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STATE OF WISCONSIN

BEFORE THE VETERINARY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY

PROCEEDINGS AGAINST

JENS LUEBOW, D.V.M.,	FINAL DECISION AND ORDER
RESPONDENT.	LS9703031VET

The State of Wisconsin, Veterinary 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, Veterinary Examining Board.

The Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs with the Department General Counsel within 15 days of this decision. The Department General Counsel shall mail a copy thereof to respondent or his or her representative.

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 29th day of March, 2000.

Diane Scott

Member of the Board

STATE OF WISCONSIN

BEFORE THE VETERINARY EXAMINING BOARD

:

IN THE MATTER OF :

DISCIPLINARY PROCEEDINGS AGAINST

JENS LUEBOW, D.V.M.,	**PROPOSED DECISION**
RESPONDENT.	Case No. LS-9703031-VET

:

SUMMARY

This is a disciplinary action by the Veterinary Examining Board against Jens Luebow, D.V.M. In five counts, Dr. Luebow was alleged to have evidenced a lack of knowledge or ability to apply professional principles or skills. Three of the five counts, each involving a failure to completely remove ovarian tissue in a spay, were proven. Another count alleged an excessive use of heparin during surgery and a failure to properly suture an animal following a spay; the failure to properly suture was proven; the charge of overheparinization was not proven. The last case, involving a failure to properly diagnose an osteosarcoma, was not proven. Various affirmative defenses were raised by Dr. Luebow during the course of the proceeding but not sufficiently proven. Dr. Luebow's license is suspended for a period of at least 20 days, and Dr. Luebow is required to obtain remedial education.

PARTIES

The parties in this matter under section 227.44 of the Statutes and section RL 2.037 of the Wisconsin Administrative Code, and for purposes of review under sec. 227.53, Stats. are:

Complainant:

Division of Enforcement

Department of Regulation and Licensing

Madison, WI 53708-8935

Respondent:

Jens Luebow, D.V.M.

Madison Veterinary Clinic, Ltd.

2125 North Stoughton Road

Madison, WI 53704

Disciplinary Authority:

Veterinary Examining Board

1400 East Washington Ave.

Madison, WI 53703

APPLICABLE STATUTES AND RULES

Statutes

453.07 Discipline.

(1) In this section, "unprofessional conduct" includes, but is not limited to:

…

(f) Engaging in conduct in the practice of veterinary medicine which evidences a lack of knowledge or ability to apply professional principles or skills.

…

Wisconsin Administrative Code

VE 7.06 Unprofessional conduct.

Unprofessional conduct by a veterinarian is prohibited. Unprofessional conduct includes:

(1) Conduct in the practice of veterinary medicine which evidences a lack of knowledge or ability to apply professional principles or skills.

…

FINDINGS OF FACT

1. The respondent, Jens Luebow, D.V.M., is licensed to practice veterinary medicine in the state of Wisconsin, under license number 3511, granted February 14, 1990.

2. Dr. Luebow practices at the Madison Veterinary Clinic, 2125 North Stoughton Road in Madison, Wisconsin.

3. A veterinary ovariohysterectomy ("spay") is the complete removal of the ovaries and the uterus from an animal. A failure to remove all ovarian tissue in a spay is below the minimum standard of acceptable practice.

4. The existence of a third ovary in an animal (an "accessory" or "supernumerary" ovary) may be possible, but if so, it is extremely rare.

Count 4 of the Complaint.

5. Dr. Luebow performed a spay on August 25, 1992 on a black labrador retriever named Cass owned by Lynne Hettrick.

6. Cass later went into heat.

7. On March 21, 1994, Dr. Clemmons operated on Cass at Spartan Animal Hospital and found ovarian tissue.

8. In his spay of Cass, Dr. Luebow did not completely remove all ovarian tissue.

Count 2 of the Complaint.

9. Dr. Luebow performed an ovariohysterectomy on December 3, 1992, on a Siamese cat named Suzy-Q owned by Linda Anderson.

10. A few months after the operation Suzy-Q exhibited signs of heat.

11. Dr. Bonnie Campbell performed a re-spay operation at the U. W. Veterinary Teaching Hospital and found an intact left ovary.

12. In his spay of Suzy-Q, Dr. Luebow did not completely remove all ovarian tissue.

Count 3 of the Complaint

13. On January 18, 1993, Dr. Luebow performed a spay operation on a Miniature Schnauzer named Maribel owned by Eugene Haug and Judith Stolper.

14. Following Dr. Luebow’s spay operation, around April of 1993, Mr. Haug observed another dog attempting to breed Maribel.

15. Dr. Bonnie Campbell at the U.W. Veterinary Hospital performed surgery on Maribel and confirmed the presence of ovarian tissue.

16. In his spay of Maribel, Dr. Luebow did not completely remove all ovarian tissue.

Count 1 of the Complaint

17. On June 29, 1994, Dawn Smith took her Persian cat, Amelia, to Dr. Luebow for assistance with a difficult birth of kittens. Dr. Luebow performed a cesarean section, delivered the kittens, and performed an ovariohysterectomy on Amelia.

18. Shortly after the surgery was completed, Ms. Smith insisted on taking Amelia home, against medical advice and over the strong objections of Dr. Luebow and his staff.

19. Approximately one-and-one-half hours after taking Amelia home, Ms. Smith took Amelia to the Emergency Clinic for Animals where she was provided services by Dr. Mark Koeppl. Upon presentation at the clinic, Amelia was profoundly weak, moribund, very pale and unable to maintain a body temperature. Amelia's abdomen was distended and filled with blood. Amelia died later that night.

20. Dr. Koeppl performed a necropsy of Amelia. He observed blood in the abdomen and the retroperitoneal space. He found a tied-off right ovarian stump, but was unable to locate a left ovarian stump.

21. Dr. Stephen Schmidt performed a subsequent necropsy on Amelia at the Wisconsin Health Laboratory of the Department of Agriculture, Trade and Consumer Protection. He observed that the genital structures had been removed, the uterine ligatures were intact and the right ligature was in place, but that the left ovarian pedicle, though ligated, was free in the abdomen except for some connective tissue. He also observed hemorrhage in the connective tissue adjacent to the area at which the ovarian pedicle had been attached, with no hemorrhage visible anywhere else.

22. Hemorrhage does not occur after an animal is dead.

23. Amelia bled internally from the left ovarian pedicle after leaving Dr. Luebow's clinic.

24. Dr. Luebow did not use an excessive amount of heparin during his surgery.

Count 5 of the Complaint

25. On November 11, 1994, John Haanstad took the family's German Shepherd, Sheba, to the Madison Veterinary Clinic, where she was examined by Dr. Luebow for a lump behind the last rib on her left thorax. Dr. Luebow was told that the lump had appeared within the previous five days and Mr. Haanstad suggested that it might be related to a recent trauma. Dr. Luebow took an x-ray which was not of diagnostic quality, but from which he noted that no fractures were visible. Dr. Luebow considered a possible diagnosis of a hematoma with a differential diagnosis of a tumor, and he recommended follow-up in two weeks.

26. On November 25, 1994, the Haanstads took Sheba to the Emergency Clinic for Animals, where she was found to have pale mucous membranes, labored breathing, and a subcutaneous mass on the left thoracic wall. The medical history provided was that Sheba was weak, had difficulty breathing, and had lost her appetite, and that the mass had been noticed approximately five weeks earlier. Following an x-ray, a fine-needle aspirate and a punch biopsy, Sheba was diagnosed as having an osteosarcoma.

