

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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FILE COPY

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

LS9211241MED

THEODORE DUCKERT, R.T.,

Respondent

FINAL DECISION AND ORDER

The parties to this proceeding for the purposes of Wis. Stats. sec. 227 53 are:

Theodore Duckert, R.T.
116 East Vine St.
Milwaukee, WI 53212

State of Wisconsin
Medical Examining Board
1400 East Washington Ave.
Madison, WI 53708

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708

A hearing was conducted in the above-captioned matter on December 18, 1992. Complainant appeared by Attorney John R. Zwieg. Respondent did not appear nor did anyone appear to represent him.

The administrative law judge (hereinafter ALJ) filed his Proposed Decision on January 21, 1993. Mr. Zwieg filed his objections to the Proposed Decision on February 15, 1993. Based on those objections, the ALJ filed his Revised Proposed Decision on February 23, 1993. The board considered the matter on March 25, 1993.

Based upon the entire record in this matter, the Medical Examining Board makes the following Findings of Fact, Conclusions of Law and Order.

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FINDINGS OF FACT

1. Respondent Theodore Duckert is certified to practice respiratory care in the State of Wisconsin, holding certificate number 933, granted on April 29, 1992. His certificate is suspended indefinitely as of November 19, 1992.

2. On December 27, 1991, Mr. Duckert completed and signed his application for a certificate to practice respiratory care in the State of Wisconsin. Mr. Duckert answered "no" to question #11 on the application which reads: "Have you ever received inpatient or outpatient care for mental illness or drug or alcohol abuse?"

3. On November 10, 1992, Investigator Ron Naef visited Mr. Duckert's apartment to obtain medical releases signed by Mr. Duckert. At that time, Mr. Naef was approached by a woman who identified herself as Mr. Duckert's "partner", and who stated that she and her daughter lived with Mr. Duckert. The woman indicated to Mr. Naef that Mr. Duckert had been a drug abuser for a long time, but had been trying to remain clean. She further advised Mr. Naef that Mr. Duckert had gone through the DePaul Rehabilitation Hospital drug treatment program about five years previously and had seen a drug counselor until approximately one year ago when he could no longer afford the counseling.

4. In July and August of 1992, Mr. Duckert was employed as a respiratory care therapist at Columbia Hospital in Milwaukee, Wisconsin. On at least six occasions in August 1992 while he was working as a respiratory care therapist, Mr. Duckert removed morphine, a Class II controlled substance, without medical purpose, from patients' IV drip bags at Columbia Hospital and drank the morphine immediately after stealing it.

5. In April, 1991, Mr. Duckert was employed by the Stein Medical Group of United Professional Companies in Milwaukee, Wisconsin. While so employed, Mr. Duckert diverted patients' drugs, falsified at least one report, and followed inappropriate follow-up protocol.

6. At present, Mr. Duckert cannot safely practice respiratory care involving patient contact or access to controlled substances.

CONCLUSIONS OF LAW

1. The Medical Examining Board has personal jurisdiction over the Respondent, Theodore Duckert, based on his holding a credential issued by the board.

2. The Medical Examining Board has jurisdiction over the subject-matter of this complaint, under sec. 15.08(5)(c), Wis. Stats, and sec. 448.02(3), Wis. Stats, based on the filing of a complaint alleging unprofessional conduct.

3. The respondent, Theodore Duckert, is in default under sec. RL 2.14, Wis Admin. Code, which means that the Board may make findings of fact and enter a disciplinary order on the basis of the complaint and the evidence presented at the hearing.

4. On December 27, 1991, the respondent, Theodore Duckert, made a false statement on his application for a certificate to practice respiratory care, thus violating sec. MED 10.02(2)(c), Wis. Adm. Code. This violation constitutes unprofessional conduct under ch. 448, Wis. Stats.

5. On six occasions in August, 1992, the respondent, Theodore Duckert, obtained a controlled substance other than in the course of legitimate practice, and as prohibited by law. This is a violation of sec. MED 10.02(2)(p), Wis. Admin. Code and it constitutes unprofessional conduct under ch. 448, Wis. Stats.

