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STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY	:		FINAL DECISION
PROCEEDINGS AGAINST	:		AND ORDER
	:		
RICHARD D. TURCOTT, M.D.,	:		LS0502031MED
RESPONDENT.	:		

Division of Enforcement Case No. 03MED487

The State of Wisconsin, Medical 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, Medical Examining Board.

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 17th day of August, 2005.

Alfred L. Franger, MD
Member of the Board
Medical Examining Board

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST
RICHARD D. TURCOTT, M.D.,
RESPONDENT

:
:
:
:
:
:
**MEMORANDUM OF
DECISION GRANTING
MOTION TO DISMISS**
Case #LS-0502031-MED

To: Attorney Kathleen E. Bonville
735 North Water Street
Suite 1400
Milwaukee, Wisconsin 53202-4267

Attorney James Polewski
Division of Enforcement
Department of Regulation and Licensing
1400 E. Washington Ave.
Madison, WI 53708-8935

A hearing was held on June 16, 2005 on the Respondent's Motion to Dismiss. Participating were Kathleen Bonville, attorney for the respondent, James Polewski, attorney for the complainant, and the undersigned administrative law judge.

The Respondent is seeking dismissal of the complaint based upon an alleged violation of the Statute of Limitations established in Wis. Stat. §448.02(3)(cm). The legislature has imposed a statute of limitations on the commencement of discipline proceedings against physicians of one year after "initiating an investigation of an allegation involving the death of a patient." The legislature has provided a mechanism for the secretary to extend the period under certain conditions. All parties agree that no extension of time was sought or granted in this matter.

The timeline of this matter is undisputed.

12/29/03	A complaint was received by the Department and assigned a tracking number of 03 MED 487.
01/16/04	Correspondence was generated from the Department to the respondent informing him of the receipt of the complaint and seeking information about the underlying circumstances.
01/22/04	The Respondent mailed a written response to the Jan. 16 correspondence.
01/23/04	The medical records of the patient were certified and sent to the Department.
03/16/04	The Medical Examining Board Screening Panel reviewed the complaint and associated material. The Panel "opened" the matter for investigation.
07/16/04	Attorney Polewski made an offer of settlement and indicated that if it was not accepted by August 16, 2004 a formal disciplinary matter would be started.
02/03/05	A formal complaint and notice of hearing were filed and mailed to the Respondent.

ISSUES

1. Which of two dates marks the initiation of the Board's investigation in this matter: January 16, 2004 or March 16, 2004?
2. Is this disciplinary action legally barred by the "statute of limitations" in sec. 448.02 (3) (cm), Stats., which says that "the [Medical Examining B]oard may initiate disciplinary action against a physician no later than one year after initiating an investigation of an allegation involving the death of a patient."

FINDINGS OF FACT

1. The respondent, Richard Turcott, is licensed to practice medicine and surgery in the state of Wisconsin, under license number 18690.
2. Respondent provided care to a patient who died in November 2002.
3. On December 29, 2003, the Department of Regulation and Licensing received an informal citizen complaint involving the death of the patient.
4. On January 16, 2004, the Division of Enforcement in the Department sent a letter to the respondent, Dr. Turcott, requesting information related to the complaint. The letter said "The Wisconsin Medical Examining Board...has requested that we review complaint concerning (Patient) that has been filed against you ..." The letter requested two items;

A written narrative detailing the treatment you provided to this patient.

Certified copies of all treatment records from 11-01-2003 to 11-28-2003 regarding your treatment of (Patient)
(Emphasis in the original)

5. On March 16, 2004, the Division of Enforcement presented the case against Respondent to a screening panel of the Medical Examining Board, and the screening panel opened it for investigation.

6. The formal disciplinary case was initiated by the filing of a Complaint on February 3, 2005. February 3, 2005 was 10 months and 19 days after March 16, 2004, and 12 months and 19 days after January 16, 2004.

7. The investigation of this matter by the Division of Enforcement on behalf of the Medical Examining Board commenced on January 16, 2004. The formal complaint was filed more than a year after the initiation of the investigation.