27. Dr. Luebow's treatment of Sheba did not fail to meet minimal standards of the veterinary profession.

Count 6 of the Complaint

28. Prior to the hearing, the attorney for the complainant stated that no evidence would be presented at hearing on Count 6 of the complaint, a statement which was accepted as a motion for dismissal. No evidence was presented at hearing and the count was not proven.

29. The Veterinary Examining Board, the Division of Enforcement, and the Department of Regulation and Licensing did not initiate and prosecute this disciplinary complaint vindictively against Dr. Luebow.

CONCLUSIONS OF LAW

I. The Veterinary Examining Board has personal jurisdiction over Dr. Luebow, based on his holding a credential issued by the board, and based on notice under sec. 801.04 (2), Stats.

II. The Veterinary Examining Board is the legal authority responsible for issuing and controlling credentials for veterinarians, under ch. 453, Stats., and it has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under sec. 15.08(5)(c), Stats., sec. 453.07, Stats., and ch. VE 7, Wis. Admin. Code.

III. Dr. Luebow's failure to remove all ovarian tissue in his ovariohysterectomy of the Hettrick dog, Cass, constitutes conduct which evidences a lack of knowledge or ability to apply professional principles or skills, and is unprofessional conduct pursuant to sec. VE 7.06 (1), Wis. Admin. Code. Discipline is appropriate under sec. 453.07, Stats.

IV. Dr. Luebow's failure to remove all ovarian tissue in his ovariohysterectomy of the Anderson cat, Suzy-Q, constitutes conduct which evidences a lack of knowledge or ability to apply professional principles or skills, and is unprofessional conduct pursuant to sec. VE 7.06 (1), Wis. Admin. Code. Discipline is appropriate under sec. 453.07, Stats.

V. Dr. Luebow's failure to remove all ovarian tissue in his ovariohysterectomy of the Stolper/Haug dog, Maribel, constitutes conduct which evidences a lack of knowledge or ability to apply professional principles or skills, and is unprofessional conduct pursuant to sec. VE 7.06 (1), Wis. Admin. Code. Discipline is appropriate under sec. 453.07, Stats.

VI. Dr. Luebow's failure to properly suture the left ovarian pedicle in his ovariohysterectomy of the Smith cat, Amelia, constitutes conduct which evidences a lack of knowledge or ability to apply professional principles or skills, and is unprofessional conduct pursuant to sec. VE 7.06 (1), Wis. Admin. Code. Discipline is appropriate under sec. 453.07, Stats.

VII. The evidence was insufficient to prove that Dr. Luebow used an excessive use of heparin during his ovariohysterectomy of the Smith cat, Amelia.

VIII. The evidence was insufficient to prove that Dr. Luebow's treatment of the Haanstad dog, Sheba, was below minimal standards of acceptable veterinary practice.

IX. The complainant filed a motion prior to the hearing to dismiss Count 6 regarding a dog owned by Robert Edwards, Jr. The motion was granted subject to the ultimate approval of the board.

X. None of the affirmative defenses raised by Dr. Luebow to this disciplinary proceeding prevents the Veterinary Examining Board from making Findings of Fact and Conclusions of Law or from imposing discipline in this case.

ORDER

THEREFORE, IT IS ORDERED that the license issued to Jens Luebow, D.V.M, to practice veterinary medicine in Wisconsin be suspended for a period of not less than 20 days, or until he complies with the following remedial education requirement, whichever is later.

IT IS FURTHER ORDERED that Jens Luebow, D.V.M., participate in and successfully complete a course specifically designed to provide clinical and classroom study in the performance of ovariohysterectomies on small animals. A description of the course content and identification of the instructor(s) shall be submitted to the Veterinary Examining Board or its designee for approval prior to commencement of the program. Dr. Luebow shall permit the person(s) conducting the program to provide a written evaluation of his participation in and successful completion of the course. The costs of the program shall be paid by Dr. Luebow.

IT IS FURTHER ORDERED that Dr. Luebow pay the costs of this disciplinary proceeding, as authorized by sec. 440.22 (2), Stats., and sec. RL 2.18, Wis. Admin. Code. If he fails to pay the costs, his license will remain suspended, under sec. 440.22(3), Stats., until further order of the Veterinary Examining Board.

IT IS ORDERED that Counts 5 and 6 of the complaint be dismissed.

ANALYSIS

This is a disciplinary proceeding conducted under the authority of ch. 227, Stats., and ch. RL 2, Wis. Admin. Code. The Division of Enforcement in the Department of Regulation and Licensing filed a complaint with the Veterinary Examining Board alleging that the respondent, Jens Luebow, D.V.M., violated rules regulating the practice of veterinary medicine. The burden of proof is on the Division of Enforcement to prove the allegations of a complaint by a preponderance of the evidence. Sec. 440.20(3), Stats.; 75 Att. Gen. 76; Gandhi v. Medical Examining Board, 168 Wis.2d 299, 483 N.W.2d 295 (Ct.App. 1992). I conclude that counts 2, 3, and 4 were proven by clear and satisfactory evidence, that one of the two charges in count 1 was proven by a

preponderance of the evidence while the other charge in count 1 was not proven, and that count 5 was not proven. In his answer and later by motion to dismiss, Dr. Luebow raised a number of affirmative defenses, the most contentious of which, and the one which remained partially unresolved at the time of the hearing, was vindictive prosecution. The handling of this issue and related discovery issues consumed the greater part of the two-and-one-half years between the filing of the complaint and the hearing. I conclude that the Veterinary Examining Board and the department did not engage in vindictive prosecution of Dr. Luebow in this proceeding. The following analysis will address quality of care and vindictive prosecution separately.

Quality of Care

The original disciplinary complaint in this matter (which was amended once during the course of the proceeding) alleged six counts of unprofessional conduct against Dr. Luebow. Count 1 involved a Persian cat named Amelia owned by Dawn Smith; Count 2 involved a cat named Suzy-Q owned by Linda Anderson; Count 3 involved a dog named Maribel owned by Judith Stolper and Eugene Haug; Count 4 involved a dog named Cass owned by Lynn Hettrick; Count 5 involved a dog named Sheba owned by John and Marj Haanstad; and Count 6 involved a dog owned by Robert Edwards, Jr. A motion to dismiss Count 6 was made three weeks before the hearing and the motion was granted subject to the ultimate approval of the board, and no evidence was presented on Count 6 at the hearing.

The Quality of Dr. Luebow's Testimony.

As a preliminary to the discussion of the evidence presented on counts 1 through 5, a comment must be made about the quality of Dr. Luebow's testimony. Dr. Luebow was represented during the early stages of this proceeding by a series of attorneys. After March 2, 1999, Dr. Luebow represented himself. Dr. Luebow is not an attorney and, as to be expected with any non-attorney, Dr. Luebow was unfamiliar with some of the procedural and evidentiary subtleties of the Wisconsin statutes and administrative rules. This led to certain aspects of this disciplinary procedure taking far longer than they should have. Despite his ignorance of some aspects of the law, Dr. Luebow is an accomplished advocate, either by nature or by experience. What that means here is that he is forceful in his presentation, he is fiercely tenacious in his argument, and like many accomplished trial attorneys, he is capable of taking a gray situation and painting it black or white to support his position. Three examples will demonstrate this.

