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STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY
PROCEEDINGS AGAINST

RICHARD D. ESENBERG, D.C.,
RESPONDENT.

DECISION AND ORDER ON
MOTION FOR REHEARING
AND MODIFYING FINAL
DECISION AND ORDER
Case No. LS-9510241-CHI

PARTIES

The parties in this matter under § 227.44, Stats., and for purposes of review under § 227.53, Stats., are:

Richard D. Esenberg, D.C.
106 East Riverview Drive
Jefferson, WI 53549

Chiropractic Examining Board
P.O. Box 8935
Madison, WI 53708-8935

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

DECISION

On November 14, 1996, the Chiropractic Examining Board issued and served its Final Decision and Order in the above captioned matter. The Final Decision and Order was served upon the Respondent on November 18, 1996. The Final Decision and Order imposed a revocation of the license to practice chiropractic in the state of Wisconsin of Dr. Richard D. Esenberg, D.C. for a minimum period of one year, effective on the date of the order, November 14, 1996.

On December 6, 1996, Respondent filed a petition for rehearing pursuant to sec. 227.49, Stats., alleging that the delay from May 23, 1996 when the Board made its final Decision and Order modifying the proposed decision of the ALJ, to November 14, 1996 when its written decision and explanation of variance was issued, constituted an unreasonable delay and operated to impose a greater period of revocation of Dr. Esenberg's license, and therefore denied him due process of law.

Dr. Esenberg's license had been previously summarily suspended by the board on October 24, 1995 for having practiced chiropractic without professional liability insurance coverage as required by sec. 446.02(8), Stats., and Chir 3.07, Wis. Adm. Code. This disciplinary action was commenced upon issuance of the summary suspension order. The Order of Summary Suspension provided that Dr. Esenberg could obtain reinstatement of his license at any time upon submitting to the Board satisfactory evidence of professional liability insurance coverage in compliance with Chir 3.07, Code. Since the date of that Summary Suspension Order, Dr. Esenberg has not sought reinstatement of his license, by his own choice, and not by any action of the Board, or operation of the Summary Suspension Order or the pending disciplinary action.

In the proposed decision in this disciplinary action, the ALJ had recommended a one year suspension of license, in effect retroactive to the date that Dr. Esenberg's license had been summarily suspended. Dr. Esenberg argued in support of adoption of that recommendation by the Board. In its Final Decision and Order, the Board modified the proposed decision of the ALJ and decided to impose upon Dr. Esenberg a minimum one year revocation of license, together with a number of conditions for consideration of an application for relicensure. However, the Board declined to allow credit against the minimum one year period of revocation for the time Dr. Esenberg's license remained summarily suspended, since, as stated above, reinstatement of his license was essentially in Dr. Esenberg's hands, and he had chosen of his own accord not to seek reinstatement during the pendency of the disciplinary action.

In his motion for rehearing, Dr. Esenberg argues that the delay in the issuance of the written Final Decision and Order of the Board operated to impose a greater period of revocation than contemplated by the Board. Dr. Esenberg states that once he was orally informed in May 1996 of the Board's decision to revoke his license for a minimum period of one year, anticipating the Board's decision to be forthcoming, he then chose not to seek reinstatement of his license only to have it soon revoked upon issuance of the Board's written Order. Thus he argues, in conjunction with the delay in issuance of the Board's written order, effectively lengthened the period of revocation. Dr. Esenberg's contention that the Board violated his rights is misplaced because Dr. Esenberg had chosen of his own accord to not seek reinstatement of his license following his summary suspension, and for the duration of the pending disciplinary action. It appears also that Dr. Esenberg was unreasonably counting on the Board to necessarily accept the ALJ's recommended order of discipline. He now charges that the Board has violated his due process rights because of the delay in the issuance of the order of revocation which did not grant credit for the period of time he chose to allow his license to remain suspended. It was only by Dr. Esenberg's chosen course of action and assumptions that he remained in suspended status up to the date of issuance of the Final Order, not by any action of the Board. Had Dr. Esenberg chosen to reinstate his license following the summary suspension order, he would have been able to resume and continue in practice until a final decision and order in the disciplinary action was to be issued, and he would not have been subjected to any greater period without a license than actually ordered by the Board. In any event, the simple fact is that the Final Order imposed a revocation of a minimum period of one year effective upon issuance of the order, and no matter when issued, could not and does not impose any thing more than what its terms provide.

