(3)(a) by the filing of a Notice of Hearing. The Notice of Hearing stated that the Optometry Examining Board had denied the request of Thomas P. Johns, O.D., for a stay of suspension of his license to practice optometry in the State of Wisconsin, and further stated that the issues at the hearing were:

1. Whether the advertisement placed by the respondent in the 1989-90 Beloit Yellow pages is deceptive and misleading.
2. Whether the denial of the extension of the stay of suspension of respondent's license, as per the stipulated terms of the Board's September 11, 1987 Order, violated respondent's due process rights.

A hearing was held on September 15, 1989, at which time Respondent, Thomas P. Johns, appeared in person with his attorney, Jack McManus, 4136 Rutland-Dunn Road, Oregon, WI 53575. Attorney Steven M. Gloe appeared for the Department of Regulation and Licensing.

Based on the entire record herein, the examiner recommends that the Optometry Examining Board adopt the following Findings of Fact, Conclusions of Law and Order as its Final Decision in this matter.

FINDINGS OF FACT

1. Thomas P. Johns, O.D., was duly licensed as an Optometrist in the State of Wisconsin on August 1, 1971, and has practiced at 540 East Grand Avenue, Beloit, Wisconsin.

2. On September 11, 1987, the Optometry Examining Board issued a Final Decision and Order (In the Matter of Disciplinary Proceedings against Thomas Johns, O.D.), in which the parties stipulated and the Board found that Dr. Johns had engaged in unlawful and unprofessional conduct by prescribing and dispensing a prescription medication other than in legitimate practice, and failed to refer a patient to a medical specialist.

3. The Board, following a stipulation of the parties to that action, imposed a two year suspension of Dr. Johns' license, with all but the first month of the suspension stayed. The condition of the stay of suspension required Dr. Johns to apply for successive three-month stays of the suspension, stating, among other things, that he was in compliance with all statutes and rules on the practice of optometry.

4. Dr. Johns was represented by legal counsel during the drafting of the stipulation adopted by the Board on September 11, 1987, and both he and his counsel signed the stipulation. One of the terms of the stipulated Order is that:

"If the Board denies the petition by the Respondent for an extension (of the stay of suspension) the Board shall afford an opportunity for hearing in accordance with the procedures set forth in Wis. Adm. Code Ch. RL 1 upon timely receipt of a request for hearing."

5. On June 16, 1989, in response to a request from Dr. Johns for a three month stay of the suspension, the Board denied the stay on the grounds that his advertisement in the Beloit Yellow Pages for 1989-90 was misleading and deceptive, and that Dr. Johns had therefore engaged in unprofessional conduct contrary to the Wisconsin Statutes and Rules governing the practice of Optometry, and had therefore violated the terms of the September 11, 1987, Order.

5. The advertisement placed by Dr. Johns in the Beloit Yellow Pages for 1989-90 includes the statement "National Board Certification for Treatment of Eye Disease of the Interior Segment and Glaucoma" and implies that Dr. Johns possesses that credential.

6. Dr. Johns has not in fact been certified by the National Board of Optometry Examiners for treatment of eye disease of the interior segment and glaucoma.

7. The advertisement was authorized by Dr. Johns through his office manager.

CONCLUSIONS OF LAW

1. The Optometry Examining Board has jurisdiction in this matter pursuant to Wis. Stat. sec. 449.07(1).

2. The advertisement placed in the 1989-90 Beloit Yellow Pages by Dr. Johns was deceptive and misleading, contrary to Wis. Adm. Code Opt 6.13, in that he did not have the certification claimed, and falsely implied specific competence and ability to treat diseases of the interior of the eye and glaucoma, contrary to Wis. Stat. secs. 449.01(1)(b) and 449.19, and is a violation of the conditions of the Stipulation which was the basis of the Board's Order of September 11, 1987.

3. Dr. Johns waived any right he may have had to a hearing before the Board in advance of the Board's denial of a stay of suspension when he signed the stipulation which led to the Board's Order of September 11, 1987.

ORDER

Now, Therefore, it is ORDERED that the period of the suspension imposed but stayed by the Order dated September 11, 1989, In the Matter of Disciplinary Proceedings against Thomas Johns, O.D., and subsequent grants of application for stay of suspension, shall be imposed and the license of Thomas Johns SUSPENDED for a period of one year and eleven months, commencing June 30, 1989.