During Dr. Luebow's testimony, he claimed that his expert witness, Dr. Kurtz, said that accessory or supernumerary ovaries are "a regular occurrence" [transcript, p. 1504]. As it turned out, during the hearing, Dr. Kurtz's testimony was limited in such a way that he was never able to offer his opinion on the frequency of such anomalies. Consequently, it was procedurally and evidentially improper for Dr. Luebow to refer to evidence which was not in the record. Even worse, however, Dr. Luebow's statement amounted to the manufacture of an opinion that Dr. Kurtz manifestly did not hold. At no time did Dr. Kurtz use that phrase or anything close to it. Even in Dr. Kurtz's deposition -- which was marked as an exhibit [no. 31] but not entered into evidence – he testified that he does not know how often such anomalies occur, that there is no reference whatever to them in the literature, and he would only go so far as to say that he considers them "possible". Dr. Luebow's transformation of "possible" into "a regular occurrence" demonstrates an ability and a tendency to exaggerate, to the point of fabricating material evidence.

Another example is the reported disciplinary case involving Dr. David Mills. Dr. Luebow testified about the Mills case, or rather, he "argued" about it during his "testimony" on the sixth day of the hearing. (Dr. Luebow was clearly incapable of distinguishing the advocate's role of arguing from the witness's role of testifying, which was a problem at times.) The statements of advocates are not evidence and they carry no evidentiary weight. At best, they carry persuasive weight. The problem with advocates who slant the facts or argue too selectively is that they quickly become unbelievable. Their words and opinions lose even the weight of persuasion, and the fact-finder has to rely on other things, namely facts in the record, to find the truth of any matter. After having interacted with Dr. Luebow for over two years, I have a serious concern about his demonstrated ability to create and believe self-serving versions of the facts which are so selective and so slanted that they amount to fictions. In its extreme form, which is relevant to his claim of vindictive prosecution, I fear that this trait may have made him incapable of perceiving the difference between honest criticism of mistakes he may have made -- criticism motivated at least in some cases by a concern for the health and safety of his patients -- and malicious and vindictive attempts to destroy him.

With regard to the Mills case, Dr. Luebow stated that the case had "nothing to do with simple complications, ORS as a simple complication from a spay operation" [transcript, p. 1508]. It is true that Dr. Mills compounded his problems by lying to the owners and to the board, but the case arose as an incomplete spay and the second conclusion of law in that case was "Dr. Mills' failure to perform a complete ovariohysterectomy on Sable constitutes conduct which evidences a lack of knowledge or ability to apply professional principles or skills, and is unprofessional conduct pursuant to sec. VE 7.06 (1), Wis. Admin. Code", which is exactly the charge leveled against Dr. Luebow in counts 2, 3 and 4. In my reading of the Mills case, it is indeed a case of simple ovarian

remnant syndrome from a spay operation, and it is proof that the board has investigated and prosecuted a veterinarian other than Dr. Luebow for such a surgical mistake. As an administrative law judge, I would not be surprised by an argument from an advocate, that is, an attorney for Dr. Luebow, that the Mills case "has nothing to do with ORS", but since Dr. Luebow was acting as his own attorney, it was difficult at times to separate testimony that might be truthful and factual, from argument (mixed in with testimony) that was intended primarily to convince, without regard to its accuracy. The latter function, the advocate's function, seriously colored the quality of Dr. Luebow's testimony. This is an evaluation of Dr. Luebow's credibility based not on his demeanor, but on the fairly regular divergence between the evidence and what he said about the evidence. This is also not a conclusion that Dr. Luebow lied in the hearing or at any other time, because a lie must be conscious. What concerns me most about Dr. Luebow is that he is so utterly convinced that he is right and that he must be right, that he convinces himself of "facts" which are simply not true; in other words, he may be incapable of objectively perceiving the truth if that truth conflicts with his conviction that he is right.

The third example illustrates his ability to manufacture a "fact" and to convince himself that the fiction exonerates him. Dr. Luebow testified that it was unlikely that he performed the spay on the Hettrick dog on August 25, 1992. His proof of this was a lengthy extrapolation from a single entry in his flight logbook which showed that he flew with his sister on August 21, 1992. He then testified that his sister was still in Madison on August 25th, which meant that it is "very likely and it appears now clear in my recollection" that he was "engaged in entertaining my sister and other things related to that", so he must have asked Dr. Nothnagel to perform the surgery. Far from being "clear", this statement was clearly speculation offered as evidence. Dr. Luebow repeated this and made it even more certain in his closing argument: "And I also made the statement that under the circumstances of re-researching this matter, I do recollect that I had Dr. Nothnagel make several surgeries. They were characteristically done during the lunch hours, and those were, at the time, the time when my sister was for a visit that we would have gone out, for example, for lunch to go sightseeing and so forth. It is very strong evidence and there's very strong support on my recollection, now, that he did the Lynn Hettrick surgery himself." [transcript, p. 1739]. The statement is strong evidence, indeed, not that Dr. Nothnagel did the surgery, but that Dr. Luebow can convince himself of anything if he tries hard enough. Dr. Luebow's testimony was so colored by this tendency to make the facts fit his need to be right, that his unsupported testimony had always to be viewed with skepticism. Ultimately, if Dr. Luebow swore that something was true, the strong possibility arose that it was not true, except in his own mind.

<u>Count 2, 3 and 4.</u>

Three counts involved a failure to completely remove ovarian tissue in a spay. Dr. Jeffrey Schuett (D.V.M. from Kansas State University, 1975; diplomate of the American Board of Veterinary Practitioners since 1989; small-animal practitioner in Pewaukee) defined an ovariohysterectomy as the complete removal of the ovaries and the uterus, and according to his testimony, as well as a matter of common sense, a failure to remove all ovarian tissue in a spay is below the minimum standard of acceptable practice. Counts 2, 3 and 4 were proven not only by a preponderance of the evidence, but by clear and satisfactory evidence. In fact, although the standard is neither "clear and satisfactory" nor "beyond a reasonable doubt", no serious doubt was raised about the allegations in any of the three counts.

Dr. Luebow took the position on counts 2, 3 and 4 that ovarian remnant syndrome (ORS) is not unusual and not an indication of a failure to meet minimum standards. The logical meaning of ORS is that following a spay operation an animal continues to demonstrate the effects of hormone production from ovarian tissue. Dr. Luebow used the term "ORS" to cover two different situations: (1) where the ovarian tissue was left behind in the spay operation from one of the normal two ovaries, and (2) where the ovarian tissue was an "accessory" or "supernumerary" ovary, i.e. a third ovary. ORS caused by a failure to completely remove both normal ovaries seems almost by definition to be below minimum standards; leaving behind in the patient's body part of the organ which is to removed cannot be a minimally acceptable result. ORS caused by a third ovary might not necessarily prove that a spay operation was below minimum standards because a veterinarian might have completely removed two ovaries; however, that situation was shown to be far too rare, if it even exists, to be an effective defense here.