Under sec. 227.49, Stats., a petition for rehearing must show a material error of law, a material error of fact, or the discovery of new evidence sufficiently strong to reverse or modify the order and which could not have been previously discovered by due diligence. Dr. Esenberg has not alleged any material error of fact, but contends that the delay in issuance of the Board's final decision amounts to a mistake of law, or in the alternative, discovery of new evidence.

The Board concludes that Dr. Esenberg has not shown grounds for rehearing as required in sec. 227.49, Stats. Dr. Esenberg has not alleged any material error of fact, nor has he shown any material error of law upon which the Board based its decision to revoke his license. The Board also rejects Dr. Esenberg's contention that the delay in issuance of the written decision amounts to a material error of law, or alternatively, discovery of new evidence sufficiently strong to reverse or modify the order and which could not have been discovered by due diligence. The fact that Dr. Esenberg's license remained in suspended status following the summary suspension order up until the Board's written final decision was issued was a matter of his own chosen course of action. Had Dr. Esenberg exercised due diligence, he could have had his license reinstated at any time and been practicing up until the effective date of the Board's order of revocation. Thus it is Dr. Esenberg's own doing that upon issuance of the Board's written final decision that he has suffered in effect a "greater period of revocation than the Board ordered," as he contends.

Therefore, the Board concludes that the delay in the issuance of the written final decision and order modifying the ALJ's proposed decision does not constitute a material error of law upon which the Board's decision was based, nor does it constitute discovery of new evidence sufficiently strong to reverse or modify the order which could not have been previously discovered by due diligence on Dr. Esenberg's part. Accordingly, the Board denies Dr. Esenberg's motion for rehearing on the grounds alleged, and concludes that the delay in the issuance of the Board's final decision and order did not operate to violate his due process rights.

That being said, the Board nevertheless has determined, based upon the entire record in this matter and the equities of the circumstances, to modify the Board's revocation order to make the revocation of license effective upon the date the Board rendered its decision, May 23, 1996. The period of revocation remains the same, that is, for a minimum period of one year. Pursuant to this modification, Dr. Esenberg may petition for, and the Board would consider, relicensure on or after May 23, 1997. All other terms and conditions remain in full force and effect. The remaining provisions of the Order adequately safeguard the interests of protection of the public, deterrence, and rehabilitation of Dr. Esenberg. As provided in the order, in conjunction with any petition for relicensure, Dr. Esenberg would have to, at a minimum, provide and demonstrate evidence satisfactory to the Board of compliance with all terms and conditions of his criminal probation; a written report from his treating physician of a complete evaluation within 30 days of any petition or application for relicensure, including diagnosis and recommendations for treatment concerning Dr. Esenberg's condition of manic depression and/or bipolar disorder; fulfillment of all continuing education requirements as applicable; retraining satisfactory to the

Board in the taking and developing of clinically sufficient radiographs; and satisfactory proof of professional liability insurance coverage in compliance with the statutes and rules applicable to the practice of chiropractic in the state of Wisconsin.

Accordingly, the Board makes the following order:

ORDER

1. The petition of Dr. Esenberg for rehearing under the terms of sec. 227.49, Stats., is denied.

2. The Final Decision and Order dated November 14, 1996 in the above captioned matter is hereby modified as follows.

a. The first paragraph of the Order, page 5, is modified to read:

“NOW, THEREFORE, IT IS ORDERED that effective May 23, 1996, the license of Richard D. Esenberg to practice as a chiropractor in the state of Wisconsin, license #1695, be and hereby is, **REVOKED FOR A MINIMUM PERIOD OF ONE YEAR.”**

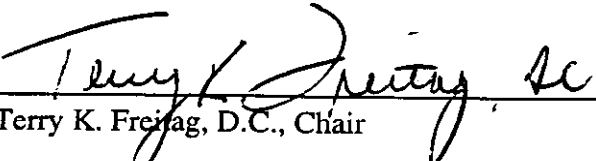
b. Paragraph number “1.”, page 5, of the Order is modified to read:

“1. The Board shall not consider a petition or application for relicensure by the Respondent until after one year following the effective date of the revocation of Respondent’s license to practice chiropractic.”

