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STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
MICHAEL M. MURPHY, M.D.,	:	LS0809251MED
RESPONDENT.	:	

Division of Enforcement Case No. 05MED319

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 15th day of April, 2009.

Gene Musser, MD
Member
Medical Examining Board

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST
MICHAEL M. MURPHY, M.D.,
RESPONDENT.

.....
: **PROPOSED DECISION**
: **AND ORDER**
: Case No. LS-0809251-MED
:

DOE Case Number 05 MED 319

PARTIES

The parties in this matter under section 227.44 of the Statutes and section RL 2.037 of the Wisconsin Administrative Code, and for purposes of review under sec. 227.53, Stats. are:

Complainant:

Division of Enforcement
Department of Regulation and Licensing
1400 East Washington Ave.
Madison, WI 53708-8935

Respondent:

Michael M. Murphy, M.D.
900 W. Clairemont Avenue
Eau Claire, WI 54701

Disciplinary Authority:

Medical Examining Board
1400 East Washington Ave.
Madison, WI 53703

APPLICABLE RULE

Wisconsin Administrative Code

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:

...
(q) Having a license, certificate, permit, registration, or other practice credential granted by another state or by any agency of the federal government to practice medicine and surgery or treat the sick, which becomes limited, restricted, suspended, or revoked, or having been subject to other adverse action by the state licensing authority or by any agency of the federal government, including but not limited to the denial or limitation of an original credential, or the surrender of a credential, whether or not accompanied by findings of negligence or unprofessional conduct.

FINDINGS OF FACT

1. The Respondent, Michael M. Murphy, M.D., d.o.b. 5/4/48, holds license 20-35058 to practice medicine and surgery in Wisconsin.
2. Dr. Murphy's mailing address is 900 West Clairemont Avenue, Eau Claire, WI 54701.
3. On or about June 1, 2004, the United States Attorney for the Western District of Wisconsin filed a complaint against Dr. Murphy alleging that Medicare payments made to him were based upon false records and statements. The government alleged that, over a period of approximately five years, Dr. Murphy billed Medicare for services that were unnecessary and for services that were not performed.
4. Dr. Murphy denies that he submitted false records and statements, and he denies that the medical services billed were either unnecessary or not performed.
5. On or about February 8, 2005, the United States District Court judge approved a settlement of the action under which Dr. Murphy agreed to pay \$200,000 to the United States and to enter into an Integrity Agreement that would govern his relations between the Office of Inspector General and the United States Department of Health and Human Services for a period of five

years. The agreement included reporting requirements and review provisions related to his practice.

6. The Integrity Agreement was subject to a Settlement Agreement and Order that stated in subparagraph D, "This agreement is neither an admission of liability by the Defendants nor a concession by the United States that its claims are not well founded." The resolution of the federal action is proof neither of guilt nor of innocence of the underlying charges.

CONCLUSIONS OF LAW

I. The Medical Examining Board is the legal authority responsible for issuing and controlling licenses for the practice of medicine and surgery, under sec. 448.02, Stats., and it has jurisdiction over a complaint alleging unprofessional conduct by a licenseholder, under sec. 448.02 (3), Stats.

II. The Medical Examining Board has personal jurisdiction over the Respondent, Michael M. Murphy, M.D., based on his hold license issued by the Board and notice under sec. 801.04 (2), Stats.

III. By having been subject to adverse action by an agency of the federal government, Dr. Murphy violated section MED 10.02 (2) (q), Wis. Admin. Code.

IV. Allegations in a complaint, specifically the complaint related to Medicare payments that was filed by the U.S. Attorney, are not legally sufficient by themselves to prove violations. No violation by Dr. Murphy was proven other than having been subject to adverse action by the federal government.

ORDER

THEREFORE, IT IS ORDERED -- in view of the fact that the federal government has already imposed reporting requirements and review provisions related to his practice -- that no discipline be imposed by the State of Wisconsin on Michael M. Murphy, M.D. for his violation of sec. MED 10.02 (2) (q), Wis. Admin. Code.