The testimony of all the veterinarians in the hearing other than Dr. Luebow was that ORS of either kind is unusual. Each witness had encountered it but considered it quite rare, on the order of two times in ten years of experience [Dr. Schuett, transcript p. 294]. No witness had any first-hand experience with accessory or supernumerary ovaries, not even Dr. Luebow, and Dr. Schuett, after performing a lengthy literature search, was able to find only one sentence in one pathology book referring to a supernumerary ovary. Dr. Dubielzig testified that ORS is "fairly common", by which he meant approximately one case per year in the pathology lab at the U.W. Veterinary School. His definition of ORS in this part of his testimony clearly meant a remnant of ovarian material left behind in a spay, as he further testified that he was not aware of any publication describing accessory or supernumerary ovaries in dogs and cats, and "I've not found anybody who's documented the presence of accessory, supernumerary or extra ovarian tissue." Dr. Kurtz testified that he occasionally sees ORS, but that it is not "common" [transcript, p. 1104] (This was one of a number of examples of Dr. Luebow putting words in a witness's mouth which were not the witness's; in this case, Dr. Kurtz corrected him.) Finally, as mentioned above, Dr. Kurtz was not allowed to testify to the incidence of accessory or supernumerary ovaries, but even in his deposition, he testified that he does not know how often such anomalies occur, that there is no reference

whatever to them in the literature, and he would only go so far as to say that he considers them "possible". (As noted above, Dr. Luebow, in his own testimony, somehow manufactured from this a conviction that Dr. Kurtz had called them "a regular occurrence".)

Count 4.

Dr. Luebow performed a spay on August 25, 1992, on a black labrador retriever named Cass owned by Lynne Hettrick. The dog later went into heat, and when Dr. Clemmons operated on Cass at Spartan Animal Hospital on March 21, 1994, he found ovarian tissue. The ovariohysterectomy on August 25, 1992 is not disputed and the existence of ovarian tissue on March 21, 1994 is not disputed.

Despite the fact that the record of the operation is in Dr. Luebow's handwriting and Ms. Hettrick testified that Dr. Luebow was the person who spoke to her about the operation when she picked Cass up, Dr. Luebow nevertheless challenged this allegation by saying that he doesn't think he performed the operation. This is an example of Dr. Luebow being sure that he could not have made the surgical mistake, then searching around for a scenario to prove that he didn't do it, and then convincing himself of that scenario.

Testimony during the hearing established that only two other veterinarians worked with Dr. Luebow at the Madison Veterinary Clinic during that time period. One, Dr. Janeen Smith, did occasional relief work there from approximately 1989 through 1993, but she did not work at the clinic between June of 1992 and December 30, 1992. These dates were established based on her pregnancy at that time. The other was Dr. Frederick A. Nothnagel (D.V.M. from the University of California – Davis in 1982), who worked at the Madison Veterinary Clinic from August of 1982 to November of 1992. Dr. Nothnagel testified convincingly that he did not perform the spay. He knew Ms. Hettrick's dog well because it was a regular patient of the Madison Veterinary Clinic. However, Ms. Hettrick's father was a good friend of Dr. Kelsey (Dr. Luebow's predecessor owner of the clinic), and it was Dr. Kelsey who provided care to Cass except on a couple of minor occasions. Dr. Nothnagel was certain that he never performed any major surgery on the animal. Dr. Luebow testified that it was unlikely that he performed the spay on the Hettrick dog on August 25, 1992, based on a convoluted extrapolation four days earlier from an entry in his flight logbook, which was discussed above. That evidence was not of sufficient weight to raise a serious doubt about Dr. Nothnagel's testimony, which included a specific memory of the Hettrick dog and a clear memory that he never performed major surgery on Cass.

Dr. Luebow argued that Dr. Nothnagel did not always keep complete and accurate records, and that he (Dr. Luebow) sometimes had to make entries for Dr. Nothnagel, so that the fact that the record of the spay is in Dr. Luebow's handwriting means nothing. At most, Dr. Luebow succeeded in raising a small doubt about the thoroughness of Dr. Nothnagel's record-keeping, and the fact that the record of the spay is in Dr. Luebow's handwriting makes it far more likely that Dr. Luebow performed the operation than that Dr. Nothnagel performed it. Dr. Luebow's contrary testimony that he turned over the spay operation to Dr. Nothnagel because he was entertaining his sister is speculative enough. To assume that he not only turned over the spay to Dr. Nothnagel, but then that Dr. Luebow for reasons unknown recorded the entire record of Dr. Nothnagel's spay constitutes unlikelihood piled on top of speculation. This does not rise even to the level of a reasonable doubt that Dr. Luebow performed the surgery. The count was proven by far more than a preponderance of the evidence.

Count 2.

Dr. Luebow performed an ovariohysterectomy on December 3, 1992, on a Siamese cat named Suzy-Q owned by Linda Anderson. A few months after the operation Suzy-Q exhibited signs of heat, and Ms. Anderson took Suzy-Q to the U.W. for a re-spay, which was performed by Dr. Bonnie Campbell. The histopathology report by Dr. Campbell stated that ovarian tissue remained, that in fact the entire left ovary was retained. She also observed suture granuloma, which would have been caused only by a prior surgery.

Dr. Richard Dubielzig of the U.W. Veterinary School (D.V.M., professor of pathology at the U.W. School of Veterinary Medicine, board certified by the American College of Veterinary Pathologists in 1977) performed a review and analysis of the histopathology slides from biopsied material taken from the cat owned by Linda Anderson. Dr. Dubielzig reviewed the slides originally viewed by Dr. Campbell and he also viewed newly prepared slides of material taken from the same preserved samples. He expressed his professional opinion that the material in the slides was taken from an entire intact ovary, as the slides showed a cross-section of an ovary along with an intact ovarian bursa and oviductal tissue. Dr. Harold Kurtz, a diagnostic pathologist for the State of Minnesota at the Veterinary Diagnostic Laboratory of the University of Minnesota, did not disagree with any of Dr. Dubielzig's conclusions on this issue. There is no question that a spay was performed on December 3, 1992, and there is no serious question that ovarian tissue remained following the spay.

Ms. Anderson testified that Dr. Luebow was there when she checked Suzy-Q in, that she spoke to Dr. Luebow when she picked Suzy-Q up, and that she was unaware that any veterinarian other than Dr. Luebow worked at the clinic. The records of the spay are in Dr. Luebow's handwriting. Once again, however, Dr. Luebow challenged this count by asserting that he is not sure he performed the operation, and by pointing out that the U.W.'s record identifies the cat's color as "sealpoint", while Dr. Luebow's record identifies Suzy-Q as a white domestic short-hair. He suggested that Ms. Anderson may have taken a different cat to be (re-)spayed. Ms. Anderson's description for Suzy-Q was "It's a Siamese mix, all the proper Siamese colors in all the wrong places … there's

spots instead of the proper Siamese markings. [The dominant color is] the creamy tan color that Siamese usually have across their back." She agreed in the hearing that the term for those colors is "sealpoint". The owner's unequivocal testimony about the identity of the cat in question overcomes any doubts raised by the difference between identifying the color as "white" or "sealpoint" or "creamy tan". In addition, the existence of suture granuloma confirmed the cat's prior surgery. The spay of Suzy-Q took place during the time when Dr. Janeen Smith was not working at the Madison Veterinary Clinic, so she could not have performed the operation, and Dr. Nothnagel did not work at the Madison Veterinary Clinic after November of 1992. That leaves Dr. Luebow. Here again, the issues raised by Dr. Luebow do not rise even to the level of a reasonable doubt that Dr. Luebow performed the surgery. The count was proven by far more than a preponderance of the evidence.

