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STATE OF WISCONSIN
BEFORE THE DENTISTRY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	
	:	
NILES K. BAKKE, D.D.S.,	:	LS0203011DEN
RESPONDENT	:	

FINAL DECISION AND ORDER

PARTIES

The parties to this action for purposes of §227.53, Wis. Stats. are:

Niles K. Bakke, D.D.S.
2457 N. Mayfair Road
Wauwatosa, WI 53226

Dentistry Examining Board
1400 East Washington Ave.
Madison, WI 53703

Division of Enforcement
Department of Regulation and Licensing
1400 East Washington Ave.
Madison, WI 53708-8935

PROCEDURAL HISTORY

A hearing in the above-captioned matter was held on May 20 and 21, 2002, before Administrative Law Judge John Schweitzer. The Division of Enforcement appeared by attorney Gilbert Lubcke. Dr. Bakke appeared in person *pro se*.

Based on the entire record in this case, the Dentistry Examining Board makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The respondent, Niles K. Bakke, D.D.S., is licensed to practice dentistry in the state of Wisconsin, under license number 2379.
2. Dr. Bakke practices orthodontics in three offices in Wisconsin. One of the offices is located in Wauwatosa.
3. On January 5, 2000, pursuant to a stipulated agreement between Dr. Bakke and the Division of Enforcement, the Wisconsin Dentistry Examining Board entered a Final Decision and Order finding that Dr. Bakke had engaged in conduct that violated sec. 447.07(3)(a), Stats. and Wis. Adm. Code sec. DE 5.02(5) in that he was not utilizing appropriate infection control techniques and was not properly utilizing biohazardous sharps containers for the disposal of orthodontic wires, brackets and bands. The Board entered an Order requiring Dr. Bakke to attend a course on May 19 and 20, 2000 entitled, "Annual Training Dental Occupational Health and Safety" and to permit at least two random unannounced inspections of the dental offices at which he practiced dentistry by an individual selected by the Board. On March 1, 2000, the Board appointed Nancy McKenney, RDH, MS, to perform the inspections of Dr. Bakke's dental offices.
4. Dr. Bakke attended the training as ordered above but during at least part of the course, he was observed to be reading a newspaper.
5. On May 21, 2001, Dr. Bakke provided orthodontic services to a patient, J.R., at his Wauwatosa office.
6. During the course of treatment on May 21, 2001, Dr. Bakke placed a 3 x 3 fixed retainer on the lingual surface of the lower arch. He bonded the retainer to the patient's teeth. This process involved the use of an evacuator, forced air and forced water and created a substantial risk of splash and splatter. Dr. Bakke did not wear a mask at any time during the course of this procedure.
7. During the course of treatment on May 21, 2001, Dr. Bakke removed the braces from the patient's lower arch. These braces had been bonded to the patient's teeth. To remove the braces, Dr. Bakke used a bond removing pliers and a high speed handpiece with high speed burs to remove the remaining bonding material from the patient's teeth. He then used the high speed handpiece to polish the patient's teeth. The process of removing the braces and bonding material from the patient's teeth and polishing the patient's teeth involved the use of an evacuator, forced air, forced water and a high speed handpiece and created a substantial risk of splash and splatter. Dr. Bakke did not wear a mask at any time during the course of this procedure.
8. The standard of care ordinarily exercised by a dentist requires that the dentist wear a mask at all times when performing procedures that involve a substantial risk of splash and splatter to avoid or minimize the unacceptable risks of cross contamination.
9. Also on May 21, 2001, Dr. Bakke put on a clean pair of gloves in preparation for examining and treating a patient who was seated in the dental chair in the operatory. Prior to examining or treating the patient, Dr. Bakke went to the sterilization area in his dental office and picked up several contaminated dental instruments in his gloved hands,

placed the instruments in sterilization bags and placed the bags in the Statim. The contaminated instruments that he handled were not instruments that had been contaminated by use on the patient who was in the dental chair in the operatory at the time. Dr. Bakke then picked up a container of distilled water with his gloved hands and filled the Statim. Dr. Bakke then turned on the Statim while still wearing his contaminated gloves. Dr. Bakke then returned to the patient in the dental chair in the operatory and, without washing his hands or changing his gloves, proceeded to examine and treat the patient.

10. The standard of care ordinarily exercised by a dentist requires that the dentist minimize the risks of cross contamination by (a) removing contaminated gloves and putting on clean gloves before examining or treating a patient, and (b) removing contaminated gloves before contacting other items of common usage in the office that are not covered with protective barriers or will not be subsequently disinfected, sterilized or disposed of.

