FILE COPY

STATE OF WISCONSIN
BEFORE THE OPTOMETRY EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST

FINAL DECISION AND ORDER ON MOTION FOR RECONSIDERATION AND REHEARING

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 10, 1997, in which it denied his request for an extension of time to file a Motion for Reconsideration of its Final Decision and Order, dated, December 6, 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 Motion for* Reconsideration and Rehearing, dated December 15, 1997, 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 was 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 lacked jurisdiction to entertain the motion. The Board's conclusion was 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]

On December 10, 1997, the Board issued a Final Decision and Order on the Motion for Reconsideration. On December 17, 1997, Dr. Becker filed a Petition for Reconsideration of the Board's December 10, 1997, Final Decision and Order.

I. Petition for Reconsideration

The Board's decision to deny Dr. Becker's request for an extension of time to file the initial Motion for Reconsideration was based upon its determination that it lacked jurisdiction to entertain the motion. Since the Board's conclusion remains the same, Dr. Becker's second Petition for Reconsideration should also be denied.

II. Petition for Rehearing

In addition to a request for reconsideration, the Petition filed by Dr. Becker also contains a request for a rehearing of the Board's Final Decision and Order, dated December 10, 1997.

In general, the procedures followed by administrative agencies to determine whether to grant petitions for rehearing are set forth in s. 227.49, Stats. Section 227.49 (5), Stats., states, in part, that an agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed.

Section 227.49 (3), Stats., states that a rehearing will be granted only on the basis of:

> (a) Some material error of law.
> (b) Some material error of fact.
> (c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

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.

Dr. Becker is requesting a rehearing of the Board's December 10, 1997, Final Decision and Order based upon a "material error of law" and "the discovery of new evidence". The Petition is being denied for the following reasons:

First, in reference to any material error of law, no reference is made in the Petition to a material error of law relating to the Board's Final Decision and Order, dated December 10, 1997. Dr. Becker states in his Petition that a material error of law has occurred because he "did not violate Opt 5.08 in any way". In essence, Dr. Becker is alleging that a material error of law occurred in conjunction with the Board's initial Final Decision and Order, dated December 6, 1996. In addition, the Board concludes that it's determination that it lacked jurisdiction to entertain Dr. Becker's Motion for Reconsideration does not constitute a material error of law.

Second, in reference to the discovery of new evidence, the September 21, 1997, letter which Dr. Becker refers to does not constitute "new evidence" discovered since the Board's consideration of this matter on December 5, 1997. In fact, the letter was included in the Board's December 5, 1997, agenda packet as part of Dr. Becker's request for an extension of time to file a Motion for Reconsideration, but was not considered by the Board because the Board concluded that it did not have jurisdiction to entertain the motion.

Third, no hearing has been ever been conducted by the Board in conjunction with this matter; therefore, there is no basis under s. 227.49 (3), Stats., for granting a rehearing. The Board's initial Final Decision and Order, dated December 6, 1996, was based upon a Stipulation signed by the parties. The Board's Final Decision and Order, dated December 10, 1997, was based upon a request by Dr. Becker for an extension of time to file a Motion for Reconsideration.

Based upon the record herein, including the arguments of the parties, the Board makes the Order as set forth above herein. [3]

Dated this 15th day of January, 1998.

Optometry Examining Board

John Bonsett-Veal, Chairman

3. Section 227.53, Stats., states, in part, that if a petition for rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency.

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
BEFORE THE OPTEMETRY 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 January 16, 1998, I served the Final Decision and Order on Motion for Reconsideration and Rehearing dated January 15, 1998 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 221 157 707.

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 16th day of January, 1998.

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 1/16/98. 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