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State of Wisconsin

Governor Scott Walker

Veterinary Examining Board

Dr. Philip C. Johnson, DVM, Chair

In the Matter of Disciplinary Proceedings Against
Jacquelyn Kieler, D.V.M., Respondent

DHA Case No. SPS-15-0044
DLSC Case No. 13 VET 033

0004780

FINAL DECISION AND ORDER

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

Jacqueline Kieler, by

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Madison, WI 53703-2865

Wisconsin Veterinary Examining Board
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PROCEDURAL HISTORY

The above-captioned proceedings were initiated on April 22, 2015, when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed a Complaint against Respondent Jacqueline Kieler, D.V.M (Respondent). The Complaint alleged that Respondent euthanized an animal against the owner's directions, thereby committing unprofessional conduct as defined by Wis. Admin. Code § VE 7.06(1) by engaging in conduct in the practice of veterinary medicine which evidenced a lack of knowledge or ability to apply professional principles. The Complaint further alleged that Respondent engaged in unprofessional conduct as defined by Wis. Admin. Code § VE 7.06(22) by certifying to the Wisconsin Veterinary Examining Board (Board) that she had completed 30 hours of continuing education required under Wis. Admin. Code § VE 10.02(1) when she had not done so.

Following Respondent's filing of an Answer to the Complaint, a telephone prehearing conference was held on May 26, 2015. Consistent with discussions at the prehearing conference, a contested case hearing was held on September 3, 2015, at which exhibits were introduced and testimony heard. At the close of hearing, the parties requested briefing, and, following receipt of the transcript, a briefing order was issued on September 21, 2015. The last submission was filed in this matter on December 11, 2015.

FINDINGS OF FACT

1. Respondent is licensed by the State of Wisconsin to practice veterinary medicine, having license number 2511-50, first granted on June 15, 1983 and, at the time of the Complaint and Answer filed in this matter, current through December 14, 2015. (Complaint, ¶ 1; Answer, ¶ 1)

2. At all times relevant to this proceeding, Respondent was working as a veterinarian at Platteville Veterinary Clinic (the clinic), in Platteville, Wisconsin. (Complaint, ¶ 2; Answer, ¶ 2)

3. Respondent has been a licensed veterinarian in Wisconsin for 32 years and has practiced at the clinic continuously for 27 years. The clinic is a rural clinic and cares for large and small animals. Respondent cares for small animals. (Hrg. Tr., pp. 79-80)

Connie Pollard's Farm, Tommy, and Tommy's July 12, 2013 Appointment with Respondent

4. Connie Pollard lives on a 20-acre farmette approximately eight miles from Platteville. She lives there with her husband, disabled children, and many animals, including dogs, numerous indoor and outdoor cats, a steer, a pony, geese and chickens. During the relevant time period, Ms. Pollard's animals included approximately 14 dogs, 14 cats living inside the house and seven barn cats. Not long before that, Respondent had 20-25 barn cats. If any animal comes onto Ms. Pollard's property, she will help the animal by providing food and medication. (Hrg. Tr., pp. 16-17, 20, 23-24, 31, 48-49, 57-58)

5. At the time relevant to this proceeding, Ms. Pollard had been bringing animals to Respondent's clinic for veterinary care for over 20 years. During that time period, Respondent had seen 80-100 of Ms. Pollard's animals, which consisted of cats, dogs and a duck. Ms. Pollard brought both barn cats and house cats to Respondent for veterinary care. (Hrg. Tr., p. 56-57, 59, 83)

6. During the 20-plus years of veterinary care provided by Respondent, Ms. Pollard was satisfied with the care that was provided to her animals. (Hrg. Tr., p. 61)

7. In October of 2012, a stray cat appeared on Ms. Pollard's property and sat outside on her hot tub. Ms. Pollard named the cat Tommy. (Hrg. Tr., p. 19)

8. At the time of its arrival, Tommy appeared to be thin and sick. Ms. Pollard worked on getting Tommy healthy, including giving him an antibiotic. (Hrg. Tr., pp. 19-22)

9. Ms. Pollard did not know where Tommy came from and estimated his age to be about four or five years old. (Hrg. Tr., pp. 22-23, 27)

10. Tommy lived on Ms. Pollard's porch and outside her home. Ms. Pollard never made any attempt to confine Tommy to her house or to her grounds and he could have left at any time. (Hrg. Tr., pp. 23-24)

11. Ms. Pollard agreed that Tommy was a barn cat rather than a house cat. (Hrg. Tr., p. 58)

12. During the nine months that Tommy lived outside on Ms. Pollard's property from the fall of 2012 through July of 2013, Ms. Pollard did not bring him to a veterinarian for a physical, rabies vaccination or other vaccinations or any type of physical check-up. (Hrg. Tr., p. 60)

13. Tommy was a friendly cat who followed Ms. Pollard around outside while she took care of the animals and did chores. Tommy would come to Ms. Pollard when called and got along well and never fought with the dogs and cats other animals on the farm. (Hrg. Tr., pp. 20-21, 28)

14. Ms. Pollard brought Tommy to Respondent for veterinary care on July 12, 2013 because Tommy had sores on his body, and she wanted to make sure that what Tommy had did not spread to the other outdoor cats. Respondent also brought in her dog that same day for Respondent to administer a rabies vaccine. (Hrg. Tr., pp. 28-29, 31-32, 34)

15. Before leaving for the appointment, Ms. Pollard took a cat carrier to her car and then called for Tommy to come to her. Tommy came running to Ms. Pollard from an outbuilding when she called him. He appeared fine to Ms. Pollard, did not appear thin, and seemed happy. (Hrg. Tr., pp. 31-33, 45-46)