STATUTES AND RULES

15.40 Department of regulation and licensing; creation.

There is created a department of regulation and licensing under the direction and supervision of the secretary of regulation and licensing.

15.405 Same; attached boards and examining boards.

...

(7) Medical examining board.

(a) There is created a medical examining board in the department of regulation and licensing.

(b) The medical examining board shall consist of the following members appointed for staggered 4-year terms:

1. Nine licensed doctors of medicine.

2. One licensed doctor of osteopathy.

3. Three public members.

(c) The chairperson of the patients compensation fund peer review council under s. 655.275 shall serve as a nonvoting member of the medical examining board.

...

440.035 General duties of examining boards and affiliated credentialing boards.

Each examining board or affiliated credentialing board attached to the department or an examining board shall:

(1) Independently exercise its powers, duties and functions prescribed by law with regard to rule-making, credentialing and regulation.

(2) Be the supervising authority of all personnel, other than shared personnel, engaged in the review, investigation or handling of information regarding qualifications of applicants for credentials, examination questions and answers, accreditation, related investigations and disciplinary matters affecting persons who are credentialed by the examining board or affiliated credentialing board, or in the establishing of regulatory policy or the exercise of administrative discretion with regard to the qualifications or discipline of applicants or persons who are credentialed by the examining board, affiliated credentialing board or accreditation.

...

440.03 General duties and powers of the department.

(1) The department may promulgate rules defining uniform procedures to be used by the department, the real estate board, the real estate appraisers board, and all examining boards and affiliated credentialing boards attached to the department or an examining board, for receiving, filing and investigating complaints, for commencing disciplinary proceedings and for conducting hearings.

(1m) The department may promulgate rules specifying the number of business days within which the department or any examining board or affiliated credentialing board in the department must review and make a determination on an application for a permit, as defined in s. 560.41 (2), that is issued under chs. 440 to 480.

(2) The department may provide examination development services, consultation and technical assistance to other state agencies, federal agencies, counties, cities, villages, towns, national or regional organizations of state credentialing agencies, similar credentialing agencies in other states, national or regional accrediting associations, and nonprofit organizations. The

department may charge a fee sufficient to reimburse the department for the costs of providing such services. In this subsection, "nonprofit organization" means a nonprofit corporation as defined in s. 181.0103 (17), and an organization exempt from tax under 26 U.S.C. § 501.

(3) If the secretary reorganizes the department, no modification may be made in the powers and responsibilities of the examining boards or affiliated credentialing boards attached to the department or an examining board under s. 15.405 or 15.406.

(3m) The department may investigate complaints made against a person who has been issued a credential under chs. 440 to 480.

440.04 Duties of the secretary.

The secretary shall:

(1) Centralize, at the capital and in such district offices as the operations of the department and the attached examining boards and affiliated credentialing boards require, the routine housekeeping functions required by the department, the examining boards and the affiliated credentialing boards.

(2) Provide the bookkeeping, payroll, accounting and personnel advisory services required by the department and the legal services, except for representation in court proceedings and the preparation of formal legal opinions, required by the attached examining boards and affiliated credentialing boards.

...

448.02 Authority. [This statutory section applies to the Medical Examining Board.]

...

(3) Investigation; hearing; action.

(a) The board shall investigate allegations of unprofessional conduct and negligence in treatment by persons holding a license, certificate or limited permit granted by the board. An allegation that a physician has violated s. 253.10 (3), 448.30 or 450.13

(2) or has failed to mail or present a medical certification required under s. 69.18 (2) within 21 days after the pronouncement of death of the person who is the subject of the required certificate or that a physician has failed at least 6 times within a 6-month period to mail or present a medical certificate required under s. 69.18 (2) within 6 days after the pronouncement of death of the person who is the subject of the required certificate is an allegation of unprofessional conduct. Information contained in reports filed with the board under s. 49.45 (2)(a) 12r., 50.36 (3)(b), 609.17 or 632.715, or under 42 C.F.R. § 1001.2005, shall be investigated by the board. Information contained in a report filed with the board under s. 655.045 (1), as created by 1985 Wisconsin Act 29, which is not a finding of negligence or in a report filed with the board under s. 50.36 (3)

(c) may, within the discretion of the board, be used as the basis of an investigation of a person named in the report. The board may require a person holding a license, certificate or limited permit to undergo and may consider the results of one or more physical, mental or professional competency examinations if the board believes that the results of any such examinations may be useful to the board in conducting its investigation.