IT IS FURTHER ORDERED that the allegations in the Complaint in this matter that the Respondent violated secs. MED 10.02 (2) (m) and (z), Wis. Admin. Code, are hereby dismissed upon motion of the Complainant.

ANALYSIS

Dr. Murphy's situation when he signed the Integrity Agreement.

I accept the affidavit of Dr. Peller that Dr. Murphy was gravely ill in the period from 2004 to 2008, and that Dr. Murphy underwent a liver transplant in March of 2008. I also accept Dr. Peller's statements regarding the care he provided for Dr. Murphy and the advice he gave to him. I do not accept as fact the conclusory statement -- even though it is appropriately expressed as Dr. Peller's own belief -- that Dr. Murphy could not have withstood the rigor of and attendance at a one-week jury trial on the federal charges. This was offered as an explanation for his decision not to fight the federal charges, but it cannot be used to prove whether Dr. Murphy would have been successful had he fought the charges, i.e. whether he was guilty or innocent of the federal charges.

Constitutional Issues.

The Respondent through his attorney raised a number of Constitutional challenges to the application of rule MED 10.02 (q) to the Integrity Agreement. Neither the Administrative Law Judge nor the Medical Examining Board is authorized to rule on the constitutionality of a statute or a rule. The issues were appropriately raised in this forum and they are preserved in the parties' motions and briefs, but they can be addressed only in Circuit Court if this case is appealed. The issues were discussed in the A "Rulings on Motions", which concluded that the rule does apply to Dr. Murphy's Integrity Agreement with the federal government. The constitutional issues will not be discussed further here, other than to say that in order to interpret the rule, I looked at changes that were made to it in 1992 and 1996, which I interpreted as having been intended to expand the rule's scope to authorize the Board to exercise jurisdiction over just such an action as taken by the federal government in this case.

I concluded that the language of rule MED 10.02 (2) (q) does cover agreements like the Integrity Agreement signed by Dr. Murphy even in the face of the statement in the Settlement Agreement that says, "This agreement is neither an admission of liability by the Defendants nor a concession by the United States that its claims are not well founded." Consequently, I conclude that the Integrity Agreement is sufficient to show that Dr. Murphy was subject to "adverse action" as intended by the rule, but that it is not proof of fraud, nor is it proof that Dr. Murphy is or ever was a danger to the public.

Dismissal of the other charges.

The attorney for the Division of Enforcement moved to dismiss the allegations in the Complaint that Dr. Murphy violated sections MED 10.02 (2) (m) and (z), Wis. Admin. Code. A violation of (m) would have required proof that Dr. Murphy committed fraud, and a violation of (z) would have required proof that Dr. Murphy violated a law substantially related to the practice of medicine. Since merely having been subject to adverse action by the federal government does not prove either of those, those charges would not have been proven by the facts in this case. Had the DOE attorney undertaken to prove them (in the absence

any findings by the federal government), a significant expenditure of time and resources would have been required, which would almost certainly not have been justified since an outcome has already been achieved with regard to Dr. Murphy's practice that is satisfactory to the most interested entity, the federal government.

Discipline.

With regard to the appropriate discipline, the attorney for Dr. Murphy recommended dismissal while the attorney for the Division of Enforcement recommended a six-month suspension and limitations, but the latter recommendation was based on a review of previous cases in which the Medical Examining Board made findings of Medicare and other types of fraud. Those cases are applicable to this situation. Since no violation by Dr. Murphy was proven other than having been subject to adverse action by the federal government, I recommend that a finding be made that Dr. Murphy violated sec. MED 10.02 (2) (q), Wis. Admin. Code and that no discipline be imposed by the Board.