6. In August 1992 Mr. Duckert practiced respiratory care while unable to do so with reasonable skill and safety. This is a violation of sec. MED 10.02(2)(i), Wis. Admin. Code and it constitutes unprofessional conduct under ch. 448, Wis. Stats.

7. During or prior to April, 1991, while employed as a respiratory therapist by the Stein Medical Group of United Professional Companies in Milwaukee, Wisconsin, the respondent obtained a controlled substance other than in the course of legitimate practice, and as otherwise prohibited by law, in violation of Wis. Admin. Code sec. Med 10.02(2)(p).

ORDER

NOW, THEREFORE, IT IS ORDERED that the certificate to practice respiratory care previously issued to the respondent, Theodore Duckert, be revoked, effective on the date hereof.

IT IS FURTHER ORDERED that the respondent, Theodore Duckert, pay the assessable costs of this proceeding, as authorized by sec. 440.22(2), Wis. Stats. and sec. RL 2.18, Wis. Admin. Code.

EXPLANATION OF VARIANCE

The board has accepted the ALJ's Proposed Decision in substantial part. Variances from his recommendations, and the basis therefore, are as follows:

Finding of Fact #4 of the Proposed Decision states that respondent removed and ingested morphine from patients' drip bags at his place of employment on at least six occasions in August, 1991. The evidence in this matter establishes that these events occurred in August, 1992, and the ALJ's Revised Proposed Decision filed subsequent to Mr. Zwieg's objections recognizes that error.¹

Conclusion of Law #V of the ALJ's Proposed Decision concludes that respondent's removal and ingestion of morphine from patients' drip bags at his place of employment was not unprofessional conduct because it occurred prior to his grant of a certificate. In light of the fact that the events occurred in 1992, following respondent's certification, as reflected by Finding of Fact #4 as revised, this conclusion is modified to reflect that respondent's actions did in fact constitute unprofessional conduct. Again, the ALJ's Revised Proposed Decision is in accord.

Conclusion of Law #VII of the ALJ's Proposed Decision (and of his Revised Proposed Decision) states as follows:

VII. During or prior to April, 1991, the respondent, Theodore Duckert, obtained a controlled substance other than in the course of legitimate practice, and as prohibited by law. This fact is relevant to the imposition of discipline, but it is not a violation of sec. MED 10.02(2)(p), Wis. Admin. Code and it does not constitute unprofessional conduct under ch. 448, Wis. Stats., because Mr. Duckert did not hold a professional credential issued by the Medical Examining Board at the time.

The board has modified this Conclusion of Law to read as follows:

7. During or prior to April, 1991, while employed as a respiratory therapist by the Stein Medical Group of United Professional Companies in Milwaukee, Wisconsin, the respondent obtained a controlled substance other than in the course of legitimate practice, and as otherwise prohibited by law, in violation of Wis. Admin. Code sec. Med 10.02(2)(p).

¹ Given that the administrative law judge probably lost jurisdiction over this proceeding following his original submission to the board, variances set forth herein are from the ALJ's Proposed Decision rather than from his Revised Proposed Decision.

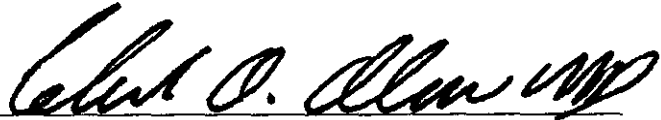
There is nothing in either the Medical Practices Act or in any case law interpreting chapter 448 which would restrict the board in disciplinary matters to consideration only of conduct occurring after licensure. On the contrary, Wis. Stats. sec. 448.06(2) specifically permits the board to deny licensure to an applicant who has, prior to becoming licensed, engaged in unprofessional conduct as defined by Wis. Admin. code ch. 10; and it would be a somewhat absurd result to conclude that unprofessional conduct which would have provided a basis for denial of a license may not provide a basis for disciplinary action against a licensee where the unprofessional conduct is discovered only after licensure has occurred. Such a result would permit an applicant to have engaged with impunity in the most egregious conduct if he or she is able to conceal that conduct from the board until after licensure has occurred.