16. Ms. Pollard testified twice that after Tommy came to her and before they left for the veterinarian appointment, she did not have time to "love him up" because they had to get to the appointment. (Hrg. Tr., pp. 32-33)

17. Respondent understood that Tommy was a barn cat. Ms. Pollard did not inform Respondent that Tommy was a friendly cat, that he came when called, that he played with puppies, that he trotted around the grounds with her or that he got along with other cats. Respondent also understood that regardless of Tommy's status as a barn cat, he deserved the same standard of veterinary care as a companion animal. (Hrg. Tr., pp. 84, 125, 246-247)

18. Based on information provided by Ms. Pollard to Respondent, Respondent's medical notes from Tommy's July 12, 2013 veterinary records state, "outside cat — showed up last year." The notes also reflect that Tommy weighed five pounds and six ounces and that the "cat is thin." (Resp. Ex. 102; Hr. Tr., pp. 85-87)

19. Ms. Pollard believed the sores on Tommy looked like ringworm, although she was also concerned about mites. (Hrg. Tr., p. 31, 35, 62)

20. Upon conducting a physical examination of Tommy, Respondent informed Ms. Pollard that she did not believe the sores were caused by ringworm. (Hrg. Tr., pp. 62, 85, 88)

21. After conducting the initial physical examination, Respondent spoke with Ms. Pollard about doing a "further workup" of the skin condition under anesthesia. Ms. Pollard consented to a biopsy and understood that the biopsy would be conducted under anesthesia. Tommy was also to receive vaccines. (Hrg. Tr., pp. 35, 62-63, 88, 90, 96, 180, 196-197)

22. Respondent explained to Ms. Pollard that since Tommy would be under anesthesia for the biopsy, Tommy should also be neutered at the same time. Respondent had neutered or spayed many of Ms. Pollard's animals in the past. Although initially, Ms. Pollard informed Respondent that she intended to have Tommy neutered at a free spaying and neutering event, Ms. Pollard eventually agreed that having Respondent neuter Tommy that day made sense because he would already be under anesthesia and, in Ms. Pollard's words, "why put him under twice." (Hrg. Tr., pp. 36-38, 88)

23. There is no dispute that Ms. Pollard consented to having Respondent neuter Tommy. (Complaint, ¶ 5; Answer, ¶ 5)

24. The discussion between Ms. Pollard and Respondent while Ms. Pollard was at the clinic was not confrontational in any way, and neither Ms. Pollard nor Respondent raised her voice. The discussion was not different in tone or manner than any of those had in the previous 20 years that Respondent had serviced Ms. Pollard's animals. (Hrg. Tr., pp. 91-92)

25. After the physical examination Respondent performed, and before Tommy was placed under anesthesia, Ms. Pollard left the clinic with her dog and returned home. Respondent was aware that Ms. Pollard would not be home for approximately 10 to 15 minutes. (Div. Ex. 6; Hrg. Tr., pp. 39, 93)

26. Once Tommy was under anesthesia, Respondent changed course and determined, based on Tommy's history and after getting a better view of the lesions, that she should conduct an IDEXX SNAP blood test to check for feline immunodeficiency virus (FIV) rather than conduct a biopsy. (Hrg. Tr., p. 96, 129)

27. The IDEXX SNAP blood test tests for feline leukemia and FIV. It is inexpensive and is a good option for diagnosing FIV as it is accurate, convenient, and relatively noninvasive. The test is correct in recognizing cats with FIV over 95 percent of the time. The IDEXX SNAP blood test is less invasive and less costly than a biopsy, and provides a result within 10 minutes. (Hrg. Tr., pp. 96-98, 120, 158-159, 214-15)

28. Prior to putting Tommy under anesthesia, Respondent believed that Ms. Pollard had consented for her to do a general work-up of Tommy, which would have included a blood test. She believed that she had informed consent to conduct appropriate diagnostic testing of Tommy to determine the cause of the lesions. (Hrg. Tr., pp. 95-96, 124-125)

29. Respondent's medical notes reflect that the IDEXX SNAP test was "not approved by owner ahead of time." Respondent made this addition to her notes after the July 12, 2013 appointment, and after Ms. Pollard later came into the clinic on July 15, 2013, and was upset about Tommy (discussed below). Respondent testified that she would have specifically sought Ms. Pollard's approval for the test had Ms. Pollard remained at the clinic. Ms. Pollard testified that she believes that Respondent knew that she does not like such diagnostic tests. Respondent testified that Ms. Pollard never told Respondent that she did not believe in testing on animals. (Hrg. Tr., pp. 47-48, 92, 94-96, 98, 124-25)

The IDEXX SNAP test and FIV

30. The IDEXX SNAP test showed that Tommy was positive for FIV. Respondent believed Tommy was FIV positive based on the test, which is 95 percent accurate, and also on basis that he was an outdoor intact (non-neutered) male cat, was thin, and had skin lesions. (Resp. 102; Hrg. Tr., pp. 99, 128)

31. FIV suppresses a cat's immune system and is incurable. FIV can turn into various forms of cancer, blood diseases, kidney failure and/or secondary infections that will ultimately claim the cat's life. Intact outdoor male cats have the highest percentage of FIV. FIV is spread through the saliva of an infected cat getting into the bloodstream of another cat, primarily by bite wounds inflicted by an infected cat, but also in situations where an infected cat is grooming another cat and licking its wounds. It cannot be transmitted through casual contact and probably cannot be transmitted through sexual contact. (Ex. 101; Hrg. Tr., pp. 81-83, 212, 217)

