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STATE OF WISCONSIN

BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY

PROCEEDINGS AGAINST

FRANCOIS J. SACULLA, MD,	FINAL DECISION AND ORDER
RESPONDENT	LS9304302MED

The State of Wisconsin, Medical Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Medical Examining Board.

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

Dated this 17th day of May, 2000.

By: Glen Hoberg, DO

STATE OF WISCONSIN

BEFORE THE MEDICAL EXAMINING BOARD

:

IN THE MATTER OF :

DISCIPLINARY PROCEEDINGS AGAINST

FRANCOIS J. SACULLA, M.D.	**PROPOSED DECISION**
RESPONDENT	**RULING ON**
	MOTION FOR COSTS
	Case No. LS-9304302-MED

:

PARTIES

Mary L. Woehrer (Attorney of record for respondent)
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Jack Zweig
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ORDER

The respondent's motion for costs and fees pursuant to section 227.485 (5), Stats., is denied. The complainant's request for costs and fees to be awarded pursuant to section 227.485 (10), Stats, is denied.

PROCEDURAL HISTORY

An initial disciplinary action, LS-9303102-MED (Complaint I) was filed against the respondent on March 10, 1993. Complaint I alleged unprofessional conduct of the respondent by having sexual contact with a patient thus violating section 448.02 (3), Stats., and Wis. Adm. Code section Med. 10.02 (2) (h). Significant for purposes of this present motion is that the respondent saw the complaining patient on an outpatient basis on January 3, 1990. The last note in the patient's treatment record by the respondent indicated that the patient would return in a month or as needed.

Intervening in the events forming the basis of Complaint I was an alleged work related injury claimed to have been suffered by the respondent on December 28, 1989. The respondent's employment ended on January 15, 1990. The respondent filed a claim for workers compensation benefits and thereafter received temporary total disability benefits of $2,299 for the period from January 16, 1990 through February 28, 1990, inclusive. At issue in the workers compensation case was the nature and extent of the respondent's permanent disability, if any.

Meanwhile, in February, 1990, the patient's (Complaint I) family called the respondent, apparently because the patient was continuing to experience severe mental problems for which the respondent had originally entered into a physician/patient relationship. Respondent thereafter met with the family at their home, and advised the family to seek an involuntary commitment of the patient.

The respondent's workers compensation case proceeded to hearing on May 14, 1999. The respondent presented medical evidence in support of a claimed disability by a Dr. Kanshepolsky whom in an April 10, 1990 report diagnosed in part psychological problems, which he opined were related to the injury. In a later May 30, 1990 report he opined the respondent was one hundred percent functionally disabled from employment as a psychiatrist, and it was doubtful that he would be able to engage in any substantial gainful employment in the future.

On April 26, 1990, an evaluation of the respondent by Bill H. Grimm, Ph.D. of New Medico Rehabilitation Services of Chicago, allegedly reached the conclusion that the respondent had deficits in part, in: left dominant-sided motor functioning, conceptual reasoning, problem solving, speed of information processing, focused attention, verbal fluency and verbal memory.

By order dated July 18, 1991, the administrative law judge in the workers compensation case dismissed the respondent's application for benefits with a finding of no permanent disability. The dismissal was based on a finding that the employer's doctor's medical opinions regarding the respondent's purported disability were more credible than the respondent's. By order dated March 16, 1992, the findings and order of the administrative law judge were affirmed by the LIRC.

As of August 26, 1991, a neuropsychological evaluation done at New Medico Rehabilitation Center of Wisconsin, by Robert Hirschman, Ph.D. allegedly concluded the respondent suffered severe impairments on higher order conceptual type tasks, which led to the conclusion that the respondent's pattern of deficits rendered him unable

to return to his former occupational role of being a physician and psychiatrist.

Based upon the Grimm and Hirschman psychological evaluations obtained by the complainant, on March 23, 1993 a Petition for Summary Suspension action (hereafter, "petition") for the suspension of respondent's license was commenced. The petition contained the same substantive allegations which would also form the basis for Complaint II. The petition alleged that based upon the medical reports of Bill H. Grimm, Ph.D., and Robert Hirschman, Ph.D., the respondent had engaged in unprofessional conduct under section 448.02(3), Stats., and Wis. Adm. Code section Med. 10.02 (2)(i), (Practicing or attempting to practice under any license when unable to do so with reasonable skill and safety to patients.)