The purposes of professional discipline have been set forth by the Wisconsin Supreme Court in various cases involving attorneys, such as State v. Kelly, 39 Wis.2d 171, 158 N.W.2d 554 (1968), State v. MacIntyre, 41 Wis.2d 481, 164 N.W.2d 235 (1969), State v. Cory, 51 Wis.2d 124, 186 N.W.2d 325 (1970), State v. Aldrich, 71 Wis.2d 206, 237 N.W.2d 689 (1976), and Disciplinary Proc. Against Kelsay 155 Wis.2d 480, 455 N.W.2d 871 (1990). The most recent of those cases says, on page 482, "We have stated as a general principle that discipline for lawyer misconduct is not intended as punishment for wrongdoing; it is for the protection of the public, the courts and the legal profession from further misconduct by the offending attorney, to deter other attorneys from engaging in similar misconduct and to foster the attorney's rehabilitation." That reasoning has been extended by regulatory agencies, including the Department of Regulation and Licensing, to disciplinary proceedings for other professions.

Under the terms of the Integrity Agreement, Dr. Murphy is required for five years to, among other things,

- designate a person to be responsible for compliance,
- post a notice of his commitment to comply with all federal programs,
- develop written policies and procedures for himself and his employees,
- arrange training for himself and his employees,
- engage an independent auditor or reviewing firm,
- undergo an annual financial review,
- report any overpayment under any federal health care program,
- report any change of business unit or location,
- report on the initial implementation of all the above,
- submit annual reports,
- be subject at all times to inspection, and
- retain all records for at least 6 years.

It is my opinion that Dr. Murphy does not need to be disciplined by the State of Wisconsin over and above the reporting requirements and review provisions of the Integrity Agreement, either to foster his own rehabilitation, to deter other doctors from actions that might lead to federal prosecution, or to further protect the public. Any other discipline by the Medical Examining Board would be merely punitive.

If the Board disagrees with this recommendation, it could consider a suspension, a reprimand, or a limitation on Dr. Murphy's license, most likely a requirement that he execute an agreement with Medical Examining Board similar to the Integrity Agreement. The cases supplied by the DOE attorney show that the Board imposes suspensions for fraud, but fraud was not proven here and I consider a suspension to be far too severe. A limitation, especially one imposing the same reporting and review requirements on Dr. Murphy by the Board, would certainly be defensible, but all it really adds is extra work, it would increase the Department's monitoring workload, and issuing Dr. Murphy a limited license might have unintended consequences for his practice. A reprimand would not be inappropriate, but it is still my opinion that it is unnecessary.

One final consideration in this regard is that the most important aspect of this case may well be the ruling that sec. MED 10.02 (2) (q), Wis. Admin. Code does apply to a federal action like the one here, even in the face of the language in the Settlement Agreement and Order. The imposition of any additional conditions or discipline on Dr. Murphy is of secondary importance, especially given the opinion expressed above that no additional measures are necessary to protect the public.

Costs.

If the Board follows the recommendation here, costs cannot be imposed. If the Board decides to impose some

discipline on Dr. Murphy, the issue of costs must then be addressed. Following the logic of the Wisconsin Supreme Court in attorney disciplinary cases, the Department of Regulation and Licensing has routinely imposed the costs of investigation and prosecution on respondents if unprofessional conduct is proven. The factors to be considered in imposing costs, as incorporated into Supreme Court Rule (SCR) 22.24, are as follow:

- (a) The number of counts charged, contested, and proven.
- (b) The nature of the misconduct.
- (c) The level of discipline sought by the parties and recommended by the [ALJ].
- (d) The respondent's cooperation with the disciplinary process.
- (e) Prior discipline, if any.
- (f) Other relevant circumstances.

In this case,

- three counts were originally charged and one was proven,
- though he contested the charges, Dr. Murphy cooperated with the disciplinary process,
- the nature of the misconduct eventually proven was relatively minor,
- the level of discipline recommended by the prosecuting attorney was a six-month suspension and limitations while the ALJ recommended no discipline, and
- Dr. Murphy has not been subject to prior discipline.

A balance of these factors would lead to the conclusion that Dr. Murphy should pay some, but not all, of the Department's costs in this case, and I would recommend that he pay one-third.