32. Skin lesions and emaciation can be part of a clinical presentation of a cat with FIV. Although infected cats can live reasonably healthy lives for several years with the disease, once a cat shows clinical signs of FIV, the cat is past the point where it can have a good life. (Hrg. Tr., pp. 216-217, 219)

33. A cat that has been vaccinated against FIV will test positive for FIV antibodies because of the vaccine, and it is not possible to conclude that the presence of FIV antibodies always means that the cat has a fatal disease versus having been vaccinated against the disease. However, very few cats are vaccinated for FIV, especially not barn cats. FIV is not a core vaccine for the American Association of Feline Practitioners (AAFP). Moreover, Respondent is aware that, according to at least one professional article, "Kittens that test positive for FIV antibody when over six months of age are considered to be infected." (Hrg. Tr., pp. 135, 138-140, 154-155)

Consent

34. Ms. Pollard had had approximately 20 animals euthanized by Respondent during the previous 20 years. Ms. Pollard does not fight against euthanasia for her animals when it is time to put an animal down because she knows when it is time and does not want the animals to suffer. (Hrg. Tr., pp. 55-56, 194-195)

35. Upon receiving the results of the FIV test and while Tommy was still under anesthesia, Respondent attempted to call Ms. Pollard to inform her that Tommy was FIV positive and to obtain consent for euthanasia. When Respondent first called Ms. Pollard's home, she spoke with Respondent's husband, who did not provide consent and instead gave Respondent Ms. Pollard's cell phone number. (Hrg. Tr., pp. 40, 42, 53-54, 99-100, 102)

36. Respondent contacted Ms. Pollard on her cell phone while Ms. Pollard was outside putting the dog that had just been vaccinated into its kennel. Respondent informed Ms. Pollard that Tommy was FIV positive, that FIV is not treatable, that FIV positive cats are immune suppressed and therefore more susceptible to infections, and that they can pass the FIV virus to other cats. Respondent recommended euthanasia for Tommy due to the risk of exposure to other cats from Tommy. (Resp. Ex. 102; Hrg. Tr., pp. 39-40, 102, 131)

37. Respondent and Ms. Pollard discussed the options of keeping Tommy outside with the other cats and moving him inside. Respondent explained that Tommy could be kept alive but that he would still be exposing other cats to FIV and would still be susceptible to secondary infections. (Hrg. Tr., pp. 131-132)

38. Respondent informed Ms. Pollard that she could take Tommy home instead of euthanizing him. Respondent gave Ms. Pollard the option of not euthanizing Tommy, but Ms. Pollard ultimately agreed to euthanize him. (Hrg. Tr., pp. 133, 153)

39. Respondent's medical notes state: "Discussed w/ owner issue of keeping FIV + cat and risk of exposure to other cats with direct contact to other outside cats and indirect exposure to inside cats. Discussed euthanasia -- owner consented." (Resp. Ex. 102; Hrg. Tr., p. 102)

40. When Respondent hung up the telephone, she told her veterinary assistant, Tracy Weigel, that Ms. Pollard had consented to euthanizing Tommy. (Hrg. Tr., p. 185)

41. According to Ms. Pollard, when she was informed that Tommy was FIV positive and should be euthanized, she dropped to her knees and told Respondent "no." Respondent then told her that FIV is like AIDS in people, that it can spread and destroy her animals outside. Ms. Pollard also understood from the conversation that if Tommy were moved from being an outside cat to an inside cat, there was a risk to her inside cats. (Hrg. Tr., pp. 40, 67-68)

42. Ms. Pollard testified that she told Respondent "no" several times but in the end, asked if she could say goodbye to Tommy. She testified that when she asked to say goodbye, she "had in [her] mind he was already gone anyhow." According to Ms. Pollard, Respondent told her she "had to be in there within seconds because he was under anesthesia, and it would be better to put him under." Ms. Pollard told Respondent that she "couldn't be there within seconds." (Hrg. Tr., pp. 40-42, 69-70, 102-103)

43. When Ms. Pollard hung up the telephone with Respondent, she understood that Tommy would be euthanized. Ms. Pollard testified that she believed Respondent was going to euthanize Tommy regardless of what Ms. Pollard said, and had likely already euthanized Tommy before Respondent ever spoke to her about it. (Hrg. Tr., pp. 41, 70-71)

44. Respondent described the conversation differently, testifying as follows: "When I called her or she called me, I first told her that Tommy was FIV positive. And I do remember her saying, which she also said she said, no, no, no. And then I discussed with her that I would recommend in this case euthanasia. She said no, no, no. But when I presented to her that Tommy is a source of infection for her other cats, that it's not just about Tommy anymore, it's about the care of her other cats and the health of her other cats and that Tommy will always be immunologically suppressed, so he's always going to be prone to infections, the combination of the two, she did consent to euthanasia." (Hrg. Tr., pp. 102-103)

45. Respondent did not remember the specific words that Ms. Pollard used to consent to euthanasia, but believed that Ms. Pollard would have said 'yes' or 'I agree,' and that she did not say "no" to euthanasia. Respondent credibly testified that by the end of the telephone call, she was absolutely clear that Ms. Pollard had

consented to euthanasia. Respondent further stated, "I did give her an option of not euthanasia, and she agreed to euthanasia." (Hrg. Tr., pp. 104, 148-149, 153)

46. Respondent credibly testified that she discussed options for keeping Tommy alive and told Respondent Tommy could be brought home but stated that he would pose a risk to other cats and would be susceptible to secondary infections. (Hrg. Tr., pp. 132-133)