The seven days of hearing were filled with tangential and irrelevant testimony, almost all of which is passed over completely in this proposed decision. One exchange which arose during the investigation of Ms. Anderson's cat, however, was perhaps relevant to the issue of vindictive prosecution. In her testimony, Ms. Anderson mentioned that "some red flags went up" regarding Dr. Luebow's conduct. On cross-examination, Dr. Luebow asked her if it is because he is a foreigner or because he has an accent. Dr. Luebow has suggested repeatedly over the course of this proceeding that he is being persecuted by the board and by some of the individuals who complained against him because of his national origin. Ms. Anderson denied this. On re-direct, Ms. Anderson explained that she had a casual conversation with Dr. Luebow at some point, in which he explained to her why he kept his Doberman at the clinic rather than at his condominium, and that it was simply the way he said "They don't understand." She said she thought that condominia usually have agreements up front, inferring that the prohibition against a dog was likely to be a rule of the condominium association [transcript, p. 1014], and the inference which could reasonably drawn from this was that Ms. Anderson saw a red flag, not in Dr. Luebow's national origin or his accent, but because she thought he was saying that the rules shouldn't apply to him.

Count 3.

Dr. Luebow performed an ovariohysterectomy on January 18, 1993 on a black Miniature Schnauzer named Maribel owned by Judith Stolper and Eugene Haug. Dr. Nothnagel testified that the handwriting on the January 18, 1993 entry of the records of the Madison Veterinary Clinic appears to be Dr. Luebow's, and indeed the handwriting is obviously Dr. Luebow's. Around April of 1993, Mr. Haug observed another dog attempting to breed Maribel. Dr. Nothnagel examined Maribel and confirmed the presence of hormonal activity inconsistent with a complete spay. Dr. Bonnie Campbell at the U.W. Veterinary Hospital performed surgery on Maribel and confirmed the presence of ovarian tissue. Again, the surgery on January 18, 1993 is not disputed, and the presence of ovarian tissue following the spay is not disputed.

Dr. Luebow challenged the facts alleged in this count by questioning whether the dog on which he performed a spay was the same dog later presented to Dr. Nothnagel and later operated on by Dr. Campbell. This challenge was based on (1) the fact that the birthdate on the record at the U.W. is 06/89, whereas the birthdate on Dr. Luebow's record is June 7, 1988, and (2) the dog's color is recorded on Dr. Nothnagel's record as gray whereas the dog's color on Dr. Luebow's record is black. The color recorded at the U.W. was black, and although the discrepancy between the two dates and the record of the dog's color as gray rather than black does raise a doubt, it is not seriously troubling in the face of the testimony from Eugene Haug about the identity of the dog in question [transcript, pp. 588-608], including the fact that he and Ms. Stolper owned only one adult female Miniature Schnauzer at the time. The owner's testimony was conclusive proof that the dog presented to Doctors Nothnagel and Campbell was the same one operated on by Dr. Luebow. Although a small legitimate doubt was raised by Dr. Luebow in this case, the evidence at the hearing was clear and satisfactory, and much more than a preponderance of the evidence, that Dr. Luebow performed the operation and that he failed to meet minimum standards of acceptable practice in the spay.

Count 1.

The first count of the complaint alleged (1) a failure to properly suture an animal following a spay and (2) an excessive use of heparin during surgery. The failure to properly suture was proven by a preponderance of the evidence (though not "clear and satisfactory" as in the previous three counts) and the charge of overheparinization was not proven.

On June 29, 1994, Dawn Smith took her Persian cat, Amelia, to Dr. Luebow for assistance with a difficult birth of kittens. Dr. Luebow performed a c-section, delivered the kittens, and performed an ovariohysterectomy on Amelia. Shortly after the surgery was completed, at approximately 9 P.M., Ms. Smith insisted on taking Amelia home, against medical advice and over the strong objections of Dr. Luebow and his staff. Between 10 and 11 P.M., Ms. Smith took Amelia to the Emergency Clinic for Animals where she was provided services by Dr. Mark Koeppl (D.V.M. from the University of Minnesota in 1984, and now a senior clinician at the Emergency Clinic for Animals). Dr. Koeppl examined Amelia and found her to be profoundly weak, moribund, very pale and unable to maintain a body temperature, with a distended abdomen. Dr. Koeppl took steps to warm Amelia and provided fluids and anti-shock medications intravenously using a catheter which was still in place from Dr. Luebow's surgery. Dr. Koeppl drew blood from the jugular vein and determined that the packed cell volume was 17% rather than a normal 30 to 50%, with an activated clotting time of over 5 minutes rather than a normal 1 to 2 minutes. A belly tap returned whole blood. Ms. Smith told Dr. Koeppl that Dr. Luebow had used heparin, which is normally

used in a catheter to prevent clotting, and that he had used it directly from a manufacturer's bottle [transcript, p. 139]. True or not, Dr. Koeppl had to consider that information. Dr. Koeppl administered protamine to counteract any heparin that was in the body either from the surgery or from the use of the catheter to provide fluids and medication. Amelia died at 4:40 A.M. Ms. Smith requested a necropsy of Amelia, which Dr. Koeppl performed. Dr. Koeppl observed blood in the abdomen and the retroperitoneal space and he found a tied-off right ovarian stump, but he was unable to locate a left ovarian stump.

Dr. Stephen Schmidt (D.V.M., Ph.D. in Veterinary Pathology (1985), and diplomate of the American College of Veterinary Pathologists) performed a subsequent necropsy on Amelia at the Wisconsin Health Laboratory of the Department of Agriculture, Trade and Consumer Protection. He observed that the genital structures had been removed, the uterine ligatures were intact and the right ligature was in place, but that the left ovarian pedicle, though ligated, was free in the abdomen except for some connective tissue [transcript, pp. 656-7, 688-9]. He also observed hemorrhage in the connective tissue adjacent to the area at which the ovarian pedicle had been attached, with no hemorrhage visible anywhere else [transcript, p. 690]. The issue of heparinization was not investigated due to cost constraints.

Based on the swollen abdomen and the presence of blood in the abdomen and the retroperitoneal space, there is no question that Amelia bled internally after leaving Dr. Luebow's clinic. This is not to say that Amelia died because of Dr. Luebow's surgery. By removing Amelia from Dr. Luebow's care against medical advice, Ms. Smith deprived Dr. Luebow of any opportunity to complete his care, including the removal of the catheter later used by Dr. Koeppl, or to correct any surgical errors. Dr. Luebow cross-examined Dr. Koeppl at length on other possible causes of death, including Dr. Koeppl's use of protamine and a belly wrap, but the actual cause of death is irrelevant to the issue of Dr. Luebow's care. The only relevance would be the possibility that the belly wrap had forced blood from the abdomen into the retroperitoneal space.

A former employee of Dr. Luebow's, Kim Sprecher, presented exceptionally relevant testimony that Dr. Luebow did not leave a blood vessel visibly unsutured when he closed Amelia. The only difficulty with Ms. Sprecher's testimony was that it was so directly on point, as if she knew exactly the point that had to be made, that it sounded rehearsed. If not literally rehearsed with Dr. Luebow, it certainly sounded practiced. The testimony also sounds a bit strange in light of Dr. Luebow's note in his records that he tried to dissuade Ms. Smith from having him do the cesarean by telling her that his staff at the time was untrained and inexperienced in c-sections [exhibit 6, p. 3, line 11 and p. 5, line 12 from bottom].