11. Also on May 21, 2001, Dr. Bakke, after discharging a patient from the operatory and while still wearing the gloves he had been wearing to examine and treat the patient, proceeded to prepare the operatory for the next patient. He inverted the chair cover that had been in place, disposed of the patient's napkin in the inverted chair cover and then removed his gloves and disposed of them in the inverted chair cover. Dr. Bakke, with bare hands, then removed other barriers that had been in place while he had been treating the previous patient and disposed of these barriers in the chair cover. As he was concluding this process, the telephone in the reception area rang and Dr. Bakke, without washing his hands or putting on clean gloves, answered the telephone by picking up the receiver with his bare hand. The receiver was not enclosed in any protective barrier. After Dr. Bakke concluded the telephone conversation, he did not disinfect the receiver or apply any protective barrier to the receiver.

12. The standard of care ordinarily exercised by a dentist requires that the dentist minimize the risks of cross contamination by washing his hands or applying clean gloves, if his hands are contaminated, following examination or treatment of a patient before contacting other items of common usage in the office that are not covered with protective barriers or will not be subsequently disinfected, sterilized or disposed of.

13. Also on May 21, 2001, Dr. Bakke, after discharging a patient from the operatory and while still wearing the gloves he had been wearing to examine and treat the patient, proceeded to prepare the operatory for the next patient. He inverted the chair cover that had been in place, disposed of the patient's napkin in the inverted chair cover and then removed his gloves and disposed of them in the inverted chair cover. Dr. Bakke, with bare hands, then removed other barriers that had been in place while he had been treating the previous patient and disposed of these barriers in the chair cover. As he was concluding this process, the telephone in the reception area rang and Dr. Bakke, without washing his hands or putting on clean gloves, answered the telephone. Following his telephone conversation, Dr. Bakke returned to the operatory to complete preparation of the room for the next patient. Dr. Bakke, with his bare hands, picked up several contaminated instruments that had been used for the examination and treatment of the previous patient, transported them to the sterilization area and placed them in the ultrasonic cleaner. Dr. Bakke returned to the operatory, picked up several additional instruments, including a mirror that had been used to examine the previous patient. Dr. Bakke briefly wiped these instruments with an Asepti wipe and placed them in a drawer. Dr. Bakke, without washing his hands or putting on clean gloves, replaced the protective barriers in the operatory including the protective barriers on the overhead light and the

curing light.

14. The standard of care ordinarily exercised by a dentist requires that the dentist minimize the risks of cross contamination by washing his hands or by applying clean gloves, if his hands are contaminated, before refitting the operatory with protective barriers.

15. Also on May 21, 2001, Dr. Bakke, in preparation for examining and treating his next patient, washed his hands and put on clean gloves. Dr. Bakke, before commencing his examination or treatment of the patient, with his clean gloves on, picked up the remote control unit for the television located in the operatory and changed the channel. The remote control unit for the television was not contained within a protective barrier and had not been disinfected prior to the time that Dr. Bakke picked it up. Dr. Bakke, without changing his gloves, commenced examination and treatment of the patient. During the course of his examination and treatment of this patient, Dr. Bakke returned to the television remote control unit and changed the channel while wearing the gloves he had on while treating the patient. Dr. Bakke, wearing the same gloves, then continued his examination and treatment of the patient. The remote control unit for the television was not covered with any type of protective barrier and was not disinfected after the patient was discharged from the operatory.

16. The standard of care ordinarily exercised by a dentist requires that the dentist remove contaminated gloves and put on clean gloves before examining or treating a patient.

17. The standard of care ordinarily exercised by a dentist requires that the dentist minimize the risks of cross contamination by removing contaminated gloves before contacting other items of common usage in the office that are not covered with protective barriers or will not be subsequently disinfected, sterilized or disposed of.

CONCLUSIONS OF LAW

I. The Dentistry Examining Board is legal authority responsible for issuing and controlling credentials for dentists, under ch. 447, Stats., and it has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under sec. 15.08(5)(c) Stats., sec. 447.07, Wis. Stats., and ch. DE 5, Wis. Admin. Code.

II. The Dentistry Examining Board has personal jurisdiction over the respondent, Niles K. Bakke, D.D.S., based on his holding a credential issued by the board, and based on notice under sec. 801.04(2), Wis. Stats.

III. Dr. Bakke's conduct in failing to wear a mask while he was engaging in procedures that involved a substantial risk of spray and splatter was a substantial departure from the standard of care ordinarily exercised by a dentist, and Dr. Bakke's conduct, as herein described, created the unacceptable risks of cross-contamination and the transmission of infectious diseases to a patient, alleged in Count I.

IV. Dr. Bakke's conduct in (a) failing to remove his contaminated gloves before touching the container of distilled water, (b) failing to remove his contaminated gloves before using his gloved hands to turn on the Statim, and (c) failing to remove his

contaminated gloves and apply clean gloves before commencing his examination and treatment of the patient was a substantial departure from the standard of care in the following respects, and Dr. Bakke's conduct created unacceptable risks of cross-contamination and the transmission of infectious diseases to a patient, as alleged in Count II.