47. Respondent agreed with the definition of informed consent in Wis. Admin. Code § VE 7.07(23) and that Ms. Pollard gets to decide what is acceptable level of risk for her other animals. (Hrg. Tr., pp. 150, 153)

48. Respondent credibly testified that if Ms. Pollard had not consented to euthanizing Tommy, she "absolutely" would not have done so, and instead Tommy would have been allowed to wake up, stay overnight at the clinic and then would have been discharged the next day. (Hrg. Tr., pp. 70, 105-106)

49. Respondent recognized that Ms. Pollard was very upset about Respondent's recommendation to euthanize Tommy, and reacted differently from all the other times Respondent had euthanized animals for her, but she did not know why the reaction was different with regard to Tommy. She also acknowledged that this event was different from previous occasions euthanizing Ms. Pollard's animals because it was the first time that euthanasia was a surprise to Ms. Pollard. (Hrg. Tr., pp. 103-104, 122)

50. The discussion with respect to euthanasia lasted approximately five minutes. Respondent described her telephone conversation with Ms. Pollard about euthanizing Tommy as "argumentative, possibly denial on her part, [and] very emotional." Respondent testified that Ms. Pollard was "very upset that he was FIV and upset that [euthanasia was] the recommendation I made." (Hrg. Tr., pp. 104, 130, 186)

51. Respondent agreed that Ms. Pollard asked to say goodbye to Tommy but denied telling her she had to be there within "seconds." (Hrg. Tr., pp. 104-105)

52. Respondent explained to Ms. Pollard that she recommended euthanizing Tommy while he was still under anesthesia. Respondent informed Ms. Pollard that Tommy was starting to wake up from the anesthesia and that there was a short window of opportunity before he would wake up. Respondent testified that when cats wake up from anesthesia, they can be "very dissociated," which can include shaking, and she did not want Ms. Pollard to see Tommy in that phase. She also did not want to re-anesthetize Tommy. (Hrg. Tr., pp. 41, 70, 104-105)

53. Respondent does not agree that she was imposing any time pressure on Ms. Pollard to euthanize Tommy. (Hrg. Tr., pp. 104, 134-135)

54. Respondent believed that euthanasia under anesthesia would be more humane and less stressful to Tommy and to Ms. Pollard, than having Ms. Pollard to drive back to the clinic to sign the euthanasia consent form, allow Tommy to wake up, re-anesthetize him and euthanize him. (Hrg. Tr., pp. 116-117, 133-34, 155)

55. Ms. Weigel has worked with Respondent as a veterinary assistant for approximately 24 years and has worked with Ms. Pollard for approximately 20 years. She had a good working relationship with Ms. Pollard. (Hrg. Tr., pp. 174-176, 178)

56. Ms. Weigel was involved in approximately 30 cases of euthanasia per year at the clinic. In her experience with Respondent, Respondent performs euthanasia only after obtaining consent. She has seen situations where the owners have not given Respondent consent and the pets then go home with the owners. Respondent handles situations involving euthanasia professionally and with empathy. (Hrg. Tr., pp. 176-177)

57. Ms. Weigel was present in the room at the clinic during the phone discussion between Respondent and Ms. Pollard about Tommy being FIV positive and the decision to euthanize Tommy. She heard Respondent's part of the conversation in which she told Ms. Pollard that Tommy was FIV positive, explained to Ms. Pollard that Tommy could spread FIV to her other house cats or farm cats, and explained her recommendation of euthanasia. According to Ms. Weigel, Respondent did not tell Ms. Pollard that she needed to be at the clinic within seconds. (Hr. Tr., p. 184)

Post-Euthanasia

58. Ms. Pollard testified that after the phone call, she went to the house crying, was "very sick for a long time" and "couldn't even come out of the house." She stated that "[t]he kids were watching me for suicide because I felt like it was my fault." She wished that Tommy had not come out of the milk house when called the day of the veterinary appointment. While testifying about these events, Ms. Pollard was visibly upset and crying. (Hrg. Tr., pp. 41-42)

59. Later on the same day of the veterinary appointment, within several hours of Tommy's euthanasia, Ms. Weigel telephoned Ms. Pollard to discuss the disposal of Tommy's remains.

60. According to Ms. Pollard's testimony, she told Ms. Weigel that Respondent would not touch any of Ms. Pollard's animals again and that Mr. Pollard wanted the records of all of her animals. (Hrg. Tr., pp. 43, 46-48, 71-72)

61. Ms. Weigel testified that during the telephone call, Ms. Pollard was upset that Tommy had been euthanized but did not question the decision to euthanize Tommy, did not indicate that she had not consented to Tommy's euthanasia, and did not express any surprise that Tommy had been euthanized. (Hrg. Tr., pp. 186-188)

62. After Ms. Pollard informed Ms. Weigel that she wished to have Tommy cremated, Ms. Weigel filled out the cremation order and wrote Ms. Pollard's name down under "owner's signature." (Hrg. Tr., p. 189)

63. On July 15, 2013, Ms. Pollard went to the clinic to obtain the records for her animals. Ms. Pollard was upset. She rejected a hug from Ms. Weigel and told her it was not right that Respondent had euthanized Tommy and that Tommy did not need to be put down. (Hrg. Tr., pp. 49-50)

64. When Respondent came out of one of the examination rooms into the reception area, Ms. Pollard began screaming at her and, at some point said that Respondent had ruined her life. Respondent had Ms. Weigel take Ms. Pollard to a back room to remove her from the reception area. (Hrg. Tr., pp. 50, 107-108)