...

(cm) The board may initiate disciplinary action against a physician no later than one year after initiating an investigation of an allegation involving the death of a patient and no later than 3 years after initiating an investigation of any other allegation, unless the board shows to the satisfaction of the secretary that a specified extension of time is necessary for the board to determine whether a physician is guilty of unprofessional conduct or negligence in treatment. For purposes of this paragraph, the date that a matter is reopened under sub. (8)(c) is considered the date that an investigation of the matter is initiated.

...

RL 2.20 Extension of time limits in disciplinary actions

(1) **AUTHORITY AND PURPOSE.** The rules in this section are adopted under the authority of ss. 15.08(5)(b), 227.11(2) and 448.02(3)(cm). Stats., to govern the extension of time limits in disciplinary actions against physicians.

(2) **COMPUTING TIME LIMITS.** In computing time limits under s. 448.02(3)(cm), Stats., the date of initiating an investigation shall be the date of the decision to commence an investigation of an informal complaint following the screening of the informal complaint under s. RL 2.035, except that if the decision to commence an investigation of an informal complaint is made more than 45 days after the date of receipt of the informal complaint in the division, or if no screening of the informal complaint is conducted, the time for initiating an investigation shall commence 45 days after the date of receipt of the informal

complaint in the division. The date that the medical examining board initiates a disciplinary action shall be the date that a disciplinary proceeding is commenced under s. RL 2.04.

RL 2.035 Receiving informal complaints. [This administrative code section applies to the Division of Enforcement in the Department.]

All informal complaints received shall be referred to the division for filing, screening and, if necessary, investigation. Screening shall be done by the disciplinary authority, or, if the disciplinary authority directs, by a disciplinary authority member or the division. In this section, screening is a preliminary review of complaints to determine whether an investigation is necessary.

Considerations in screening include, but are not limited to:

- (1) Whether the person complained against is licensed;
- (2) Whether the violation alleged is a fee dispute;
- (3) Whether the matter alleged, if taken as a whole, is trivial; and
- (4) Whether the matter alleged is a violation of any statute, rule or standard of practice.

[emphasis added in all of the above statutes and rules by underlining]

ANALYSIS

The issues to be decided are not complex. Which of two dates establish the initiation of the Board's investigation in this matter: January 16, 2004 or March 16, 2004? The inquiry involves an interpretation of the statutes and rules defining the various roles and responsibilities of the Department and the Board.

The answer to the first fact question dictates the answer to the legal question of whether this disciplinary action is legally barred by the "statute of limitations" in sec. 448.02 (3) (cm), Stats., which says that "the [Medical Examining B]oard may initiate disciplinary action against a physician no later than one year after initiating an investigation of an allegation involving the death of a patient." (A "statute of limitation" is a legal term for a law that sets a time period following which a certain type of action may not be brought.)

Counsel for the Respondent, argues that January 16, 2004 was the date on which the one-year statute of limitations began to run, that being the date on which the Division of Enforcement began its investigation. Counsel for the Department's Division of Enforcement, argues that March 16, 2004 is the relevant date, that being the date on which a screening panel of the Board received the prepared case for screening and made the decision to open it "for investigation".

The statutes that create and define the Department (sections 15.50, 440.03 and 440.04) and the Medical Examining Board (15.405 and 448.02) grant to both of them the authority to investigate complaints against licensees. The statutes do not determine whether an investigation such as that initiated by the Division of Enforcement on January 16, 2004 was the Department's or the Board's, because the statutes permit both entities to investigate. The statement "The Wisconsin Medical Examining Board...has requested that we review a complaint concerning (Patient) that has been filed against you..." is evidence, though not conclusive evidence, that it was the Board's investigation.

