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Before the  
State of Wisconsin

In the Matter of the Application for a Dentist  
License Lance Kisby, D.M.D., Applicant

FINAL DECISION AND ORDER

Order No. **0006014**

Division of Legal Services and Compliance Case No. 18 DEN 037

The State of Wisconsin, Dentistry Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make 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, Dentistry 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 at Madison, Wisconsin on the 9 day of January, 2019.

Member  
Dentistry Examining Board



**Before The  
State of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Application for a Dentist  
License Lance Kisby, D.M.D., Applicant

DHA Case No. SPS-18-0028  
DLSC Case No. 18 DEN 037

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**PROPOSED DECISION AND ORDER**

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

Lance Kisby, D.M.D., by

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**PROCEDURAL HISTORY**

The above-captioned matter is before this tribunal on a Notice of Denial issued to Applicant Dr. Lance Kisby on March 30, 2018 by the Dentistry Examining Board ("Board"), which denied his application for licensure as a dentist in Wisconsin. A hearing was held on July 27, 2018, in Madison, Wisconsin, at which Joint Exhibits 1, 2 and 5 were received, as were Dr. Kisby's Exhibits 100-104 and the Department of Safety and Professional Services, Division of Legal Services and Compliance's ("Division") Exhibits 3-4. Following the hearing, the undersigned administrative law judge "(ALJ)" issued an order on August 14, 2018, denying a motion filed by Dr. Kisby's attorney to have admitted as a party the Lac Du Flambeau Band of

Lake Superior Chippewa Indians ("Tribe").<sup>1</sup> In addition, the parties submitted post-hearing briefs, with the last brief received on October 25, 2018.

### FINDINGS OF FACT

1. On or about December 6, 2017, Dr. Lance Kisby submitted an endorsement application (number 628995) for a license to practice as a dentist in the State of Wisconsin.

2. In a Notice of Denial dated March 30, 2018, the Board found that Dr. Kisby failed to provide sufficient evidence that he engaged in the "active practice of dentistry" in at least 48 of the 60 months preceding his application as required by Wis. Admin. Code § DE 2.04(1)(d).

3. As used in Wis. Admin. Code § DE 2.04(1)(d), "active practice of dentistry" is defined by Wis. Admin. Code § DE 1.02(2) as "having engaged in at least 750 hours of the practice of dentistry within the 12-month period preceding application for licensure in Wisconsin. . . ."

4. Following receipt of the denial letter, Dr. Kisby submitted 164 pages of additional material concerning his professional experience and achievements. (Joint Exhibit ("Ex.") 2; Applicant's ("App.") Ex. 104; July 27, 2018 Hearing Transcript ("Tr."), at 29-30, 48-51)

5. Notwithstanding that submission, the Board affirmed its initial determination that Dr. Kisby had not engaged in the active practice of dentistry in 48 months of the 60 months preceding his application. (Tr. at 55)

6. The Board's decision to deny Dr. Kisby's application was made by Dr. Wendy Pietz, through delegation. The Board appointed Dr. Pietz as the Board's credentialing liaison in 2015, 2016, 2017, and 2018, and delegated the authority to review all dental applications and make all decisions regarding the applications on behalf of the Board. She is the only person reviewing all of the dentistry applications. (Division's ("Div.") Ex. 4 at 207-208; Tr. at 34, 36, 38-39, 58)

7. Dr. Pietz is a professional member of the Board and has been a member of the Board since 2014. She has been a licensed dentist in Wisconsin for fourteen years, specializing in oral and maxillofacial surgery. (Div. Ex. 3; Tr. at 32-35)

8. In reviewing applications and making determinations, Dr. Pietz reviews the applications from beginning to end to determine whether the standards for licensure are met. (Tr. at 40-41)

9. Dr. Kisby engaged in the practice of dentistry for more than 750 hours in each of the 12-month periods comprising the 60 months (5 years) preceding his application. He worked 6,084 hours in 2013, 1,428 hours in 2014 and "at least" 750 hours in each of the years 2015, 2016, and 2017. (Tr. at 60-62)

10. Dr. Pietz's conclusion that Dr. Kisby had not engaged in the active practice of dentistry was based on her interpretation of Wis. Admin. Code §§ DE 2.04(1)(d) and 1.02(2). Dr. Pietz starts with the 750-hour/12-month definition of "active practice" in Wis. Admin. Code

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<sup>1</sup> Because the term "Tribe" has been used in these proceedings by counsel for Dr. Kisby, it is also used here.