65. While they were in the back room, Ms. Pollard, Ms. Weigel and Respondent had a conversation that Ms. Pollard described as arguing about why Respondent euthanized Tommy. According to Ms. Pollard, during this conversation, Respondent stated that Tommy was too thin and that Ms. Pollard "should be happy" that Respondent euthanized Tommy because doing so had saved money for Ms. Pollard, to which Ms. Pollard responded that it was her money. Ms. Pollard also stated that Respondent told her that Respondent's Wisconsin veterinary books told her to euthanize Tommy. (Hrg. Tr., p. 50-51)

66. Respondent testified that Ms. Pollard was very upset and confrontational during the conversation. According to Respondent, Ms. Pollard had been reading about FIV on the internet and was very upset and confrontational about Tommy. Respondent did not recall referring to her veterinary books. (Hrg. Tr., pp. 50, 108)

67. The conversation in the back room lasted approximately 15 minutes. Ms. Weigel testified that Ms. Pollard was noticeably upset but did not mention that she had not consented to euthanasia. Ms. Weigel interpreted Ms. Pollard's comments to mean that she was feeling regret over Tommy being euthanized and that she was "very emotionally upset that she had consented to that." She also believed that Ms. Pollard stated that she was not given the opportunity to say goodbye; however, Ms. Weigel testified that Respondent had informed Ms. Pollard that if she came back in, she could say goodbye. (Hrg. Tr., pp. 192, 197-198)

68. On July 17, 2013, Ms. Pollard asked a police officer to accompany her to the clinic to pick up her records for Tommy. Respondent was very surprised to see Ms. Pollard with a police escort. Respondent or her assistant told Ms. Pollard that Tommy's records were not finished. Ms. Pollard received the records on July 20, 2013. (Hrg. Tr., p. 53, 110)

69. In a letter to the Board dated September 19, 2013, Respondent denied an initial allegation by Ms. Pollard that Respondent and Ms. Weigel had lied to her about the contagiousness and expected life span of a cat with FIV. She also denied Ms. Pollard's allegation that she euthanized Tommy without Ms. Pollard's consent. Respondent stated: "I have NEVER nor will I ever euthanize an animal without the owner's consent. In this case authorization was given verbally over the phone by Ms. Pollard." (Resp. Ex. 103)

70. In October 2014, Ms. Pollard spoke with Dr. Cari Schaffer, a veterinarian in Lancaster Wisconsin, in regard to one of her cats that had been euthanized. During the conversation, Ms. Pollard was very unhappy about the circumstances surrounding the euthanasia of the cat. Based on that conversation, Dr. Schaffer had an understanding or impression that Ms. Pollard had consented to the cat being euthanized. (Hrg. Tr., p 163-164, 165-167, 171-174)

71. Ms. Pollard admits that she told Dr. Schaffer that she felt guilty about Tommy being euthanized. (Hrg. Tr., p. 73)

72. According to Dr. Schaeffer, a veterinarian in Wisconsin would not euthanize an animal when an owner had said not to do so. (Hrg. Tr., p. 167)

Expert Testimony

73. Dr. Ray Pawlisch has been a veterinarian for over 30 years, including practicing in a rural area. At hearing, he was qualified as an expert in the area of veterinary medicine. (Hrg. Tr., pp. 200, 208-209)

74. Dr. Pawlisch understood that Tommy was a barn cat. His opinion that Tommy was a barn cat did not change due to Tommy sleeping on the front porch with a litter box and food, being playful, enjoying playing with puppies, sleeping with other cats or trotting beside Ms. Pollard while doing chores. (Hrg. Tr., pp. 211, 237-240, 244)

75. Dr. Pawlisch also understood that Tommy tested positive for FIV, that he was an intact male cat, had lesions and was thin. Dr. Pawlisch viewed lesions and emaciation in a cat as clinical signs of FIV. (Resp. Ex. 101; Hrg. Tr., pp. 212, 215, 218-219, 237)

76. Dr. Pawlisch's professional opinion was that Respondent acted properly when she used the IDEXX SNAP blood test to diagnose Tommy with FIV; that euthanasia was an appropriate recommendation by Respondent in these circumstances; and that Respondent acted properly for an FIV positive cat. (Hrg. Tr., pp. 215-217, 220-221)

77. In each of their 30-plus years as veterinarians, neither Dr. Pawlisch nor Respondent had ever heard of a veterinarian euthanizing an animal when the owner had said not to do so. (Hrg. Tr., pp. 106, 222)

Veterinarian Records

78. Respondent's Exhibit 102 are the veterinary record notes of Tommy from July 12, 15, and 17. These notes are substandard for documenting the necessary facts and reasoning, proffered by the Respondent, for obtaining Ms. Pollard's direction to allow the euthanasia of Tommy.

79. Respondent's Exhibit 102 does specifically state that Tommy was given "anesth 1.2 cc Ketaset/ace." This indicates, to any veterinarian, that the anesthesia given to Tommy was a 1.2 cubic centimeter injection of a combination of the veterinary drugs Ketamine and Acepromazine.

80. The notes Respondent wrote in Respondent's Exhibit 102, stating that she injected 1.2 ccs of the anesthetic into Tommy, also stated that Tommy's weight on July 12, 2013 was "5.6", which would be known by a veterinarian to mean 5.6 pounds.. Even if Tommy weighed 9 pounds, as indicated on DLSC Exhibit 3, the documentation of this dose of anesthetic would be known to any veterinarian of ordinary skill, practicing companion animal veterinary medicine, that it would keep a cat, such as Tommy weighing between 5.6 and 9 pounds, sedated for a much longer period than the time elapsed from the injection of the anesthetic to when the Respondent called Ms. Pollard to obtain the consent for euthanasia.