The Division of Enforcement initially argued that the administrative rule RL 2.20 sets out the rule for computing the time limit. This rule was created in March 2004 and became effective in April 2004. In their Response Brief, the Division argues that RL 2.20 sets the date of initiation of investigation as February 12, 2004. They rely upon a calculation of 45 days after the receipt of the informal complaint.

The Respondent rebutted this argument. Respondent cites the case of Gutter v. Seamandel, 103 Wis. 2d 1, 308 N.W.2d 721 (1999) for the proposition that when rules of limitation are amended, the new rule is prospective only, that is, applies to acts accruing after the effective day of the new rule. Respondent's argument is persuasive. The case cited restates the provisions of Stat. § 990.06. Thus both the courts and the legislature have indicated that changes in periods of limitations, such as those reflected in the adoption of RL 2.20 can not be retroactively applied to causes of action that are already in existence. The legislature has made it clear that the provisions of §990.06 are applicable to interpretations of administrative rules.

227.27 Construction of administrative rules.

- 1) In construing rules, ss. 990.001, 990.01, 990.03 (1), (2) and (4), 990.04 and 990.06 apply in the same manner in which they apply to statutes, except that ss. 990.001 and 990.01 do not apply if the construction would produce a result that is inconsistent with the manifest intent of the agency.

990.06 Repeal or change of law limiting time for bringing actions.

In any case when a limitation or period of time prescribed in any act which shall be repealed for the acquiring of any right

barring of any remedy, or for any other purpose shall have begun to run before such repeal and the repealing act shall provide any limitation or period of time for such purpose, such latter limitation or period shall apply only to such rights or remedies shall accrue subsequently to the time when the repealing act shall take effect, and the act repealed shall be held to continue in force and be operative to determine all such limitations and periods of time which shall have previously begun to run unless such repealing act shall otherwise expressly provide.

The argument expressed in the Response Brief by the Division of Enforcement is not supported by the law and may be discarded. At the motion hearing, the Division of Enforcement presented a different argument. The prosecuting attorney asserted that in the absence of a legislative or administrative definition of the method for determining the date of initiation of investigation, the provisions of RL 2.035 become applicable.

RL 2.035 is the administrative rule that controls the handling of complaints in the Department. That section says investigation follows screening, a screening decision should be based only on the informal complaint, and there should be no investigation prior to screening. This provides support for the prosecutors argument that the "investigation" started only after the screening panel opened the case "for investigation", but it begs the question of what to call the work the Division of Enforcement was doing prior to March 16, 2004. Mr. Polewski suggested that this period be called screening. Logically it is easy to see why some collection of basic data is done before screening, i.e. to present the screening panel with enough information upon which to base an informed decision. As a practical matter, the need to collect or verify "basic data" is quite understandable, but the implication that the collection of basic data is not an investigation because it is called something else is troubling. The problem is that, regardless of the language in RL 2.035, some sort of investigation did take place before the case was screened. Although it is always good policy to avoid arbitrary and capricious decisions, there is no specific legal requirement that a pre-investigation be conducted for that purpose, nor is there a statute or rule that designates a pre-investigation done for that purpose as something other than an "investigation".

This attempt to distinguish pre-investigative screening from investigation is further muddled by the nature of the requests made in the January 16, 2004 letter. The Division of Enforcement did not request a summary of the care provided, rather it requested a narrative "detailing the treatment". The Division also requested *certified* copies of *all* treatment records. Certified copies are copies that fulfill the evidentiary requirements for admission into legal proceedings. Such a request is often preparatory to litigation rather than a cursory review. These are substantially investigatory demands.

Most damaging to the position of the Division is the closing paragraph of the January 16, 2004. The division asserts that its failure to respond to this request for information may result in an investigation "which may also consider your failure to respond to this request." Presumably, this is a reference to MED 10.02 (2) (zc).

Med 10.02 Definitions.

