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STATE OF WISCONSIN
BEFORE DENTISTRY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
GERALD GATZKE, DDS,	:	LS0301072DEN
RESPONDENT.	:	

The State of Wisconsin, Dentistry 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, Dentistry 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 2nd day of July, 2003.

Bruce Barrette
Chairperson
Dentistry Examining Board

STATE OF WISCONSIN

BEFORE THE DENTISTRY EXAMINING BOARD

	:	
IN THE MATTER OF	:	
DISCIPLINARY PROCEEDINGS AGAINST	:	PROPOSED DECISION
AGAINST	:	
	:	
GERALD GATZKE, D.D.S.,	:	LS0301072DEN
RESPONDENT	:	

SUMMARY

This is a disciplinary action against Gerald Gatzke, who was alleged (1) to have practiced during a period when he did not hold a current CPR certification and (2) to have used nitrous oxide without a scavenger attachment. The allegations were not disputed by Dr. Gatzke and the formal proceeding was limited to argument over the appropriate discipline to be imposed. Dr. Gatzke is reprimanded for his violation of rules regulating the profession, and ordered to pay the costs of the proceeding.

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
 1400 East Washington Ave.
 Madison, WI 53708-8935

Respondent:

Gerald Gatzke, D.D.S.

127 Broad Street N

Prescott, WI 54021

Disciplinary Authority:

Dentistry Examining Board

1400 East Washington Ave.

Madison, WI 53703

PROCEDURAL HISTORY

A. This case was initiated by the filing of a complaint with the Dentistry Examining Board on January 7, 2003. The Complaint and a Notice of Hearing were prepared by Attorney James Polewski of the Division of Enforcement of the Department of Regulation Licensing and sent to Dr. Gatzke by certified mail.

B. On January 30, 2003, a Motion to Extend Time to Answer was filed by Attorney Warren Lee Brandt, Brandt Law Office, 100 Orange Street, Prescott, WI 54021, and the Answer was filed on February 10, 2003. The Answer admitted all the factual allegations of the Complaint, but raised a number of issues designated Affirmative Defenses.

C. The parties prepared a stipulation to resolve the case. The stipulation was presented to the Dentistry Examining Board on March 5, 2003 but rejected by the Board.

D. Prehearing conferences were held on February 14, March 19 and March 21, 2003. During the final prehearing conference, parties agreed that paragraph 2 of the Answer constitutes an admission of the factual allegations in the Complaint, and that the only contested issue in the case is the appropriate discipline, if any, to be imposed. Mr. Brandt agreed that paragraphs 3 through 8 of Dr. Gatzke's Answer designated "affirmative defenses" were moot and that they could be withdrawn. Written arguments on discipline were ordered, with final submissions due on April 14, 2003.

E. This Proposed Decision is based on the Complaint, the Answer, and the written arguments of the parties on the issue of discipline.

FINDINGS OF FACT

1. The respondent, Gerald O. Gatzke, D.D.S., is licensed to practice dentistry in the state of Wisconsin, under license number 5001698, first issued July 14, 1976.

2. Dr. Gatzke administers nitrous oxide as an anesthetic agent to his patients.

3. Beginning on November 1, 1988, dentists using nitrous oxide in Wisconsin were required to equip their nitrous oxide systems with "scavenger" masks. A scavenger system is necessary to ensure that any waste nitrous oxide is captured and does not accumulate in the dental office and have an adverse effect on the dentist, any other staff members, or any patient.

4. On September 9, 2002, an employee of Marcus Dental Supply examined Dr. Gatzke's nitrous oxide equipment and discovered that no scavenger system was installed. Dr. Gatzke purchased a new MSR flow meter and a scavenger breather circuit, which was installed on his nitrous oxide equipment on September 20, 2002.

5. Beginning on April 1, 1988, dentists practicing in Wisconsin were required to possess a current certificate in cardiopulmonary resuscitation (CPR). From 1997 to 2002, Dr. Gatzke practiced without a current CPR certification. Dr. Gatzke obtained a current CPR certificate in September of 2002.

APPLICABLE STATUTES AND RULES

Statutes

447.07 Disciplinary proceedings.

(1) The examining board may, without further notice or process, limit, suspend or revoke the license or certificate of any dentist or dental hygienist who fails, within 60 days after the mailing of written notice to the dentist's or dental hygienist's last-known address, to renew his or her license or certificate.