81. The amount of anesthetic given to Tommy, indicated by Respondent's own notes, contradict Respondent's testimony that there was a short window of opportunity before he would wake up and was a very important factor to obtain the consent for Tommy's euthanasia by Ms. Pollard without having her be able to drive back to the clinic, have a full discussion of the treatment options, and have Ms. Pollard sign the consent form in person.

Continuing Education Requirements

82. Respondent renewed her veterinarian license on line on December 1, 2013. (Complaint, ¶ 11; Answer, ¶ 11; Hrg. Tr., pp. 156-157)

83. On her renewal application, Respondent certified that she had completed the 30 credits of veterinary continuing education required by Wis. Admin. Code ch. VE 10 for the 2011-2013 reporting period. (Complaint ¶ 12; Answer, ¶ 12; Hrg. Tr., p. 156-157)

84. The Division performed an audit of Respondent's continuing education credits for the 2011-2013 reporting period. (Complaint, ¶ 13; Answer, ¶ 13).

85. The audit of Respondent's claimed continuing education credits revealed that Respondent had completed only nine credits of continuing education during the 2011-2013 reporting period. (Complaint, ¶ 14; Answer, ¶ 14).

86. On July 4, 2012, Respondent broke her leg while waterskiing, resulting in her ankle being immobilized for five months in a cast, three months in a full leg cast and two months in a toe to knee cast, followed by physical therapy. (Hrg. Tr., p. 117)

87. During Respondent's immobilization and recuperation, two major conventions occurred that she normally attends each year. If Respondent had attended these seminars that she normally attended, she would have fulfilled her continuing education requirement. (Hrg. Tr., p. 118)

88. Respondent testified that she did not intentionally fail to report her continuing education requirements. (Id.)

89. In her more than 30 years as a veterinarian, Respondent has never previously failed to meet the continuing education requirements. (Hrg. Tr., pp. 117-118)

90. It is unclear in the record if Respondent has made up all of the 30 credits of veterinary continuing education required by Wis. Admin. Code ch. VE 10 for the 2011-2013 reporting period. In Respondent's Exhibit 103, Respondent states "I have enclosed CE certificates as requested. Due to an injury last year I was physically limited for a 4 month period (July through October) and was unable to attend the WVMA Convention. I am registered for the convention next month for additional CE credits."

DISCUSSION

Burden of Proof

The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3); see also Wis. Admin. Code § HA 1.17(2). To prove by a preponderance of the evidence means that it is “more likely than not” that the examined action occurred. See *State v. Rodriguez*, 2007 WI App. 252, ¶ 18, 306 Wis. 2d 129, 743 N.W.2d 460, citing *United States v. Sauter*, 60 F.3d 270, 280 (7th Cir. 1995).

Violations

Pursuant to Wis. Stat. § 453.07(2) (a) (2011-2012), the Board may reprimand a veterinarian or deny, revoke, suspend, limit or any combination thereof, the veterinarian’s license if the veterinarian has engaged in unprofessional conduct. Unprofessional conduct is defined by both Wis. Stat. § 453.07(1) (f) (2011-2012) and Wis. Admin. Code § VE 7.06(1) to include engaging in “conduct in the practice of veterinary medicine which evidences a lack of knowledge or ability to apply professional principles or skills.” Unprofessional conduct also includes “[f]ailure to inform a client prior to treatment of the diagnostic and treatment options consistent with the veterinary profession’s standard of care and the associated benefits and risks of those options.” Admin. Code § VE 7.06(23).

In addition, unprofessional conduct is defined to include “[m]aking any materially false statement or giving any materially false information in connection with an application for a license or for renewal or reinstatement of a license or in making a report to the examining board,” Wis. Stat. § 453.07(1) (a) (2011-2012), or “[f]alsely certifying to the board under s. VE 10.02(6) that the veterinarian . . . [h]as completed the 30 hours of continuing education required under s. VE 10.02(1).” Wis. Admin. Code § VE 7.06(22).

Consent to Euthanasia

The Division asserted in its Complaint that by euthanizing an animal against the owner’s directions, Respondent committed unprofessional conduct pursuant to Wis. Admin. Code § VE 7.06(1) by engaging in conduct in the practice of veterinary medicine which evidenced a lack of knowledge or ability to apply professional principles.

However, in its post-hearing brief, and over the objection of Respondent, the Division alleges a violation related to informed consent not alleged in its Complaint – that Respondent engaged in unprofessional conduct as pursuant to Wis. Admin. Code § VE 7.06(23).

Respondent argues that the Division’s addition of an allegation not mentioned in the Complaint and not known to Respondent until the submission of the Division’s brief violates due process. The ALJ found that she need not consider Respondent’s due process argument, however, because the ALJ concluded that the Division failed to meet its burden of establishing either the violation of Wis. Admin. Code § VE 7.06(1) alleged in its Complaint, or the violation of Wis. Admin. Code § VE 7.06(23) alleged in its post-hearing brief. The Board, however, does not believe that it specifically needs to address the allegation of a violation of Wis. Admin. Code

§ VE 7.06(23), because it does believe there is sufficient evidence in the record for establishing a violation of Wis. Admin. Code § VE 7.06(1) and believes it is appropriate to address only those allegations that were properly before the ALJ at the commencement of the hearing.

Wisconsin Admin. Code § VE 7.06(1)

The ALJ's discussion of the record, in finding that it did not establish by a preponderance of the evidence that Respondent euthanized Tommy against Ms. Pollard's directions, concentrated on the credibility of the Respondent's testimony as compared to the credibility of Ms. Pollard's testimony as to whether Respondent had euthanized Tommy at the owner's direction. The Board agrees with the ALJ that it is the totality of the circumstances that address if the owner gives a direction for a procedure.