(2) The term "unprofessional conduct" is defined to mean and include but not be limited to the following, or aiding or abetting the same:

(zc) After a request by the board, failing to cooperate in a timely manner with the board's investigation of a complaint filed against the credential holder. There is a rebuttable presumption that a credential holder who takes longer than 30 days to respond to a request of the board has not acted in a timely manner. (Emphasis added)

Clearly, the January request was viewed at the time as the Board's investigation. The Respondent was threatened with disciplinary proceedings if he failed to cooperate with the Board's investigation. If the investigation were not commenced until March, the January letter should not have contained any reference to potential discipline under the theory that failure to cooperate with the pre-investigative screening process would be considered failure to cooperate with a Board's investigation.

In response to the January 16, 2004 letter, the Division received certified copies of the medical records and a written detailed narrative of the treatment from the Respondent. The record is devoid of any statement of what further "investigative" steps were taken after the case was "opened for investigation" by the screening panel in March 2004. If the steps taken prior to March 16, 2004 were pre-investigation screening and the steps taken after March 16, 2004 were the investigation, one would expect that there was substantially more investigation after that date than before it. The absence of such evidence is not compelling in and of itself and is worthy of consideration in conjunction with the other factors referred to.

The clear intent of the statutory language in § 448.02 (3) (cm) is to set a time limit to the investigation of certain types of complaints. A major danger of the interpretation urged by Mr. Polewski is that the pre-screening collection of basic data could be extended indefinitely, which could create precisely the situation the statute of limitations was presumably created to avoid: an investigation or "pre-investigation" of indeterminate time. This is supported by the fact that in this case, there is no readily identifiable distinction between the investigation that occurred before and after the screening decision; it involved the same personnel, the same issues, and the same file. In this case, the effect of the screening panel's decision to "open the case for investigation" was really to continue the investigation that was begun on January 16, 2004. It is easy to envision that RL 2.20 was promulgated to provide guidance and to assure that "pre-investigations" do not drone on interminably.

In this case, the informal complaint was received on December 29, 2003, and the screening decision was made more than 30 days later, so the date of initiation of the investigation would have been calculated as February 12, 2004, and since the formal complaint was filed on February 3, 2005, this action would not be barred under the new rule. However, as noted above, the provisions of RL 2.20 do not apply to this case.

The most reasonable interpretation of the activities in this case is that the investigation that was initiated at the request of the Board on January 16, 2004 was the type of investigation the legislature intended to regulate by the passage of § 448.02 (3) (cm) and since the formal complaint was filed more than a year later, the prosecution is barred from pursuing it.

A similar issue has previously been submitted to the Board in the Matter of Disciplinary Proceedings against **Mark C. Boettcher, M.D., Respondent**, Case No. LS-0307291-MED. In that circumstance, the Administrative Law Judge reached a conclusion similar to the one reached by this writer. The Medical Examining Board subsequently reversed that decision. In the absence of specific statutory or regulatory language, the issue of the date of commencement of an investigation is dependent on the facts of that case. This question must be evaluated on a case-by-case basis.

In this case, the facts strongly show that the Board's investigation began on January 16, 2004. The complaint was not filed within one year of that date.

The Board may adopt this Proposed Order as written, or it may vary from Finding of Fact 7 and Conclusion of Law 2, or the Motion to Dismiss, and direct the ALJ to continue the hearing process.

CONCLUSIONS OF LAW

I. The Medical Examining Board is the legal authority responsible for issuing and controlling credentials for medical doctors and surgeons, under ch. 448, Stats., and it has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under sec. 15.08(5)(c), Stats. and sec. 448.02 (3), Stats. The Medical Examining Board has personal jurisdiction over the respondent based on his holding a credential issued by the Board, and based on notice under sec. 801.04 (2), Stats.

II. The disciplinary action in this matter, based on an allegation involving the death of a patient, was not commenced within one year after the initiation of the investigation by and on behalf of the Medical Examining Board, as required by sec. 448.02 (3) (cm), Stats.

ORDER

THEREFORE, IT IS ORDERED that this action be dismissed.

Dated: July 5, 2005

Dennis C. Schuh,
Administrative Law Judge
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708