After the respondent's appearance before the board in the petition proceeding the board issued an April 12, 1993 order denying the petition but ordering the respondent to undergo psychiatric evaluations within 45 days. On October 1, 1993, the board issued an order terminating the petition proceedings.

On April 30, 1993, Complaint II (LS-9304302-MED) was commenced.

Following the respondent's motion for attorney's fees related to the petition proceedings, the board issued an order on November 29, 1993, denying attorney's fees to the respondent, concluding that, "not only was initiation of the summary proceeding substantially justified; it was, based on that information acquired prior to the hearing, entirely justified." The respondent did not file a request for rehearing, or seek timely judicial review of the board's findings in its November 29, 1993 order.

At its December 15, 1993, meeting, the board once again considered the respondent's motion for attorney's fees related to the petition proceeding, given the late filing by the respondent of a reply brief. After reviewing the respondent's reply brief, the board on December 27, 1993, affirmed its earlier November 29, 1993 order. The respondent did not file a request for rehearing, or seek timely judicial review of the board's December 27, 1993 order.

The respondent's motion for summary judgment on both Complaints I and II was denied on October 19, 1993. Meanwhile, by August 25, 1994, a proposed decision on Complaint I was issued, and thereafter adopted in a final order of the board with a variance limiting the respondent's license. The respondent sought judicial review of the board's Complaint I final decision and order, without success.

A Complaint III thereafter was commenced based upon the respondent failing to seek an evaluation ordered by the board pursuant to its final order rendered in Complaint I. On September 18, 1997, pursuant to stipulation, the respondent agreed that he could not practice medicine in the state of Wisconsin until he had obtained a psychological evaluation ordered at the conclusion of Complaint I.

Thus, Complaint I and III were at an end. By motion dated March 23, 1999, the Division of Enforcement moved for dismissal of Complaint II on the grounds of administrative efficiency. The fact the respondent could not practice medicine until obtaining a successful psychological evaluation pursuant to the Complaint I and III orders rendered the allegations of Complaint II and its further litigation essentially moot.

On April 21, 1999, a proposed decision was rendered granting the motion to dismiss Complaint II, reserving the issue of the respondent's present motion for costs, granting 30 days to file such motion. By final decision and order dated May 19, 1999, the board adopted as final the proposed decision of April 21, 1999. The respondent filed the present motion for attorney's fees and costs on May 17, 1999.

DISCUSSION

The respondent's filing of the present motion was timely under section 227.485 (5), Stats. The motion included an itemized application for fees and other expenses. On June 7, 1999, the Division of Enforcement, (hereafter, "State") filed a memorandum in opposition to respondent's Motion for Costs. This ruling is presented to the Medical Examining Board for inclusion in its final decision. Three separate and independent grounds exist to deny the respondent's motion.

The statute authorizing a motion for costs following an administrative proceeding is section 227.485, Stats., which provides in relevant part,

> (3) In any contested case in which an individual is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

The respondent's motion presents a fascinating argument that he asks the board to accept. In essence, the respondent claims that since a previous workers compensation judge found the respondent's proffered evidence of disability less credible than his employer's, that not only should this board be bound by that decision, but that also it proves that the respondent was not disabled. The argument continues; since the respondent was found

not to be disabled in the workers compensation context and since the State is alleged to know or should have known of the LIRC decision at the time Complaint II was filed, that demonstrates no substantial justification for the filing of Complaint II. Appended to the respondent's motion are other testimonials demonstrating that the respondent was able to work as a psychiatrist from approximately 1993. This is further evidence, claims the respondent, that the State had no substantial justification for filing or maintaining Complaint II.

The respondent is not a prevailing party for purposes of Complaint II

The term "prevailing party" is not further defined in the statutes. The respondent presents no case law or legal reasoning as to why a dismissal sought by the State on the grounds of administrative efficiency suffices to make the respondent a prevailing party. The respondent did not obtain a dismissal following a successful motion for summary judgment. Such a motion was brought and denied. No other substantive determination of the merits of the case occurred in the respondent's favor.

Section 227.485(5), Stats., in setting forth the preliminary procedure to claim and receive costs as a prevailing party states in part, "The decision on the merits of the case shall be placed in a proposed decision and submitted under ss. 227.47 and 227.48". Thus, the explicit reference to the claims procedure contemplated is that the decision shall be on the "merits of the case". While it is true that a dismissal may be based upon the merits of the case, depending upon the grounds for dismissal, no such basis exists here. The State moved to dismiss Complaint II based upon administrative efficiency. The respondent did not challenge the dismissal on this ground or move to dismiss on other grounds reflecting the merits of the action.