The Board finds it very important that Respondent testified to the following that was found to be credible Findings of Fact by the ALJ:

"52. Respondent explained to Ms. Pollard that she recommended euthanizing Tommy while he was still under anesthesia. Respondent informed Ms. Pollard that Tommy was starting to wake up from the anesthesia and that there was a short window of opportunity before he would wake up. Respondent testified that when cats wake up from anesthesia, they can be "very dissociated," which can include shaking, and she did not want Ms. Pollard to see Tommy in that phase. She also did not want to re-anesthetize Tommy. (Hrg. Tr., pp. 41, 70, 104-105)

53. Respondent does not agree that she was imposing any time pressure on Ms. Pollard to euthanize Tommy. (Hrg. Tr., pp. 104, 134-135)

54. Respondent believed that euthanasia under anesthesia would be more humane and less stressful to Tommy and to Ms. Pollard than having Ms. Pollard to drive back to the clinic to sign the euthanasia consent form, allow Tommy to wake up, re-anesthetize him and euthanize him. (Hrg. Tr., pp. 116-117, 133-34, 155)"

In essence, the Board looks at this as creating "exigent circumstances" so that Respondent needed to obtain direction from Ms. Pollard for consent to euthanize Tommy in a short period of time, without having a face-to-face conversation with an obviously distraught client, and getting clear direction through a signature on a euthanasia consent form, which is standard practice in applying the professional principles of veterinary medicine. However, significantly missing from the Findings of Fact and added by the Board in Findings of Fact 78-81, was the substantial evidence, directly in Respondent's treatment notes, undermining this part of Respondent's testimony as to how and why she obtained the direction from Ms. Pollard to euthanize Tommy in the manner that she did.

Comprised of veterinarians well versed in the professional practice of veterinary medicine, the Board, reading only Respondent's own notes, is able to make findings that 1.2 cc of anesthetic, given to a cat of 5.9 to 9 lbs, will keep the cat under anesthesia for a period substantially longer than the time frame when Ms. Pollard left Respondent's clinic, Tommy was anesthetized and tests were performed, and Respondent called Ms. Pollard

to gain direction for performing the euthanasia. The Board finds that Respondent's testimony about her perceived need to obtain direction because of these supposed exigent circumstances, which was not borne out by her own treatment notes, evidenced a lack of knowledge or ability to apply professional principles in regards to obtaining the direction to euthanize Tommy.

In addition, in proceeding to obtain direction to euthanize, particularly without having a signed consent form, a veterinarian's treatment notes should show complete and substantial documentation for obtaining consent. The Board finds that Respondent's treatment notes are substandard and inadequate for documenting this direction, particularly in circumstances that called for meticulous documentation, when the owner was in a highly charged emotional state when asked to give direction, and no signed consent was obtained. This is additional evidence that leads the Board to the finding that Respondent engaged in conduct that evidenced a lack of knowledge or ability to apply professional principles to the practice of veterinary medicine and violated Wis. Admin. Code § VE 7.06(1).

The Board is aware of the fact that the Division did not call an expert witness to testify to evidence in the treatment notes. While this is a failure on the part of the Division to assist the ALJ in understanding the important evidence these notes, the Board believes, whether specifically testified to or not, the Board is required to take into account this substantial evidence in the record. As the professional Board overseeing the discipline of another in their own field, the Board has the expertise to know what those notes mean and weigh them against the testimony and they need to exercise this judgment in order to carry out their important responsibilities to the public. In addition, the Board believes the Respondent, as a licensed veterinarian, is on notice that she is held to these standards. As stated in *Noesen v. State of Wisconsin Department of Regulation and Licensing, Pharmacy Examining Board*, 2008 WI App 52 at ¶15 :

"Licensing statutes are enacted not for the benefit of the individuals licensed, but for the benefit and protection of the public. *Strigenz v. Dept. of Reg. & Lic. Dentistry Exam. Bd.*, 103 Wis. 2d 281, 287, 307 N.W.2d 664 (1981). These statutes are founded on the state's police power to protect the public welfare and to safeguard the life, health, and property of its citizens. *Id.* "It is not necessary that a written rule declare that a professional person must practice his or her profession in a minimally competent manner." *Id.* at 286. It is also not necessary for licensing regulations to enumerate each specific act or omission that would constitute unprofessional conduct. *Id.* at 290. No licensed professional "can convincingly argue that he was not on notice that he had to perform professionally in a minimally competent manner for his conduct to be becoming a professional person." *Id.* at 287."

Continuing Education

The Division alleges that by certifying to the Board that she had completed the required 30 hours of continuing education for the 2011-2013 reporting period when she had not done so, Respondent engaged in unprofessional conduct as defined by Wis. Admin. Code § VE 7.06(22).

From the outset of these proceedings, Respondent has admitted that she failed to complete the required continuing education requirements for the 2011-2013 reporting period and that she falsely stated on her December 1, 2013 renewal application that she had completed these educational requirements. However, she

asserts that her failure was inadvertent, as was her reporting to the Board that she had fulfilled her continuing education requirements. Respondent notes that she had a waterskiing accident in July of 2012 that resulted in her ankle being immobilized for five months in a cast – three months in a full leg cast and two months in a toe to knee cast. Respondent states that as a result of her immobilization and recuperation, she was not able to attend to major conventions that she normally attends that would have fulfilled her continuing education requirements. As a result, Respondent argues that she mistakenly believed that her continuing education requirements had been fulfilled. Respondent also notes that in her more than 30 years as a veterinarian, she has never previously failed to meet the continuing education requirements.