(3) Subject to the rules promulgated under s. 440.03 (1), the examining board may make investigations and conduct hearings in regard to any alleged action of any dentist or dental hygienist, or of any other person it has reason to believe is engaged in or has engaged in the practice of dentistry or dental hygiene in this state, and may, on its own motion, or upon complaint in writing, reprimand any dentist or dental hygienist who is licensed or certified under this chapter or deny, limit, suspend or revoke his or her license or certificate if it finds that the dentist or dental hygienist has done any of the following:

(a) Engaged in unprofessional conduct.

...

(7) In addition to or in lieu of a reprimand or denial, limitation, suspension or revocation of a license or certificate under sub. (3), the examining board may assess against an applicant, licensee or certificate holder a forfeiture of not more than \$5,000 for each violation enumerated under sub. (3).

Wisconsin Administrative Code

DE 5.02 Unprofessional conduct.

Unprofessional conduct by a dentist or dental hygienist includes:

(1) Engaging in any practice which constitutes a substantial danger to the health, welfare or safety of a patient or the public.

...

(5) Practicing in a manner which substantially departs from the standard of care ordinarily exercised by a dentist or dental hygienist which harms or could have harmed a patient.

...

(24) Failing to hold a current certificate in cardiopulmonary resuscitation unless the licensee has obtained a waiver from the board based on a medical evaluation documenting physical inability to comply. A waiver shall be issued by the board only if it is satisfied that another person with current certification in CPR is immediately available to the licensee when patients are present.

...

DE 11.11 Office facilities and equipment.

No general anesthesia or sedation may be administered to a patient in a dental office unless the dental office contains: [etc.]

...

(6) (a) For use of nitrous oxide inhalation conscious sedation, the following equipment:

1. Adequate equipment with fail-safe features and a 25% minimum oxygen flow;
2. A system equipped with a "scavenger" mask.

(c) For the purpose of this subsection "nitrous oxide inhalation conscious sedation" means an altered level of consciousness that retains the patient's ability to independently and continuously maintain an airway and respond appropriately to physical stimulation or verbal command produced through the administration by inhalation of a combination of nitrous oxide and oxygen.

...

ANALYSIS

This is a disciplinary proceeding conducted under the authority of ch. 227, Stats. and RL 2, Wis. Admin. Code. The Division of Enforcement in the Department of Regulation and Licensing filed a complaint with the Dentistry Examining Board alleging that the respondent Gerald Gatzke, D.D.S., violated rules regulating the practice of dentistry, specifically, (1) that between the years 1997 and 2002 he failed to maintain current certification for cardio-pulmonary resuscitation (CPR) as required by sec. DE 5.02 (24), Wis. Admin. Code; and (2) between 1988 and 2002 he failed to include a scavenger mask as part of his nitrous oxide system as required by DE 11.11 (6) (a) 2., Wis. Admin. Code. The factual allegations of the complaint were not contested and based upon the admission in Dr. Gatzke's Answer, finding unprofessional conduct are made. The Dentistry Examining Board has the authority under s. 447, Stats., to impose discipline or a forfeiture, or both, upon a licensee who engages in unprofessional conduct.

The only contested issue is the appropriate discipline to be imposed. At one point, the parties prepared a stipulation that would have imposed a reprimand on Dr. Gatzke, along with an order that he pay the partial costs of the action in the amount of \$150, but the stipulation was rejected by the Board. For the purpose of this formal proceeding, the parties in essence stipulated to the facts and to the findings of unprofessional conduct, and presented only written arguments on appropriate discipline. Although settlement offers are typically not disclosed to, or considered by, administrative law judges hearing cases, it is appropriate here to refer to and to consider the Board's previous consideration and rejection of the parties' stipulation.

The recommendation of the prosecuting attorney, James Polewski, is that Dr. Gatzke be reprimanded and ordered to pay the full costs of the proceeding. Mr. Polewski prepared an affidavit of costs for the Division of Enforcement that totals \$1,390.99. To that would be added the costs of the Office of Legal Counsel, which are estimated at this point to total approximately \$200.

Dr. Gatzke's attorney, Warren Brandt, recommended that the terms of the original stipulation be imposed, i.e., that Dr. Gatzke be reprimanded and ordered to pay partial costs in the amount of \$150. Mr. Brandt focused much of his written argument on the history of negotiations with Mr. Polewski, which are in fact moot at this point and not affirmative defenses to the allegations in the complaint. Mr. Brandt also stated that a payment of \$150 has already been tendered by Dr. Gatzke.