V. Dr. Bakke's conduct in failing to wash his hands or put on clean gloves before picking up the receiver and in failing to disinfect the receiver or place a protective barrier over the receiver after he concluded his telephone conversation was a substantial departure from the standard of care ordinarily exercised by a dentist, and Dr. Bakke's conduct, as herein described, created the unacceptable risks of cross-contamination and the transmission of infectious diseases to a patient, as alleged in Count III.

VI. Dr. Bakke's conduct in failing to wash his contaminated hands or put on clean gloves before refitting the operatory with protective barriers was a substantial departure from the standard of care ordinarily exercised by a dentist, and Dr. Bakke's conduct, as herein described, created the unacceptable risks of cross-contamination and the transmission of infectious diseases to a patient, as alleged in Count IV.

VII. Dr. Bakke 's conduct in (a) examining and treating the patient while wearing gloves that had been in contact with the potentially contaminated remote control unit for the television and (b) while wearing gloves he had been using during his examination and treatment of a patient, making contact with the remote control unit for the television that was not enclosed in a protective barrier and that would not subsequently be disinfected, sterilized or disposed of, was a substantial departure from the standard of care ordinarily exercised by a dentist and Dr. Bakke 's conduct created unacceptable risks of cross-contamination and the transmission of infectious diseases to a patient, as alleged in Count V.

VIII. The violations in Conclusions of Law III through VII above constitute unprofessional conduct, under section DE 5.02(5), Wis. Admin. Code, and discipline is appropriate, under section 447.07 (3)(a), Wis. Stats.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that beginning on the date this Order is signed the license of Niles K. Bakke to practice as a dentist in the State of Wisconsin is **LIMITED** subject to the following terms and conditions:

A. Niles K. Bakke, D.D.S., shall take and successfully complete the education program designed for him by Elise Sampson, D.D.S., as set forth in Attachment I by any modification as set forth herein, including, but not limited to, taking written tests administered to him by Dr. Sampson. Dr. Bakke shall commence the education program within thirty (30) days of the date on which this Order is signed.

B. During the time Dr. Bakke is enrolled in Dr. Sampson's educational program, he shall only be permitted to treat patients at the Marquette University School of Dentistry.

C. Dr. Sampson shall notify the Board in writing when Dr. Bakke has successfully completed the educational program. Upon receipt of that notification, Dr. Bakke may begin treating patients in his private practice. Dr. Bakke's private practice shall then be monitored by Dr. Sampson for not less than twelve (12) months subject to all of the following terms and

conditions:

- (1) Dr. Bakke shall provide Dr. Sampson with a monthly schedule of patients for any and all of his offices.
- (2) Dr. Sampson shall make a minimum of four, random, unannounced visits to Dr. Bakke's office(s). Said visits shall occur over a 12-month period. Following each visit, Dr. Sampson shall furnish the Dentistry Examining Board (Board) with a written report setting forth the procedures she witnessed and indicating whether or not Dr. Bakke's performance was satisfactory with respect to infection and exposure control. At the conclusion of her final visit, Dr. Sampson shall furnish the Board with a written report indicating whether Dr. Bakke has satisfactorily complied.

D. The limitations on Dr. Bakke's license shall remain in effect until such time as he provides proof satisfactory to the Board that he has successfully complied with all of the terms and conditions of this Order.

E. Failure to comply with the terms of this Order may result in additional monitoring, the imposition of additional conditions, or the suspension of Dr. Bakke's license to practice dentistry.

F. All reports or other documents required to be filed with the Dentistry Examining Board under the terms of this limited license shall be filed with:

Department Monitor
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
1400 East Washington Avenue
Madison, WI 53708-8935

IT IS FURTHER ORDERED that Dr. Bakke shall pay any and all costs associated with his educational program and monitoring. Dr. Bakke shall make payment to the Marquette University School of Dentistry (Marquette) in accordance with a payment schedule established by Marquette.

IT IS FURTHER ORDERED that the assessable costs of this proceeding be imposed upon Niles Bakke, D.D.S., pursuant to §440.22, Wis. Stats.

EXPLANATION OF VARIANCE

Following its review of the Proposed Decision, the Board voted to accept the Findings of Fact. However, a minor modification was made to Paragraph VIII of the Conclusions of Law. Paragraph VIII originally cited sec. 447.07 (3), Wis. Stats. and sec. DE 5.02, Wis. Admin. Code. Because those citations suggest a far broader range of conduct than was alleged in the Complaint or proved at the hearing, Paragraph VIII has been amended to narrow the scope of the actual violations. Indeed, Paragraphs III-VII of the Conclusions of Law refer to a "substantial departure from the standard of care ordinarily exercised by a dentist" and "unacceptable risks of cross-contamination and the transmission of infectious diseases to a patient" such that citations to sec. 447.07 (3) (a), Wis. Stats. and sec. DE 5.02 (5), Wis. Admin. Code, which afford a greater measure of specificity, are more appropriate.