Thus, there is no dispute in this case that Respondent violated Wis. Admin. Code § VE 7.06(22) by certifying to the Board that she had completed her continuing education requirements when she had not done so. The Board, however, makes an additional Finding of Fact (90) that it was unclear in the record if Respondent has made up all of the 30 credits of veterinary continuing education required by Wis. Admin. Code ch. VE 10 for the 2011-2013 reporting period.

Discipline

The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

The Board finds that Respondent violated both Wis. Admin. Code § VE 7.06 (1) and (22). The Board believes that each of these violations warrant that Respondent be reprimanded. The Board believes, while the Respondent ultimately obtained direction from Ms. Pollard as to euthanizing Tommy, which was professionally appropriate given the diagnosis of FIV, she did so under circumstances that constituted unprofessional conduct. The Board agrees with the ALJ that a reprimand is an appropriate discipline to impose on the Respondent for representing to the Board that she completed her continuing education requirements when she had not done so.

In addition, however, the Board also believes that Respondent needs to have a limitation placed on her license, requiring additional continuing education requirements. This is to ensure Respondent is fully educated, so that the violations do not occur again, and to ensure Respondent has fully made up the continuing education requirements missed during the 2011-13 reporting period.

The Board believes the two disciplines best serves the goals of rehabilitation, protection of the public, and deterrence set forth in *Aldrich*.

Costs

The Division has the authority to assess costs pursuant to Wis. Stat. § 440.22. With respect to imposition of costs, factors to consider include: (1) the number of counts charged, contested and proven; (2) the nature and seriousness of the misconduct; (3) the level of discipline sought by the prosecutor; (4) the cooperation of the respondent; (5) any prior discipline; and (6) the fact that the Department is a program revenue agency, funded by other licensees. See *In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS 0802183 CHI (Aug. 14, 2008).

Although the Board makes a final decision that the violations were ultimately proven, the Board is also mindful that the Division could have made much better use of the disciplinary process, in this case, by using the expertise of the Board and other veterinarians to make clear what misconduct actually occurred, what discipline would be appropriate to request, and to present it clearly and concisely to the ALJ. This weighs heavily against the Division in being awarded costs.

The Board agrees with the ALJ, in regard to Respondent's cooperation in all respects during this proceeding. Respondent has also timely complied with all deadlines and other requirements in this proceeding. In addition, Respondent has had no prior discipline in her 30-plus years of practicing veterinary medicine in Wisconsin. These factors likewise weigh heavily against imposing the costs of these proceedings on Respondent.

Therefore, the Board concurs with the ALJ that no costs should be imposed on Respondent for these disciplinary proceedings.

CONCLUSIONS OF LAW

1. Respondent engaged in unprofessional conduct under Wis. Admin. Code § VE 7.06(1), by obtaining the direction of Ms. Pollard to euthanize Ms. Pollard's cat, under circumstances Respondent created, that evidenced a lack of knowledge or ability to apply professional principles to the practice of veterinary medicine.
2. Respondent engaged in unprofessional conduct under Wis. Admin. Code § VE 7.06(22) by falsely certifying to the Board that she had completed the 30 hours of continuing education required under s. VE 10.02(1).
3. Under the facts of record, a reprimand is warranted pursuant to the factors delineated in *Aldrich*.
4. Under the facts of the record, a limitation on Respondent's license to practice veterinary medicine is warranted.
5. Under the facts of this case and the Department's prior decision in *Buenzli-Fritz*, the Board will not impose costs on Respondent.

ORDER

For the reasons set forth above, IT IS ORDERED that Respondent is REPRIMANDED, and Respondent's license is LIMITED, as follows, effective the date the Final Decision and Order is signed by the Board.

1. Within six months of the date of this Order, Respondent shall do either of the following, using the requirements of Paragraphs 2-8, below for completion: a) submit to the Board that she has already

completed the 30 hours of required continuing education necessary for the 2011-13 reporting year, or b) complete any hours of continuing education for that reporting year, not already completed, and submit them.

2. Within six months of the date of this Order, Respondent shall, at her own expense, take and successfully complete three hours of education on the topic of anesthesia administration in the practice of veterinary medicine.

3. Within six months of the date of this Order, Respondent shall, at her own expense, take and successfully complete three hours of education on the topic of client communications in the practice of veterinary medicine.

4. Respondent shall, at her own expense, take and successfully complete three hours of education on the topic of recordkeeping in the practice of veterinary medicine.

5. Each course attended in satisfaction of this Order must be pre-approved by the Board or its designee.

6. Respondent shall be responsible for locating course(s) satisfactory to the Board and for obtaining the required approval of the courses from the Board or its designee.

7. Respondent must take and pass any exam offered for the course(s).

8. Respondent shall submit proof of successful completion of the education in the form of verification from the institution providing the education to the Board at the address stated below.

9. None of the education completed pursuant to this Order may be used to satisfy any continuing education requirements that have been or may be instituted by the Board or Department.

10. Proof of successful course completion shall be sent to:

Veterinary Examining Board
2811 Agriculture Drive
PO Box 8911
Madison, WI 53708-8911

11. In the event Respondent fails to timely submit proof of successful completion of the ordered education as set forth above, Respondent's license may, in the discretion of the Board, be suspended without further notice or hearing until Respondent has complied with completion of the education.

IT IS FURTHER ORDERED that the above-captioned matter is hereby closed as to Respondent Jacquelyn Kieler.

Dated this 13 day of June, 2016.

STATE OF WISCONSIN
VETERINARY EXAMINING BOARD

By: P. C. Johnson DVM
Member of the Board