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STATE OF WISCONSIN
BEFORE THE OPTOMETRY EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST

FINAL DECISION AND ORDER ON MOTION FOR RECONSIDERATION

JEROME E. BECKER, O.D.,
RESPONDENT.

TO: Jerome E. Becker, O.D.
3526 W. Silver Spring Road
Milwaukee, WI 53209

Attorney Gilbert C. Lubcke
Department of Regulation & Licensing
Division of Enforcement
P.O. Box 8935
Madison, Wisconsin 53708

This matter involves a request by Dr. Becker to the Board to reconsider its Final Decision and Order, dated December 6, 1996, in which it reprimanded him for failure to record all required patient information, in violation of s. Opt 5.08, Wis. Adm. Code. The Board's Final Decision and Order, a copy of which was served on Dr. Becker on December 10, 1996, is based upon a Stipulation which he signed on October 3, 1996.

Based upon the record herein, including the legal arguments of the parties, the Board make the following order:

ORDER

NOW THEREFORE, IT IS ORDERED, that the respondent's request for an extension of time to file a motion for reconsideration and respondent's motion for reconsideration be, and hereby is, denied.

DECISION

On December 6, 1996, the Board issued a Final Decision and Order in which it reprimanded Dr. Becker for failure to record all required patient information, in violation of s. Opt 5.08, Wis. Adm. Code. The Board's action is based upon a Stipulation signed by Dr. Becker on October 3, 1996. A copy of the Final Decision and Order was served on Dr. Becker on December 10, 1996. Dr. Becker did not file a request for a rehearing under s. 227.49, Stats., nor a petition for judicial review under s. 227.53, Stats.

In September, 1997, Dr. Becker mailed a 12-page document directly to four optometrists serving on the Board in which he requested that they set aside the Board's Final Decision and Order, dated December 6, 1996. [1]

On October 27, 1997, the Board's Legal Counsel sent a letter to Dr. Becker and the Division of Enforcement outlining the procedure which would be followed by the Board in considering Dr. Becker's request to set aside the Board's Final Decision and Order. Dr. Becker was requested to file a motion for reconsideration, along with an affidavit in support of the motion by November 5, 1997. The Division of Enforcement was requested to file its response and affidavit in support of its position by November 13, 1997. Dr. Becker was requested to file a reply on or before November 20, 1997. Dr. Becker did not file a motion for reconsideration by November 5, 1997; therefore, the Board's Legal Counsel sent a letter to the parties stating that the matter was concluded.

In a letter dated, November 14, 1997, Dr. Becker formally filed a motion for reconsideration with the Board, in which he stated that he did not respond to the October 27, 1997, letter because:

> "it was his belief that no response was necessary. Item #1 in the Oct 27, 1997 letter says a motion for reconsideration will be filed. Becker assumed that the Department of Regulation would file the motion in compliance with Becker's request for such action in his September 21, 1997 letter".

On November 17, 1997, Dr. Becker filed a request for an extension of time to file a motion for reconsideration.

On November 20, 1997, the Division filed its objection to Dr. Becker's request for an extension of time to file a motion for reconsideration. The Division's objection is based upon: 1) Dr. Becker's failure to identify any legal or factual basis upon which the Board could conclude that his failure to comply with the November 5, 1997, deadline was excusable neglect or any other legal or equitable consideration, and 2) the Board does not have jurisdiction to entertain a motion for reconsideration because Dr. Becker failed to file the motion within 20 days of the date of service of the Final Decision and Order, as required under s. 227.49 (1), Stats.

1. The Optometry Examining Board consists of 5 optometrists and 2 public members.

The Board considered Dr. Becker's request for an extension of time to file a motion for reconsideration on December 5, 1997, and voted to deny his request on the basis that it lacks jurisdiction to entertain the motion. The Board's conclusion is based upon the fact that Dr. Becker failed to file a petition for rehearing within 20 days after service of the Final Decision and Order issued by the Board on December 6, 1996, as required under s. 227.49, Stats. [2]

Section 227.49, Stats., read, in part, as follows:

> Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. ...

As a result of Dr. Becker's failure to file a petition for rehearing within 20 days after service of the Board's Final Decision and Order issued in this matter, the Board concludes that it lacks jurisdiction to conduct any further proceedings regarding the matter. *See, Schenkoski v. Labor and Indus. Review Comm., 203 Wis. 2d 109, 552 N.W. 2d 120 (Ct. App. 1996); Milwaukee v. Public Service Comm., 259 Wis. 30, 47 N.W. 2d 298 (1951).*

Based upon the record herein, including the arguments of the parties, the Board makes the Order as set forth above herein.