Case law suggests that for purposes of determining a prevailing party, some type of adjudication upon the merits must be made, in combination with a party receiving the benefits or relief requested.

> " Whether a party is a 'prevailing party' is a question on the merits of the case as to whether that party received the benefits or relief requested.
>
> Here Sheely is a 'prevailing party.' She asked the circuit court to review DHSS's determination that she was not "disabled" and not qualified for medical assistance. The circuit court held DHSS had incorrectly determined her status and ordered a remand. Subsequently a federal administrative judge concluded Sheely was 'disabled' and she received medical assistance pursuant to sec. 49.46(1)(a), Stats. DHSS did not refute this "disability" determination and closed its file. Sheely ultimately received the result and relief she initially requested and therefore she is a 'prevailing party.'" Sheely v. DHSS, 150 Wis. 2d 320, 332 (1989)

The plaintiff in Sheely was considered a prevailing party because she first obtained a finding of "disabled", and thereafter the benefits to which she was entitled. Although Sheely could be read to stand for the proposition that anytime a party receives the result and relief requested they become a prevailing party, such a broad reading would sweep within it any dismissal for any reason. Such an approach would render meaningless the Court's foundation of analysis that, "Whether a party is a 'prevailing party' is a question on the merits of the case as to whether that party received the benefits or relief requested." Id. at 332. Therefore, to parse this sentence in context with the statute the "question" to which the Court refers in determining a prevailing party is, if the benefit or relief requested was obtained based upon the merits of the case.

Reading Sheely within the context of the need for a determination of the merits of the case is consistent with the concept that words used in statutes ought not to be rendered mere surplusage by the interpretation applied. To allow each word contained in section 227.485 (5), Stats., to be relevant and have meaning, the use of the phrase "on the merits of the case" must therefore be given a meaning that precludes decisions not on the merits. Thus not any and all dismissals can qualify as being "on the merits of the case". The grounds for dismissal must be examined. The dismissal of Complaint II was not based upon the merits of the case.

A close review of the respondent's present motion and reply brief reveals an implicit agreement with the need to adjudicate on the merits. The thrust of respondent's brief, and attached supporting documents is the claim that the respondent is not currently "disabled", and has not been so for a long time. The respondent senses that this hurdle must somehow be cleared before he can then argue that the burden is now on the State to demonstrate substantial justification for its actions.

The respondent's attorney states;

"The facts alleged in the complaint were false." (Respondent's Motion, p. 3).

"The State also never had the law to support this complaint." (Respondent's Motion p.3-4).

"In order for the State to prevail, it needed a competent medical expert to testify that 'Dr. Saculla was incompetent and unable to practice medicine.'" (Respondent's Motion p. 4)

The basis for the present motion is thus flawed. False (meaning unproven) allegations standing alone don't create

liability for section 227.485, Stats., costs. Moreover, aside from the respondent's attorney's bold statement as to the allegations' falsity, no other means exists to test this proposition. The respondent simply would have his attorney's bare assertion taken as evidence. Thus, bootstrapping to a conclusion that the State never had the law to support Complaint II is likewise unsupported, because adjudication of the underlying facts determines what law ultimately applies.

The respondent's final assertion as to the State's required means of proof of the allegations by expert testimony is also wrong. Many scenarios exist whereby it could and possibly would have been possible without expert testimony to factually prove that the respondent practiced in violation of section 448.02(3), Stats., and Wis. Adm. Code section Med. 10.02 (2)(i). The administrative law judge's note in his denial of a summary judgment motion that there would be differing expert opinion testimony on this issue was not stricture. The State may have been required to use expert testimony, or it may not have. Regardless, any outcome based upon weighing evidence never occurred because Complaint II was dismissed with no findings on the merits.

The respondent demonstrates a misunderstanding of the law and the nature of the charge against him contained in Complaint II. Practicing or attempting to practice when unable to do so with reasonable skill and safety to patients can and often is a completed act at the time the complaint is brought, and can also be continuing thereafter. Therefore, all of the supporting testimonials filed upon behalf of the respondent miss the point. Aside from the fact that the testimonials themselves have not been tested for credibility through litigation, it really doesn't matter if at times the respondent is or was able to practice. This testimonial evidence doesn't address the times when he may not have been able to practice but did practice or attempted to do so.