The decision in *Disciplinary Proceedings Against Rabideau*, 102 Wis. 2d 16 (1991), cited by the ALJ, is inapposite. That case held in relevant part that conduct occurring prior to licensure (or, in that case, admission to the bar) but which was known to the licensing authority at the time licensure was granted, may nonetheless be considered in a later disciplinary action for the purpose of determining appropriate discipline. The case could probably be read to stand for the proposition that such known prior conduct may not provide the sole basis for disciplinary action brought subsequent to licensure, but it may not be read as standing for the proposition that such prior conduct, *if unknown to the licensing authority at the time of licensure*, may not provide the basis for subsequent disciplinary action. Indeed, the court comments "If [prior conduct is] relevant to the question of initial eligibility, such matters may well be relevant to later disciplinary proceedings, due to the bar's continuing interest in the qualifications of its members; the authority to consider such matters is a continuing one." *Rabideau, supra*, at 33.

Dated this 12th day of April, 1993.

STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

by



Clark O. Olsen, M.D.
Secretary

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review,
the times allowed for each, and the identification
of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Medical Examining Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Medical Examining Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Medical Examining Board

The date of mailing of this decision is April 16, 1993.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. 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 the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) 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.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The 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. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

227.52 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employe trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review, by the labor and industry review commission, and except as otherwise provided by law.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) 1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board or the consumer credit review board, the credit union review board or the savings and loan review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b) 1 to 4.

2. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a 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.

3. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59 (6) (b), 182.70 (6) and 182.71 (5) (g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions

for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents.

(c) A copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party's attorney of record. A court may not dismiss the proceeding for review solely because of a failure to serve a copy of the petition upon a party or the party's attorney of record unless the petitioner fails to serve a person listed as a party for purposes of review in the agency's decision under s. 227.47 or the person's attorney of record.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review board) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

| | | |
|----------------------------------|---|--------------------------------|
| IN THE MATTER OF | : | |
| DISCIPLINARY PROCEEDINGS AGAINST | : | AFFIDAVIT OF COSTS OF |
| | : | OFFICE OF BOARD LEGAL SERVICES |
| THEODORE DUCKERT, R.T., | : | Case No. LS-9211241-MED |
| RESPONDENT. | : | |

John N. Schweitzer affirms the following before a notary public for use in this action, subject to the penalties for perjury in sec. 946.31, Wis. Stats.:

1. I am an attorney licensed to practice law in the State of Wisconsin, and am employed by the Wisconsin Department of Regulation and Licensing, Office of Board Legal Services.
2. In the course of my employment, I was assigned as the administrative law judge in the above-captioned matter.
3. I failed to keep records of my time spent on this matter, and although approximately five hours were spent writing the decision, I can reconstruct with certainty only the hearing itself. Therefore, the verifiable costs of the proceeding for the Office of Board Legal Services in this matter are set out below:

| | |
|---|--------------------|
| a. Administrative Law Judge Expense - John N. Schweitzer | |
| Conduct hearing, 12/18/92 (1 hour @ \$23.80/hour = <u>\$23.80</u> | |
| b. Reporter Expense - Magne-Script, 112 Lathrop Street, Madison, WI | |
| Record hearing | \$ 75.00 |
| Transcribe hearings | \$ 112.20 |
| Total reporter expense | = <u>\$187.20</u> |
| Total costs for Office of Board Legal Services | = <u>\$ 211.00</u> |



John N. Schweitzer
Administrative Law Judge

Sworn to and signed before me this 27th day of January, 1992.

Loretta J. Jurek, Notary Public, State of Wisconsin.

My commission 11-6-94.