In addition to the nature of the alleged offenses themselves, a decision on appropriate discipline may consider any aggravating or mitigating circumstances. Mr. Brandt asserted, and Mr. Polewski did not dispute, that in nearly 26 years of practice, Dr. Gatzke has received no previous complaints or inquiries from the Board, a fact that is worth considering in this decision. Mr. Brandt asserted that the supplier of Dr. Gatzke's nitrous oxide equipment did not inform him of the need for a scavenger mask, but that is not an excuse for Dr. Gatzke from the responsibility of knowing and following the rules for the profession. Mr. Brandt also asserted that Dr. Gatzke took measures to ensure adequate ventilation of his office to avoid the build-up of nitrous oxide. Assuming that this assertion is true -- and it must be recognized that the assertion was not presented in the form of a legally cognizable fact -- Dr. Gatzke demonstrated an understanding of the purpose of the rule requiring scavenger masks, which may in some small measure reduce the conclusion that he engaged in unprofessional conduct, but the rule is straightforward and he failed to follow it.

The purposes of professional discipline have been set forth by the Wisconsin Supreme Court in various cases involving attorneys, such as State v. Kelly, 39 Wis.2d 171, 158 N.W.2d 554 (1968), State v. MacIntyre, 41 Wis.2d 481, 164 N.W.2d 1 (1969), State v. Cory, 51 Wis.2d 124, 186 N.W.2d 325 (1970), State v. Aldrich, 71 Wis.2d 206, 237 N.W.2d 689 (1976), Disciplinary Proc. Against Kelsay, 155 Wis.2d 480, 455 N.W.2d 871 (1990). 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 framework has been adopted by regulatory agencies, including the Department of Regulation and Licensing, for disciplinary proceedings for other professions.

The goal of "rehabilitating" Dr. Gatzke -- in other words, insuring that he will abide by the rules of professional conduct in the future -- has almost certainly been accomplished by this proceeding, and perhaps even by the notice to him in September of 2001 that his nitrous oxide equipment was inadequate and that his CPR certification had lapsed. Aside from the two violations themselves, there is nothing in this record to suggest that Dr. Gatzke will not be more conscientious in the future. The goal of protecting the public from unprofessional conduct by Dr. Gatzke has also already been accomplished by the mere investigation and initiation of disciplinary proceedings. Dr. Gatzke has renewed his CPR certification and he has installed the required equipment on his nitrous oxide system for the protection of persons in his office. The goal of deterring other professionals from similar unprofessional conduct will likely be accomplished by merely informing them of Dr. Gatzke's violations. A reprimand published as a disciplinary action should be sufficient to notify other dentists of the need to maintain CPR certification and to have a scavenger mask for nitrous oxide equipment. More severe discipline should not be necessary to get other professionals to take notice of the need to comply. Nonetheless, the purposes of professional discipline requires more than a reprimand.

Costs.

The assessment of costs against a disciplined professional is authorized by sec. 440.22(2), Wis. Stats. and sec. RL 2.18 Admin. Code. Under those provisions, the Board has the discretion to impose all, some, or none of the costs of the proceeding. Section 440.22(2), Stats., provides in relevant part as follows:

In any disciplinary proceeding 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 the 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 ALJ'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, that licensee should bear the costs of the proceeding.

CONCLUSIONS OF LAW

I. The Dentistry Examining Board is the legal authority responsible for issuing and controlling credentials for dentists, under ch. 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, Stats., and ch. DE 5, Wis. Admin. Code. The Dentistry Examining Board has personal jurisdiction over Dr. Gatzke based on his holding a credential issued by the board, and based on notice under sec. 801.04 (2), Stats.

II. Dr. Gatzke's failure to have his nitrous oxide equipment equipped with a scavenger system was unprofessional conduct in violation of section 447.07 (3) (a), Stats. and sections DE 5.02 (5) and DE 11.11 (6) (a) 2, Wis. Admin. Code.

III. Dr. Gatzke's failure to hold a current certificate in CPR was unprofessional conduct in violation of section 447.07 (3) (a), Stats. and sections DE 5.02 (1) and (24), Wis. Admin. Code.

IV. The violations in II and III above constitute unprofessional conduct, under sec. 447.07, Stats., and discipline is appropriate under sec. 447.07 (3) [(7)], Stats.

ORDER

THEREFORE, IT IS ORDERED that Gerald Gatzke, D.D.S., is REPRIMANDED for his unprofessional conduct.

IT IS FURTHER ORDERED that Gerald Gatzke, D.D.S., pay the costs of this proceeding, and if he fails to pay the costs within 90 days of the date of the cost order, his license may be summarily suspended, under sec. 440.22 (3), Stats. If Dr. Gatzke has already paid a portion of the costs, the balance shall be due within 90 days.

Dated and signed: April 16th, 2003

John N. Schweitzer

Administrative Law Judge

Department of Regulation and Licensing