The possibility was raised by Dr. Luebow that Ms. Smith caused further injury to Amelia between the time she left Dr. Luebow's clinic and the time she took Amelia to the Emergency Clinic for Animals. Dr. Luebow went to great lengths to portray Ms. Smith as a bad character. He did manage to establish that she has not always paid her bills. He also managed to get Thomas Sansone (a private investigator who worked for Dr. Luebow) to paraphrase a portion of a deposition of Ms. Smith in which, according to Mr. Sansone, she admitted that she lied and cheated. Actually, the strongest and most useful evidence of Ms. Smith's character was her disregard for medical advice when she took Amelia home. This does raise doubts about what may have happened to the cat between Dr. Luebow's clinic and Dr. Koeppl's, but such a possibility is speculative. If the bleeding had later been found to have occurred from a trauma injury, such speculation might carry some weight, but in the face of the positive finding that the ovarian pedicle was avulsed, it is likely that the avulsed ovarian pedicle was the source of the bleeding, and it is basically impossible for the bleeding to have been caused by Dawn Smith.

Dr. Luebow also raised the possibility that Dr. Koeppl avulsed the pedicle when he performed his necropsy. Although this scenario must be considered, it is contradicted by the evidence. Dr. Kurtz confirmed that hemorrhage does not occur after an animal is dead, and that hemorrhage would be a principal indicator of whether the pedicle was avulsed antemortem or postmortem. Given the testimony from Dr. Koeppl regarding the bleeding he observed in the retroperitoneal area and the testimony from Dr. Smith regarding hemorrhage in the tissues adjacent to the area where the ovarian pedicle had been attached, which would not have occurred if the pedicle was avulsed postmortem, it seems highly unlikely that Dr. Koeppl's first necropsy could have been the cause of the avulsed pedicle, though it must be acknowledged that the first necropsy did nothing to improve the accuracy of the second necropsy. This means that even in the face of Kim Sprecher's testimony about the visual appearance of Amelia before Dr. Luebow closed the surgical incisions, the pedicle must have been avulsed by Dr. Luebow. The evidence on this count is not nearly as convincing as on counts 2, 3 and 4, and a number of very reasonable doubts were raised, but the conclusion that Dr. Luebow failed to properly suture the left ovarian pedicle is still more likely than not.

With regard to Dr. Luebow's use of heparin and its possible contribution to the bleeding observed in Amelia, speculation ran rampant. Heparin is an anti-clotting agent. It is routinely used to prevent clotting and to maintain the free flow of fluids in catheters. The issue of heparinization is separate from the suturing issue since, even with an elevated level of heparin in her bloodstream, Amelia would not have bled into her abdomen if all vessels had been properly sutured. Dr. Luebow inserted a catheter into Amelia during his operation and he testified that he injected a small amount of heparin into the catheter at the beginning of the operation and at the end, in case the catheter was needed later. The catheter was left attached when Ms. Smith took Amelia home. It was still attached when Ms. Smith and Amelia arrived at the Emergency Clinic for animals. Dr. Koeppl administered fluids and anti-shock medications intravenously using the catheter. All witnesses made the logical assumption that this

action would have flushed any heparin remaining in the catheter into Amelia's bloodstream. Dr. Luebow testified that he used an appropriate level of heparin. Various other witnesses provided various calculations of the volume of heparin that was used and the volume that should have been used, based on assumptions which were based loosely on the few known facts. None of the other calculations carried much probative weight.

The allegation that Dr. Luebow used an inappropriate amount of heparin was based on (1) Ms. Smith's report that Dr. Luebow had used heparin directly from a manufacturer's bottle [transcript, p. 139], (2) the large amount of blood observed in Amelia's abdomen, and (3) the fact that the sample of blood drawn from Amelia by Dr. Koeppl blood did not clot properly. Ms. Smith did not have any specialized knowledge of veterinary procedures and she was distraught over the imminent death of her cat. Ms. Smith is not a sufficiently reliable source of information to have her statement to Dr. Koeppl outweigh Dr. Luebow's contrary testimony regarding his routine practice regarding the use of heparin, given his generally high level of professional skill as testified to by various witnesses during the hearing.

The amount of blood in Amelia's abdomen may well have simply been a factor of the length of time the bleeding had occurred and the volume of blood potentially flowing through an ovarian pedicle. Dr. Schmidt testified that the left ovarian pedicle receives its blood supply from an artery that branches directly off the aorta, which means that a lot of blood would have been available, and heparin would not appear to have been necessary to produce the volume of blood lost by Amelia.

Dr. Koeppl's observation regarding the clotting time for Amelia's blood was the most probative evidence. He testified that the activated clotting time for the sample of Amelia's blood which he drew from the jugular was over 5 minutes instead of a normal 1 to 2 minutes. No witness challenged either part of this statement. Two factors lessen the probative value of this fact, however. The first, which is merely speculative and was not addressed in the hearing, was the effect of blood volume and concentration on clotting time. Dr. Koeppl not only testified that Amelia had lost a lot of blood into her abdomen, but that its packed cell volume was 17% rather than a normal 30 to 50%; the potential effect on clotting of having a packed cell volume 1/3 to ½ normal was not mentioned. The second, which goes beyond speculation to a reasonable inference from the sequence of facts related, is that Dr. Koeppl drew his sample of blood from Amelia's jugular shortly after flushing the contents of the catheter into her, which would mean that his sample could have contained a full fresh dose, even perhaps a concentrated dose, of heparin in a greatly reduced volume of blood. The effect of this on clotting time would have been dramatic. There really was no acceptable proof of the level of heparin in Amelia's blood at any particular time. Furthermore, Dr. Koeppl's use of the catheter to provide fluids, with its unintended consequence of injecting additional heparin into Amelia's bloodstream, cannot really be blamed on Dr. Luebow. The evidence was insufficient to prove that Dr. Luebow used an excessive amount of heparin during his surgery.

Count 5

The last remaining count of the complaint, involving a failure to properly diagnose an osteosarcoma, was not proven. On November 11, 1994, John Haanstad took the family's German Shepherd, Sheba, to the Madison Veterinary Clinic, where she was seen by Dr. Luebow. Dr. Luebow recorded the following: "Owner noticed lump behind last rib on left side of thorax. Possible diagnosis: feels like hematoma, subfascial. Differential diagnosis, possibly a tumor. Sudden development about five days ago. Size is approximately … 3 x 3 cm. One large x-ray number 88. No fractures visible. Recommend control latest in about two weeks. Report may or might support hematoma."

On November 25, 1994, the Haanstads took Sheba to the Emergency Clinic for Animals, where she was examined by Dr. Steve Timm. Dr. Timm was not a witness in the hearing, but Dr. Koeppl testified using the clinic's records. The medical history taken upon her arrival at the clinic was that Sheba was weak, had difficulty breathing, and had lost her appetite. Dr. Timm recorded pale mucous membranes, labored breathing, and a subcutaneous mass on the left thoracic wall. According to the history taken at the clinic, the mass had been noticed approximately five weeks earlier. An x-ray was taken [exhibit 3] which showed the mass. Dr. Timm removed bloody fluid from the chest, which was abnormal, and he collected a fine needle aspirate and a punch biopsy of the mass. The fine needle aspirate was diagnosed as containing mesenchymal cells, possibly from a tumor of unidentified cell type, and the punch biopsy was identified as being from an osteosarcoma. The pathologist who diagnosed the samples estimated a 4 to 6 month survival time for Sheba, and the Haanstads had Sheba put to sleep approximately 4 to 6 months later.