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

| | | |
|-----------------------------------|---|---------------------|
| IN THE MATTER OF THE DISCIPLINARY | : | |
| PROCEEDINGS AGAINST | : | AFFIDAVIT FOR COSTS |
| | : | LS9211241MED |
| THEODORE DUCKERT, R.T., | : | |
| RESPONDENT. | : | |

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

John R. Zwieg, being duly sworn, deposes and states as follows:

1. That he is an attorney licensed in the state of Wisconsin and is employed by the Wisconsin Department of Regulation and Licensing, Division of Enforcement:

2. That in the course of those duties he was assigned as a prosecutor in the above-captioned matter.

3. That set out below are the costs of the proceeding accrued to the Division of Enforcement in this matter, based upon Division of Enforcement records compiled in the regular course of agency business in the above-captioned matter.

PROSECUTING ATTORNEY EXPENSE

| <u>Date</u> | <u>Activity</u> | <u>Time Spent</u> |
|-------------|--|-------------------|
| 10/19/92 | Review of case with Investigator Naef | 45 min |
| 11/11/92 | Review of further investigative findings with Naef | 1 hr |
| 11/16/92 | Review of file and drafting: Petition for Summary Suspension, Notice of Presentation, and letter to Braatz | 3 hrs, 15 min |
| 11/18/92 | Drafting proposed Order of Summary Suspension | 1 hr, 15 min |
| 11/19/92 | Drafting Affidavit of Service of Notice of Presentation of Petition for Summary Suspension and drafting Disciplinary Complaint | 1 hr, 15 min |
| 11/20/92 | Obtaining administrative law judge, hearing dates and drafting Notice of Hearing | 45 min |
| 12/02/92 | Obtaining RT council co-advisor and conversations with advisor | 30 min |
| 12/02/92 | Telephone conversation with Respondent's "partner" | 15 min |
| 12/02/92 | Drafting letter to Respondent and Stipulation and Final Decision and Order | 1 hr, 15 min |
| 12/02/92 | Evening telephone conversation with Respondent | 20 min |
| 12/03/92 | Correspondence to board advisor and RT council co-advisor | 20 min |
| 12/04/92 | Letter to administrative law judge | 20 min |

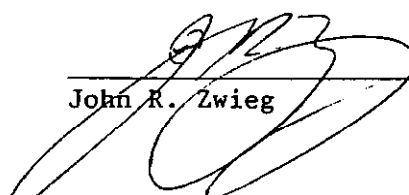
| | | |
|--------------------|--|-----------------------|
| 12/10/92 | Telephone Conversations with Respondent's "partner" and Respondent | 30 min |
| 12/10/92 | Correspondence to Respondent | 15 min |
| 12/16/92 | Correspondence to Braatz | 15 min |
| 12/16/92 | Appearance before MEB presenting Stipulated Resolution conditioned upon receipt of signed Stipulation | 1 hr, |
| 12/18/92 | Obtaining morning mail to find Stipulation from Respondent which had been returned unsigned. Time spent preparing for hearing and at hearing | 2 hrs, 15 min |
| 01/22/93 | Reviewing proposed Decision | 1 hr, |
| 02/10/11 and 12/93 | Research of law and drafting objections to proposed Decision | 6 hrs, 30 min |
| 02/24/93 | Review of revised proposed Decision | 30 min |
| 03/09/93 | Correspondence to Braatz regarding revised proposed Decision | 45 min |
| | TOTAL HOURS | 24 hrs, 15 min |

Total attorney expense for 24 hours and 15 minutes at \$30.00 per hour (based upon average salary and benefits for Division of Enforcement attorneys) equals: \$727.50

MISCELLANEOUS DISBURSEMENTS

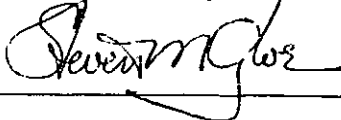
None

TOTAL ASSESSABLE COSTS **\$727.50**



John R. Zwieg

Subscribed and sworn to before me this 2nd day of June, 1993.



Notary Public
My Commission is permanent.

JRZ:ske
DOEATTY-2547