The respondent is mistaken in the belief that if he can establish he is all better now, or at some time in the past, such a finding means he never violated Wis. Adm. Code section 10.02 (2) (i) at one or more times in the past. But for the State's belief in the mootness of Complaint II at this time, the respondent could still be subject to discipline on the exact same charges alleged, regardless of his present condition, or his condition at any time in the past. Disciplinary actions are not subject to a statute of limitations, or generally laches.

Substantial Justification for the State's Position

Section 227.485 (3), Stats., provides that an award of costs shall be made "unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position". Therefore, if the respondent to be deemed a prevailing party on Complaint II, to recover an award of costs, the State's position must not have been substantially justified. The State bears the burden of establishing substantial justification.

"Substantially justified" is defined in sec. 227.485(2)(f), Stats., as "having a reasonable basis in law and fact". This term also means that there was a legitimate basis in fact for having taken the position and the position had arguable merit. Behnke v. DHSS, 146 Wis.2d 178, 430 N.W.2d 600 (Ct. App. 1988). Using another test, the agency's position must have had a reasonable basis in truth and in law and there was a reasonable connection between the facts alleged and the legal theory advanced. Stern v. DHFS, 212 Wis. 2d 393, 569 N.W.2d 79 (Ct. App. 1997).

The State's position here did have a reasonable basis in fact and law. Assuming that the respondent was not faking his claimed work related injury and the effects therefrom, the State could reasonably conclude that the evidence offered on his behalf in the workers compensation action was genuinely offered in the respondent's reasonable belief he could not practice as a psychiatrist. That result of his claimed injury was one of the bases of his workers compensation action. It should not be lost that the respondent received temporary total disability payments, and was pressing a claim for additional disability payments. It is disingenuous for the respondent to later attempt to play "gotcha" to his advantage, turning his loss in the workers compensation forum to a gain in the disciplinary forum.

Because the respondent provided psychiatric services to at least one known patient, the subject of Complaint I, on January 3, 1990, it is certainly reasonable to assume the this post injury practice could have violated sec. 10.02(2) (i), given the respondent's claims to disability based upon his inability to practice psychiatry. The time window post injury made it reasonable to assume that if the respondent was injured on December 28, 1998, he may reasonably have been unable to practice by January 3, 1990. Further, meeting and counseling the patient's family in February, 1990, while he was actually receiving temporary total disability payments directly leads to the reasonable conclusion that impairment existed while engaged in the practice of psychiatry, given his doctor's opinion that he was unable to so practice.

These facts if found by a factfinder would suffice for a violation of Wis. Adm. Code section 10.02(2) (i). Therefore a reasonable basis in law and fact existed for the bringing and maintaining of Complaint II.

The State was reasonable to take the respondent's three examining workers compensation doctors at their word that the respondent could not practice psychiatry. No evidence has been introduced by the respondent here to show that his doctor's were so clearly wrong that no reasonable reliance could be placed on their reports. The respondent obviously relied on them himself, he cannot now claim that no other party could have. Once the issue of disability was raised by the respondent, the State had the right to challenge and adjudicate any and all claims that he had recovered, the time frame of his recovery or his denials that he practiced or attempted to practice

while unable to do so safely. The State may or may not have prevailed on Complaint II, but it was justified in taking the factual and legal positions it did.

Finally, the respondent blurs the distinction between the workers compensation claims process, and the state regulatory process related to his licensure as a psychiatrist. The respondent offers no law or rationale why a finding of no disability for purposes of a workers compensation award directly translates into a mandatory cross agency finding of no "practicing or attempting to practice under any license when unable to do so with reasonable skill and safety to patients." This ultimately, is the fatal flaw in the respondent's motion, and perhaps why the moving papers are silent on this point.

Each agency of the state government is charged with administering different portions of enacted legislation codified in the published statutes of this state. The rationale, purpose, definitions, burdens and presumptions for the administration of the workers compensation statutes are wholly different and distinct from those of the regulatory discipline process. Therefore, even if a hearing officer finds no disability for the purposes of denying a workers compensation claim, that does not mean that the respondent could not still have been suffering from some level of impairment which would constitute a violation of section 10.02(2)(i).