RELEVANT PROCEDURAL HISTORY

A. A Complaint in this matter was filed on September 25, 2008 by Attorney Jeanette Lytle of the Department's Division of Enforcement. The Complaint alleged (1) that a federal prosecuting attorney filed a complaint against the Respondent alleging that he billed Medicare for unnecessary services and for services not performed; and (2) that the Respondent entered into a settlement of the action. These were alleged to be violations of sec. MED 10.02 (2) (m), (q), and (z), Wis. Admin. Code. Subparagraph (m) of section MED 10.02 (2) deals with fraud and other false statements, subparagraph (q) deals with actions by another agency, and subparagraph (z) deals with violations of laws, rules and regulations. The Integrity Agreement between the Respondent and the U.S. Department of Health and Human Services was attached as an exhibit.

B. An Answer in this matter was filed on October 1, 2008 along with a Motion to Dismiss, by Attorney Drew Ryberg on behalf of the Respondent. The Answer included a Settlement Agreement and Order between the Respondent and the U.S. Department of Health and Human Services acting through the U.S. Department of Justice as an exhibit. The grounds for the Motion to Dismiss were that the complaint "represents duplicative prosecution unrelated to the authority of the Department of Regulation and Licensing and imposes a second forfeiture or jeopardy to" the respondent.

C. A Motion to Allow Testimony was filed by the Mr. Ryberg on October 17, 2008. The motion in essence argued that the Integrity Agreement should not be received as proof of a violation of federal law and should not be dispositive for the purpose of determining unprofessional conduct.

D. Ms. Lytle filed a Motion *in Limine* to Clarify Issues and Limit Evidence on November 14, 2008. The motion in essence argued that the filing of a complaint against the Respondent by the federal government, and his entering into an Integrity Agreement, should be considered conclusive evidence of "having been subject to other adverse action ... whether or not accompanied by findings of negligence or unprofessional conduct."

E. Mr. Ryberg filed a Brief in Support of Prehearing Motions on December 18, 2008. The Brief stated that the Respondent initially denied the federal complaint and that his agreement to enter into the Integrity Agreement specifically stated that it was not an admission of liability. The Brief also emphasized the language in section MED 10.02 (2) (q) which can be interpreted as requiring adverse action against "a credential", and the federal government took no action against Dr. Murphy's license.

F. Ms. Lytle filed State's Brief on Prehearing Motions on January 9, 2009.

G. Mr. Ryberg filed Respondent's Reply Brief on January 13, 2009.

H. Ms. Lytle filed State's Reply Brief on Prehearing Motions on January 14, 2009.

I. Rulings on Motions were issued by the undersigned Administrative Law Judge on February 3, 2009. Mr. Ryberg's Motion to Dismiss and Motion to Allow Testimony with regard to testimony related to the alleged violation of sec. MED 10.02 (2) (q) were both denied, and Mr. Lytle's Motion *in Limine* with regard to testimony related to the allegation that the Respondent violated sec. MED 10.02 (2) (q) was granted.

J. Following the rulings, the parties agreed on February 9, 2009 to cancel the hearing and to submit the case for decision based on written arguments.

K. Mr. Ryberg filed a Motion to Dismiss on February 10, 2009, and an Affidavit of Thomas P. Peller, M.D. on February 17, 2009.

L. Ms. Lytle filed a Closing Argument and a Motion to Dismiss Charges (the charges based on alleged violations of section MED 10.02 (2) (m) and (z), Wis. Admin. Code) on February 17, 2009.

M. On February 24, 2009, Mr. Ryberg filed Respondent's Closing Arguments and a Motion to Dismiss Claims of 10.02 (2) (m) (z) and Appear on March 18, 2009.

N. On February 25, 2009, Mr. Ryberg filed a copy of the Integrity Agreement with the statement "While I maintain that there should be no discipline imposed and the matter dismissed, if there is to be something then it ought to be making his filing requirements for CMS through the Integrity Agreement the same for the Medical Examining Board."

Dated and signed: March 12, 2009

Nick Schweitzer
Administrative Law Judge
Department of Regulation and Licensing