Dr. Schuett expressed the opinion that Dr. Luebow's treatment of Sheba failed to meet minimum standards of acceptable veterinary practice for two reasons: 1. The quality of the x-ray he took at the Madison Veterinary Clinic on November 11, 1994 and used for his diagnosis [exhibit 17] was inadequate, and was specifically underexposed in the location of the mass he was trying to identify. 2. Dr. Luebow made no further attempt to identify the mass or the pleural effusion. Dr. Schuett expressed the opinion that a minimally competent action would have been to do a fine-needle aspirate or a biopsy.

A fair amount of expert testimony was taken during the hearing regarding the utility of fine-needle aspirates. On cross-examination, Dr. Schuett's estimate was that a fine-needle aspirate produced a conclusive diagnosis approximately 25% of the time, Dr. Koeppl agreed that a fine-needle aspirate does not always produce an

interpretable result, and Dr. Kurtz testified that a fine-needle aspirate is diagnostic in less than 25% of cases. More important, however, is the history that was presented to Dr. Luebow. Dr. Schuett agreed that he would not have bothered even taking an x-ray if he was presented with a swelling on the thorax in a relatively young dog, and if he was told by the owner that the dog had been in a fight five days earlier and the swelling had developed since that time. There was no mention in Dr. Luebow's records of a dogfight, though Dr. Luebow testified that Mr. Haanstad told him that Sheba had been in a fight five days earlier and that the swelling had been noticed afterward.

In light of what was said earlier about Dr. Luebow's tendency to manufacture favorable "facts", the report of a dogfight can be believed only to the extent that it is independently corroborated. Investigator Celina Kobs talked to Ms. Haanstad, who said the lump had been there for two weeks before taking the dog to Dr. Luebow, though Ms. Haanstad testified in the hearing that when her husband took the dog in he told Dr. Luebow the wrong time period over which the swelling had been there. Ms. Kobs talked to Mr. Haanstad, who said he never told Dr. Luebow that there had been a dogfight, but in the transcript of her phone conversation with Private Investigator Sansone in 1995, Ms. Haanstad said her husband told Dr. Luebow "it was just five days and he thought it was a cracked rib so Dr. Luebow was responding to the information that John supplied to him." [exhibit 35, p. 8] This set of conversations recorded and repeated is convoluted, but it does support Dr. Luebow's testimony that Mr. Haanstad said something to suggest that the swelling was very recent and that it might be related to a recent trauma. Dr. Luebow did record "sudden development about five days ago", and "no fractures visible", and this is sufficient support for his actions.

Dr. Luebow's treatment of Sheba was adequate. He took an x-ray looking for a fracture; he did not see one. He noted that a tumor was possible. He commented that a hematoma was also possible but uncertain. He recommended follow-up in two weeks. There was testimony that his x-ray was not of diagnostic quality and that he should have taken another. Nevertheless, a preponderance of the evidence did not show that Dr. Luebow failed to meet minimal standards in his treatment of Sheba.

Character Witnesses.

Dr. Luebow presented testimony from three character witnesses, all of whom spoke very favorably of Dr. Luebow's veterinary abilities, based on their experiences with him. Bob Bolz, a client of the Madison Veterinary Clinic, testified that he has a high opinion of Dr. Luebow's professional abilities. Stuart Updike, a physician at the U.W. Medical School, worked with Dr. Luebow prior to Dr. Luebow's licensure as a veterinarian when Dr. Luebow was hired to assist Dr. Updike's surgical research team; Dr. Updike testified that Dr. Luebow was overqualified for the position he was in, but that he was a meticulous surgeon and an outstanding colleague. Frederick Blancke, M.D., stated that he had no criticism of Dr. Luebow's abilities as a veterinarian, based on Dr. Luebow's treatment of his own animals and acquaintances' animals. The ability of character witnesses to provide useful information is usually very limited. Their testimony here carried little weight beyond establishing that Dr. Luebow enjoys a reputation among some as a very competent practitioner. The impression conveyed by Dr. Luebow during the hearing was that he is generally a very competent and conscientious veterinarian.

Vindictive Prosecution

The answer filed on April 4, 1997 raised a number of affirmative defenses. In April of 1998, the respondent withdrew the affirmative defenses based on failure to state a claim, laches, equitable estoppel, issue preclusion, and claim preclusion. In June of 1998, a ruling was issued denying the affirmative defense based on a violation of due process because of a delay in instituting the proceedings. In August of 1998, a ruling was issued denying the affirmative defense of selective prosecution. On July 5, 1999, an extensive, twelve-page, ruling was made that the affirmative defense of vindictive prosecution had not been proven. The ruling contained a provision for its own re-opening following review by the ALJ of information about informal citizen complaints which had not been received by the date of the ruling. Rather than repeat the analysis here, that ruling is attached as the first appendix to this Proposed Decision. On July 16, 1999, the ruling regarding vindictive prosecution was clarified and extended to include any other affirmative defense based on a violation of due process. The citizen complaints were provided to the ALJ on July 23, 1999, but were not inspected prior to the hearing. This section includes a proposed final resolution of the vindictive prosecution issue, which is to affirm the July 5, 1999 ruling.

Dr. Luebow contended that the various "informal complaints" which were identified in various documents were evidence of recruiting fake complaints, disguising uninvestigated allegations as formal complaints, and the invention of fake names in order to multiply the charges against him. Having reviewed the files ultimately provided by the Division of Enforcement, I conclude that the division has not manufactured fake files. I further conclude that information about the "files" was presented to Dr. Luebow accurately during the lengthy course of this proceeding. It appears possible that (1) the information was presented in such a way that Dr. Luebow had difficulty connecting it (as I did), or (2) Dr. Luebow persisted in certain beliefs regardless of evidence to the contrary. Based on the observation of Dr. Luebow at the hearing and the analysis of the quality-of-care issues above, the latter seems quite possible. More likely, however, is that Dr. Luebow has a highly analytical mind which insists on investigating all possibilities (again like a good attorney). In order to do so, he must have all the

facts. When information is withheld from him, for example, due to a claim of attorney work-product, he sees possibilities which include conspiracy and improper motives. Dr. Luebow becomes as determined to have the information as his adversary is to withhold it. A continuing battle was waged during the pre-hearing stages of this case as he insisted on knowing the identity of any persons who filed original complaints against him, even when those complaints were not part of this formal disciplinary action.

I conclude that much of the problem running throughout the investigation and prosecution of this matter is Dr. Luebow's very combativeness and insistence on knowing all the facts, which may in turn have caused investigators and prosecutors and witnesses to dig in their heels and avoid cooperating with him whenever legitimately possible. A good example can be found in Dr. Luebow's examination of investigator Celina Kobs during the hearing. Her insistence on answering Dr. Luebow's questions precisely as they were asked, despite the fact that in many cases it was clear to me, and probably to her as well, that he was trying to ask a different question, led him into a spiral of frustration that eventually caused him to accuse her (falsely) of giving contradictory and untruthful answers.

It is my considered opinion that the division took some unfortunate actions during the lengthy course of this case which unnecessarily antagonized Dr. Luebow, such as issuing an investigative subpoena requiring Dr. Luebow to turn over all of his files for one-and-a-half years of practice. It was ironic to hear Mr. Polewski similarly describe as "oppressive" the subpoena served by Dr. Luebow requiring Mr. Williams and Ms. Kobs to bring to the hearing "any and all papers, documents, reports, recordings or other materials generated and/or relied upon at any time during the above identified proceedings" [transcript, p. 802]. Such actions by the division only exacerbated the situation and contributed to Dr. Luebow's conviction that he had been singled out for prosecution.