OPINION

I

The testimony in this hearing proved to me that Thomas Johns approved an advertisement in the Beloit Yellow Pages which he knew to be false, and which he intended the public to rely upon in choosing an optometrist. The advertisement claims that Thomas Johns is certified by a National Board in treatment of the diseases of the interior of the eye, and in the treatment of glaucoma. When he was called upon to support that claim in this hearing, Johns brought in a beautifully framed certificate from the International Association of Boards of Examiners in Optometry which states that he has

passed the competency based examination in treatment and management of ocular disease. He testified further that the advertisement should have read that he was certified by a national board in the treatment of diseases of the anterior segment of the eye, and that there was a printing error which made it say "interior" rather than "anterior."

At the time Johns caused this advertisement to be placed, he was on actual, personal notice that his license to practice optometry was in jeopardy. Much like a felon on probation, he had been warned, and he had actually agreed, that any violation of the statutes and rules governing the practice of optometry could result in the immediate suspension of his license. He agreed to this provision with the advice of counsel after a violation of medically treating his patients, contrary to the law of Wisconsin.

Despite that actual knowledge of the uncertainty of continued licensure and the necessity for unimpeachable conduct, Thomas Johns authorized an advertisement which he must have known to be false simply by looking at the certificate on his wall. The certificate was not issued by a National Board of any description; on its face, the certificate does not support the advertisement. Johns elicited testimony at the hearing with the apparent goal of proving the International Association of Boards of Examiners in Optometry to be interchangeable with the National Board of Optometry Examiners, but it is clear that the two organizations are not the same.

Secondly, it requires a particularly subtle reading to take the advertisement as anything other than a claim to competence and ability to treat glaucoma. It seems to me that no person reading the claim of National Board Certification for treatment of glaucoma would fail to conclude that Johns was able to treat glaucoma. Johns testified that he knows he is not able to medically treat his patients, and that he always refers patients requiring medical treatment to ophthalmologists, but that he wanted the public to know of his additional education. It strikes me that this argument is far too subtle for the wording of the advertisement, and that the effect is only to advertise a service which is not available.

"National Board Certification" is commonly understood to communicate special expertise in professional fields. There is no evidence in this proceeding from which one could reasonably conclude that Johns possesses any special expertise in optometry. He does unquestionably possess a certificate of having passed an examination of some type, but there is no evidence that passing that examination required any special skill, knowledge, experience, or talent.

I conclude that the advertisement placed by Thomas Johns was false. I also conclude that Johns knew it to be false and intended to misrepresent his qualifications and abilities in order to mislead the public in making a choice of optometrists. This conduct clearly falls within the prohibition of Wis. Adm. Code Opt 6.13.

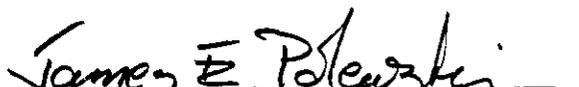
II

Due process is a method of measuring whether a person has had a fair opportunity to present his side of a dispute. It appears that Thomas Johns raises the question of whether having this hearing after the Board denied his application for a further stay of the suspension of his license, rather than before, violated his right to due process.

In the stipulation which resolved the previous disciplinary action against him, Johns agreed, having had the advice of competent legal counsel, that the Board could proceed in precisely this fashion. The stipulated Order provides that if the Board should deny an application for stay of the suspension that the suspension shall immediately take effect, and that Johns may have a hearing on the denial of the application of stay if he asks for one within thirty days. Johns further agreed that he knew what rights he was giving up by stipulating to the Order, and that he agreed to waive those rights. The stipulated Order was written in simple, clear, concise language, leaving no doubt that Johns was on a form of probation during good behavior. The Order left no doubt about the Board's potential responses if Johns failed to comply with the terms of the disciplinary Order.

The government may not deprive a person of any of the due process protections of the state or federal constitutions, but neither may the state deny any individual the freedom to forego those protections if the individual perceives it to be advantageous to do so. In this case, Johns knowingly, intelligently, and freely waived any right he may have had to a hearing before the Board denied his application for a continued stay of suspension. There is no evidence that the Board acted in an arbitrary or capricious fashion in its decision to deny the application for a continued stay. The evidence presented at this hearing amply supports the Board's conclusions and the exercise of its discretion.

Dated this ⁷th day of November, 1989.


James E. Polewski, Examiner

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review,
the times allowed for each and the identification
of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with State of Wisconsin Optometry Examining Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon State of Wisconsin Optometry Examining Board.

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: State of Wisconsin Optometry Examining Board.

The date of mailing of this decision is December 13, 1989.

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227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

227.52 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employe trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review, by the labor and industry review commission, and except as otherwise provided by law.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally

disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59 (6) (b), 182.70 (6) and 182.71 (5) (g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents.

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review board) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.