Dated this 10 day of December, 1997.

Optometry Examining Board

John Bonsett Veal

John Bonsett-Veal, Chairman

2. It should be noted also that in paragraph 2 of the Stipulation, Dr. Becker waived numerous rights including, but not limited to, the right to petition for rehearing.

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
BEFORE THE OPTOMETRY EXAMINING BOARD

In the Matter of the Disciplinary Proceedings Against

Jerome E. Becker, O.D.,

Respondent.

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
)
COUNTY OF DANE)

I, Kate Rotenberg, having been duly sworn on oath, state the following to be true and correct based on my personal knowledge:

1. I am employed by the Wisconsin Department of Regulation and Licensing.

2. On December 11, 1997, I served the Final Decision and Order on Motion for Reconsideration dated December 10, 1997 upon the Respondent Jerome E. Becker, O.D. by enclosing a true and accurate copy of the above-described document in an envelope properly stamped and addressed to the above-named Respondent and placing the envelope in the State of Wisconsin mail system to be mailed by the United States Post Office by certified mail. The certified mail receipt number on the envelope is P 221 157 647.

3. The address used for mailing the Decision is the address that appears in the records of the Department as the Respondent's last-known address and is:

Jerome E. Becker, O.D.
3526 W. Silver Spring Road
Milwaukee WI 53209

Kate Rotenberg
Kate Rotenberg
Department of Regulation and Licensing
Office of Legal Counsel

Subscribed and sworn to before me
this 11th day of December, 1997.

Notary Public, State of Wisconsin
My commission is permanent.

NOTICE OF RIGHTS OF APPEAL

TO: JEROME E BECKER OD

You have been issued a Final Decision and Order. For purposes of service the date of mailing of this Final Decision and Order is 12/11/97 Your rights to request a rehearing and/or judicial review are summarized below and set forth fully in the statutes reprinted on the reverse side.

A. REHEARING.

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in section 227.49 of the Wisconsin Statutes. The 20 day period commences on the day of personal service or the date of mailing of this decision. The date of mailing of this Final Decision is shown above.

A petition for rehearing should name as respondent and be filed with the party identified below.

A petition for rehearing shall specify in detail the grounds for relief sought and supporting authorities. Rehearing will be granted only on the basis of some material error of law, material error of fact, or new evidence sufficiently strong to reverse or modify the Order which could not have been previously discovered by due diligence. The agency may order a rehearing or enter an order disposing of the petition without a hearing. If the agency does not enter an order disposing of the petition within 30 days of the filing of the petition, the petition shall be deemed to have been denied at the end of the 30 day period.

A petition for rehearing is not a prerequisite for judicial review.

B. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in section 227.53, Wisconsin Statutes (copy on reverse side). The petition for judicial review must be filed in circuit court where the petitioner resides, except if the petitioner is a non-resident of the state, the proceedings shall be in the circuit court for Dane County. The petition should name as the respondent the Department, Board, Examining Board, or Affiliated Credentialing Board which issued the Final Decision and Order. A copy of the petition for judicial review must also be served upon the respondent at the address listed below.

A petition for judicial review must be served personally or by certified mail on the respondent and filed with the court within 30 days after service of the Final Decision and Order if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. Courts have held that the right to judicial review of administrative agency decisions is dependent upon strict compliance with the requirements of sec. 227.53 (1) (a), Stats. This statute requires, among other things, that a petition for review be served upon the agency and be filed with the clerk of the circuit court within the applicable thirty day period.

The 30 day period for serving and filing a petition for judicial review commences on the day after personal service or mailing of the Final Decision and Order by the agency, or, if a petition for rehearing has been timely filed, the day after personal service or mailing of a final decision or disposition by the agency of the petition for rehearing, or the day after the final disposition by operation of the law of a petition for rehearing. The date of mailing of this Final Decision and Order is shown above.

The petition shall state the nature of the petitioner's interest, the facts showing that the petitioner is a person aggrieved by the decision, and the grounds specified in section 227.57, Wisconsin Statutes, upon which the petitioner contends that the decision should be reversed or modified. The petition shall be entitled in the name of the person serving it as Petitioner and the Respondent as described below.

SERVE PETITION FOR REHEARING OR JUDICIAL REVIEW ON:

STATE OF WISCONSIN OPTOMETRY EXAMINING BOARD

1400 East Washington Avenue
P.O. Box 8935
Madison WI 53708-8935