Again, assuming the respondent's examining doctors in the workers compensation context were acting in good faith, combined with the respondent's asserted claim of disability, it is reasonable to conclude that a level of impairment less than a workers compensation disability could exist that would still violate section 10.02(2)(i).

The value of the respondent's proffered later testimonials of work quality as a psychiatrist, or any later offered doctors' evaluations of the respondent's fitness to practice fail to address the key element of substantial justification. It is not whether the State simply loses, to the contrary, the State has the burden to establish a prima facie case of a violation. Any evidence the respondent might submit contra to rebut the inference of impairment created when the State's burden is met simply assists the finder of fact in making the ultimate factual determination. However, substantial justification measures the reasonableness of the State in taking the position it did. Here, the reliance upon the respondent's own medical reports was reasonable for the violation alleged.

If one were to waive a magic wand here and test the credibility of the respondent's evidence for every permutation that he is not impaired, never was impaired, and/or never practiced while being impaired, none of the foregoing can establish that the State did not have a reasonable basis in law or fact to bring the action. As previously explained, the State had ample reasonable basis to bring and maintain Complaint II.

Issue preclusion

The respondent previously brought a motion for costs alleging lack of substantial justification by the State in bringing the petition for summary suspension. The substantive basis of the alleged violations contained in the petition were the same as the substantive allegations of Complaint II.

The board's order of November 29, 1993 as reconsidered and affirmed by its December 27, 1993 order, while declining to issue a summary suspension, nonetheless found substantial justification for the bringing of a summary suspension petition against the respondent under section 227.51 (3), Stats. The respondent failed to timely seek judicial review of that order pursuant to section 227.51 (3), Stats.

Thus, the board's December 27, 1993 summary suspension denial order is final for all purposes and the respondent's attempt to relitigate a finding of substantial justification is barred by the principle of issue preclusion.

Issue preclusion requires the procedural and substantive ability to litigate an issue fully and fairly and requires that the following factors be considered;

" (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?" Michelle T. v. Crozier, 173 Wis. 2d. 681, 688 (1993)

The summary suspension proceeding is a separate statutory proceeding which allows the extraordinary remedy of a summary suspension based upon a finding that public health, safety or welfare imperatively requires emergency action. Section 227.51 (3), Stats.

Prior to issuing an order for summary suspension a petition for summary suspension must be filed. Wis. Adm. Code section RL 6.04. Notice must be provided to the licensee of the time and place that the petition will be presented to the licensing authority. Wis. Adm. Code section RL 6.05. The licensee has the opportunity to appear before the board to contest the issuance of the summary suspension order and should such order be issued, the right to

request a hearing to show cause why the order should not be continued. Wis. Adm. Code section RL 6.09. A losing respondent possesses full judicial appeal rights pursuant to section 227.52 Stats.,

In essence the summary suspension proceeding consists of an allegation of misconduct forming the basis of disciplinary proceedings comprised in a complaint, (Wis. Adm. Code section RL 6.10), with the additional statutory element that the conduct complained of is of such an emergency nature that a summary suspension is also required pending litigation of the complaint.

When the board ordered that no summary suspension should issue in this case, and found substantial justification for bringing the petition, the respondent could have chosen to seek judicial review of that decision, but did not. The factual allegations contained in the summary suspension petition were the same as the factual allegations contained in Complaint II, with the mere addition of a requirement of emergency harm being shown. Indeed, the exact same substantive violation by necessity was required to be pleaded in both the petition and Complaint II.

The same issue of substantial justification was decided previously by the board when it denied the respondent's previous motion for costs in relation to the petition for summary suspension. The respondent's present motion seeks to relitigate that exact same issue. The motion procedure for seeking costs which the respondent availed himself in the petition procedure are also the exact same as that utilized in the present context. The burdens of proof are the same in both allocation and degree. Finally, the respondent makes no argument that there is any fundamental unfairness in the application of issue preclusion at this time. The respondent had the opportunity to seek judicial review of the board's order of November 29, 1993 as reconsidered and affirmed by its December 27, 1993, order, but did not. The respondent is barred from relitigating this issue.

Costs- section 227.485 (10)

No costs are to be awarded to the State. The motion by respondent is not deemed to be frivolous. The State has not sufficiently demonstrated that the requirements of section 227.485(10) are satisfied to justify an award of costs.

Dated and signed: April 18, 2000

_____

William A. Black

Administrative Law Judge

Department of Regulation and Licensing