Because Dr. Bakke was found to have substantially departed from the standard of care ordinarily exercised by a dentist in violation of the dental practice act, he is also subject to discipline by the Board. It is well established that the

objectives of professional discipline include the following: (1) to promote the rehabilitation of the licensee; (2) to protect the public; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 209, 237 N.W.2d 689 (1976). Punishment of the licensee is not an appropriate consideration. *State v. MacIntyre*, 41 Wis. 2d 481, 485, 164 N.W.2d 235 (1969).

After reviewing a proposal by Dr. Bakke's counsel, to which the prosecution did not object, the Board also voted to modify the Order contained in the Proposed Decision. Although Dr. Bakke appeared *pro se* at his disciplinary hearing, he subsequently retained legal counsel. Both he and his attorney appeared before the Dentistry Examining Board (Board) at its meeting on January 8, 2003. At that meeting Dr. Bakke presented a proposal to the Board intended to address the deficiencies in his dental/orthodontic practice. The proposed program was developed by Dr. Elisa Sampson, an associate professor within the Department of General Dental Sciences at the Marquette University School of Dentistry, and focuses on infection control and the OSHA bloodborne pathogens standard. It contains two main components, an academic one and one that addresses Dr. Bakke's clinical practice.

The academic program is designed to evaluate and improve Dr. Bakke's understanding of several matters including infectious diseases as seen in dentistry, the risks to patients and dental staff of bloodborne and other infectious diseases, the possible consequences of those risks, and the safeguards and procedures that must be followed to reduce them. Dr. Bakke took the initiative to seek out such a program. In so doing, he has demonstrated a willingness to obtain personalized training that is tailored to his needs and one that will serve to improve his deficiencies in this area. As part of the program, he will be required to demonstrate his competency through written tests. He will also need to demonstrate his competency in his clinical practice.

While Dr. Bakke is engaged in his coursework with Dr. Sampson, he will be prevented from working in his private practice. As a result, he will be effectively suspended from working as a dentist in a private practice setting until he is able to successfully complete the coursework. Once Dr. Bakke has completed his coursework to the satisfaction of Dr. Sampson, she will continue to monitor him in his private practice over a twelve month period, thereby providing continuity between the educational component and the clinical one. In order to accomplish that end, Dr. Bakke will supply Dr. Sampson with a monthly schedule of his patients. Dr. Sampson will then be able to make random, unannounced visits to his practice so that she can observe him actively treating patients. At the conclusion of each visit, Dr. Sampson will forward written reports to the Board in which she describes the procedures she witnessed and indicates whether or not Dr. Bakke's performance was satisfactory with respect to infection and exposure control.

The combination of an educational program and monitored clinical practice will provide essential reinforcement for Dr. Bakke that infection and exposure control is a fundamental component of any dental/orthodontic practice. Furthermore, the knowledge and understanding that he gains from the academic component of his education will be swiftly implemented into his clinical training and private practice. Such a program is critical for his rehabilitation. Moreover, it provides an adequate measure of protection for his patients and will deter others in the profession from engaging in substandard practices.

Dr. Bakke will also bear the cost of the educational program and monitoring, which shall further serve to underscore the importance of that training. In addition, he will be required to pay the costs of this proceeding.

Section 440.22(2), Stats., provides in relevant part as follows:

In any disciplinary proceedings against a holder of a credential in which the department or an examining board, affiliated credentialing board or board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board, affiliated credentialing board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder. Costs assessed under this subsection are payable to the department.

The presence of the word "may" in the statute is a clear indication that the decision whether to assess the costs of this disciplinary proceeding against a respondent is a discretionary decision on the part of the Dentistry Examining Board, and that the Board's discretion extends to the decision whether to assess the full costs or only a portion of the costs. The Board's

recommendation that the full costs of the proceeding be assessed is based primarily on fairness to other members of the profession.

The Department of Regulation and Licensing is a “program revenue” agency, which means that the costs of its operations are funded by the revenue received from its licensees. Moreover, licensing fees are calculated based upon costs attributable to the regulation of each of the licensed professions and are proportionate to those costs. This budget structure means that the costs of prosecuting cases for a particular licensed profession will be borne by the licensed members of that profession. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the vast majority of the licensees who have not engaged in misconduct. Rather, to the extent that misconduct by a licensee is found to have occurred following a full evidentiary hearing, that licensee should bear the costs of the proceeding.

Dated this 5th day of March, 2003, in Madison, Wisconsin.

STATE OF WISCONSIN

DENTISTRY EXAMINING BOARD

Bruce Barrette

Chair Person