Mr. Polewski's letter response dated August 3, 1999 was very helpful in making connections among many confusing references to the "informal complaints". One example will suffice here. One of Dr. Luebow's persistent demands has been to know the contents of the Dale Metzalaar file. Mr. Polewski explained that Dale Metzalaar was a name which arose early in the course of the investigation. (The *in camera* inspection of file number 93 VET 029 showed "Dale Metzalaar" as nothing more than a name provided by someone else and written on a telephone message slip.) Mr. Polewski stated that on February 15, 1994, Pamela Stach wrote to Dr. Luebow's attorney at the time requesting files for 12 of Dr. Luebow's clients, including the name Dale Metzalaar, but that the attorney stated that Dr. Luebow had no record of ever treating an animal belonging to Dale Metzalaar. Mr. Polewski stated that no further requests were ever made for records related to Dale Metzalaar, but that Dr. Luebow persists in believing there is a citizen complaint filed by Dale Metzalaar against him. In fact, even following Mr. Polewski's August 3rd explanation, Dr. Luebow asked "Why would any investigator/prosecutor request records when there is no complainant and no complaint? (e.g. Dale Metsalaar, Roger Smith, Diane Griffiths etc.)"

Nothing in the *in camera* review of citizen complaints requires a change in the July 5, 1999, ruling. Consequently, the affirmative defense is denied and there is no legal basis for dismissal of the complaint.

<u>Discipline</u>.

The purposes of professional discipline have been set forth by the Wisconsin Supreme Court in various cases involving attorneys, such as <u>State v. Kelly</u>, 39 Wis.2d 171, 158 N.W.2d 554 (1968), <u>State v. MacIntyre</u>, 41 Wis.2d 481, 164 n.w.2d 235 (1969), <u>State v. Cory</u>, 51 Wis.2d 124, 186 N.W.2d 325 (1970), and <u>State v. Aldrich</u>, 71 Wis.2d 206, 237 N.W.2d 689 (1976). Those purposes are (1) to rehabilitate the offender, (2) to protect the public by assuring the moral fitness and professional competency of those privileged to hold licenses, and (3) to deter others in the profession from similar unprofessional conduct. That reasoning has been extended by regulatory agencies, including the Department of Regulation and Licensing, to disciplinary proceedings for other professions.

The first purpose is to rehabilitate the offender. In my reading of the cases, the term "rehabilitation" means what is necessary to make a person conform his or her behavior to the requirements of the profession, and it covers both positive and negative reinforcement to deter the offender from similar behavior in the future. See, for example, <u>State v. Postorino</u>, 53 Wis.2d 412, 419, 193 N.W.2d 1(1972). Thus, even though the purpose of discipline is not to impose punishment *per se*, appreciating the unpleasant consequences of unprofessional behavior is part of rehabilitation.

Repeatedly during the hearing, Dr. Luebow demonstrated an ability to mold the facts or even to manufacture non-existent facts to fit a concept that he was, and must be, right. It is possible that he has developed this attitude as a result of his past disagreements with the board, but whatever the cause, it has resulted in an unwillingness to admit that he might have made a mistake. The discipline necessary to make Dr. Luebow accept some responsibility for making a mistake is a suspension of his license. Anything less would be viewed by him as a victory, which might prevent him from accepting the true situation. The suspension need not be of any particular duration, however, and a long suspension would probably have the unwanted effect of embittering him further against the board. A suspension of 20 days is sufficient to have an appropriate rehabilitative effect. A suspension of 20 days would also be consistent with the discipline imposed in the case mentioned above involving Dr. David Mills, because the similarities between that case and this are substantial. Both grew out of failures to properly perform ovariohysterectomies, and both were compounded by the respondent's attitude. Dr. Mills lied to the

owners of the animal and to the board. Dr. Luebow did not lie in the same way, but he fought the case so forcefully that he ended up denying that he could have been responsible for his mistakes, and he ended up fabricating evidence which he appears to have believed. It is true that more counts were proven against Dr. Luebow, but his failures to perform surgery properly are only more frequent, not more serious, than Dr. Mills'.

The second purpose is to protect the public, by assuring Dr. Luebow's moral fitness and professional competency. The phrase "moral fitness" is a difficult one to deal with, as morality *per se* is not an appropriate area for state regulation; "moral fitness" becomes relevant only to the extent that a person's acts affect others. Therefore, for the purpose of interpreting the second purpose of discipline, I make no distinction between "moral fitness" and "professional competency". The proper discipline to ensure professional competency is an educational requirement, and although Dr. Luebow's suspension is set at "not less than 20 days", the actual length will be tied, as a practical matter, to his completion of appropriate training. The details of the training are contained in the proposed order and are not repeated here.

The third purpose is to deter others in the profession from similar unprofessional conduct. Some disciplinary cases are based on violations such as fraud or theft, drug use or inappropriate sexual behavior, acts which a person may or may not choose to do. In such cases, the third purpose of discipline is significant. Dr. Luebow's violations were mistakes, not premeditated acts which a veterinarian might or might choose to do. In this case, the third purpose of discipline is satisfied by a finding of unprofessional conduct, a short suspension and an educational requirement. This cannot "deter" a practitioner from making mistakes, but it can bring to the attention of the profession the absolute need to maintain competence.

Mr. Polewski recommended a suspension of not less than six months, and participation in and completion of a course approved by the board specifically structured to provide clinical and classroom study in the performance of ovariohysterectomies and their potential risks and complications; evaluation of soft tissue masses which require aspiration and biopsy; and a course in radiology which addresses the indications for and proper procedures for the taking of a radiograph, including the visual quality necessary for adequate diagnosis. The reasons have already been mentioned for departing from the recommendation for a six-month suspension. Since the charge related to x-rays and the evaluation of soft tissue masses was not proven, no remedial education in those areas would be appropriate. Mr. Polewski also recommended that Dr. Luebow resume practice only under the supervision of a veterinarian approved by the board who specializes in small animal practice. Such a requirement appears punitive and inconsistent with the discipline imposed in the Mills case.

Costs.

The assessment of costs against a disciplined professional is authorized by sec. 440.22(2), Wis. Stats. and sec. RL 2.18, Wis. Admin. Code, but neither the statute nor the rule clearly indicates the circumstances in which costs are to be imposed. The Veterinary Examining Board has the discretion to impose all, some, or none of the costs of the proceeding. One approach is routinely to impose the costs of investigating and prosecuting unprofessional conduct on the disciplined individual rather than on the profession as a whole, as the Wisconsin Supreme Court does in attorney discipline cases. Another approach is to use costs as an incentive to encourage respondents to cooperate with the process, and thus to impose costs only if the respondent is uncooperative or dilatory. Although he was repeatedly urged to participate in settlement conferences, Dr. Luebow refused to consider a compromise of his position, and he refused to participate in a settlement conference tentatively scheduled for August 16, 1999. I feel certain that this uncompromising attitude affected the proceedings from the very beginning and protracted them unnecessarily. An order that Dr. Luebow pay the entire cost of this proceeding is appropriate.

Dated and signed: February 13, 2000

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John N. Schweitzer

Administrative Law Judge

Department of Regulation and Licensing