3. All other terms and conditions of the Final Decision and Order dated November 14, 1996 in the above captioned matter shall remain in full force and effect as provided in said Order.

Dated: 12-27-96

Wisconsin Chiropractic Examining Board


Terry K. Freitag, D.C., Chair

STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY
PROCEEDINGS AGAINST

PETITION FOR REHEARING
CASE NO. LS-9510241-CHI

RICHARD D. ESENBERG, D.C.,
RESPONDENT.

RESPONDENT, RICHARD D. ESENBERG, D.C., by his attorneys, NEUBERGER, LORENZ, GRIGGS & SWEET, by ANDREW R. GRIGGS, hereby petitions the Chiropractic Examining Board for a rehearing pursuant to §227.49, Wis. Stats. The basis for this rehearing is that a material error of law was made, or in the alternative, new evidence has been discovered which is sufficiently strong to reverse or modify the order. The basis of the error of law, or in the alternative, the new evidence is set forth as follows:

1. On May 23, 1996, oral argument was heard by the Chiropractic Examining Board wherein the Division of Enforcement of the Department of Regulation and Licensing by its attorney, Peter Sammataro, argued against the proposed decision of Administrative Law Judge Ruby Jefferson-Moore. At the same hearing Richard D. Esenberg, D.C., by his attorney, Andrew R. Griggs, argued in favor of the decision made by Administrative Law Judge Ruby Jefferson-Moore.
2. Within one week of the May 23, 1996, hearing, before the Chiropractic Examining Board, Respondent's attorney, Andrew R. Griggs, was informed that the Chiropractic Examining Board had rendered its decision which in part revoked Dr. Esenberg's chiropractic license for a period of one year following the issuance of the Chiropractic Examining Board's order.
3. Expecting a written decision and order to be forthcoming from the Chiropractic Examining Board, Dr. Esenberg chose not to reinstate his license only to have the license subsequently revoked.
4. The Chiropractic Examining Board unreasonably delayed in rendering its written final decision and order for nearly six months following the May 23, 1996, hearing, and did not render

a written decision until November 14, 1996, and said written decision was not mailed to Respondent until November 18, 1996.

5. Said delay was unreasonable, and has had the effect of revoking Dr. Esenberg's license for nearly six months beyond that which was originally contemplated by the Chiropractic Examining Board.
6. The delay on the part of the Chiropractic Examining Board amounted to a denial of due process. The cardinal test for the presence or absence of "due process" of law in administrative proceedings is the presence or absence of rudiments of fair play long known to the law. State ex rel. Madison Airport Co. vs. Wrabetz, 231 Wis. 147, 285 N.W. 504 (1939). The delay in rendering its written decision thus causing approximately six months of additional license revocation for the Respondent amounts to a denial of due process and fair play according to law.

WHEREFORE, Respondent, Richard D. Esenberg, D.C., respectfully requests a rehearing wherein Dr. Esenberg petitions the Chiropractic Examining Board to consider the final decision and order revoking Respondent's chiropractic license for one year, to be effective May 23, 1996, allowing Respondent to petition for the reinstatement of his license on or about May 23, 1997.

Respectfully submitted this 6th day of December, 1996.

NEUBERGER, LORENZ, GRIGGS & SWEET
Attorneys for Respondent

By: _____

Andrew R. Griggs
Andrew R. Griggs (SB#1008913)
136 Hospital Drive
Watertown, WI 53098-3338
(414) 261-1630
(414) 261-0339 FAX

I certify that on 12/6/96, I served the within document on the following person(s) or firm(s) by mail pursuant to Sec. 801.14, Wis. Stats.

Grace Bentzen
To: Richard D. Esenberg, D.C.
Chiropractic Examining Board (by certified mail)
Department of Regulation and Licensing Division
of Enforcement (by certified mail)

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.

Serve Petition for Rehearing or Judicial Review on:

STATE OF WISCONSIN CHIROPRACTIC EXAMINING BOARD

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

The Date of Mailing this Decision is:

January 16, 1997

1. 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 sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

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

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision 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.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)