§ 1.02(2), divides by 12 to get an average of 62.5 hours of active practice per month, then rounds that number down to 60 hours per month. She then multiplies the number of hours per week reported by the applicant on his or her application by a factor of four to obtain what Dr. Pietz views as the hours per month worked by the applicant, which she then compares to the 60-hour per month mark. (Tr. at 44-45, 59-60, 62-63)

11. In any month in which Dr. Pietz's method of calculation reveals that the applicant did not "actively practice" for 60 hours or more, Dr. Pietz does not count that month in determining whether the applicant has met the "48 months of the last 60 months" requirement, i.e., she treats that month as one in which there was no active practice of dentistry, no matter how close to the 60-hour mark the dentist came. For example, Dr. Pietz treated Dr. Kisby as having no "active practice" hours in January of 2017, even though the record shows he had 58 hours, because he had not reached the 60-hour mark. (Tr. at 44, 60)

12. Allowing 60 hours per month to count as active practice results in 720 hours per year rather than the required 750 hours per year.

13. Dr. Pietz's interpretation of the rules has been followed since 2015. There is no written policy or standard that Dr. Pietz followed to employ this methodology. (Tr. at 60, 66)

14. When Dr. Pietz was asked about the fact that dividing 750 by 12 actually produces a result of 62.5 rather than the 60 she uses, Dr. Pietz responded, "I understand, but I have to -- I could apply 62.5, but it's not ever come that close to needing to apply 62.5." (Tr. at 59-60)

15. When Dr. Pietz was questioned about her practice of multiplying a practitioner's weekly practice hours by a factor of four to obtain a monthly average, even though every month but February has more than 28 days, the following exchange occurred:

Q That [multiplying an average weekly number of hours by four to obtain a monthly average despite the fact that there are more than four weeks in a month] might give you an average, but it's not really correct; is that right?

A Correct. When files are very close to either meeting or not meeting the requirement, we ask for a lot of information to make the decision about active practice.

(Tr. at 62-63)

16. Dr. Thomas Wheeler is licensed as a dentist in the State of Wisconsin and at the time of hearing was employed as the dental director and a practitioner at the Peter Christensen Dental Clinic in Lac du Flambeau ("the Clinic"), which is owned by the Lac du Flambeau Tribe. According to Dr. Wheeler, nine dentists are employed at the clinic both full-time and part-time, with no pediatric dentists. (Tr. at 13-14)

17. Part of his function as director is to recruit dental practitioners and other employees for the Clinic. He has attempted to employ a pediatric dentist at the Clinic but, aside from Dr. Kisby, Dr. Wheeler has not spoken to any other pediatric dentist who is interested in working at the Clinic. (Tr. at 14-15)

18. Approximately 17,000 patient visits are handled at the Clinic annually and of those, approximately 3,000 patients are under the age of 18. (Tr. at 15)

19. The general dentists at the Clinic are unable to fully treat all of the pediatric patients at the Clinic; therefore, they are referred. Tribe members are typically sent to Eau Claire, but the clinic at Eau Claire has limited availability, and is a four-hour round-trip visit. Since January 2018, only about 30 of the 300 pediatric patients were able to go to a pediatric dentist. These 30 patients were chosen based on how extreme their cases were – *i.e.*, how much infection there was, how much pain they were in and how critical it was to take care of them immediately. Referring the pediatric patients to Eau Claire creates hardship on the children's parents, not only financially, but also because the appointments are often early in the morning because some patients are not supposed to eat or drink before their appointments, requiring the parents to wake up at 4:00 or 5:00 a.m. (Tr. at 17-19)

20. If Dr. Kisby had been licensed in Wisconsin and able to work at the Clinic, many of the 300 children would have been seen by him, requiring only a 15-minute drive. (Tr. at 19-20)

### DISCUSSION AND CONCLUSIONS OF LAW

#### Burden of Proof

In its Notice of Hearing, the Division states the issue for hearing as follows: "Was the Board's denial of Applicant's application for a Dentist license based upon a mistake of fact or law, or was it arbitrary or capricious, under the facts of this case?" In her pretrial brief, counsel for Dr. Kisby appeared to adopt that standard; however, at hearing, counsel inquired as to whether it was the Division which actually had the burden of proof. (Tr. at 8)

The "mistake of fact or law" standard contained in the Division's Notice of Hearing appears to derive from Wis. Admin. Code § SPS 1.07(3), which states that an applicant's request for a hearing must contain "[a] specific description of the mistake in fact or law which constitutes reasonable grounds for reversing the decision to deny the application for a credential. . ." The Division has offered no support for the "arbitrary or capricious" standard contained in its Notice of Hearing; therefore, it is not adopted here. Instead, at hearing, the Division correctly referred to Wis. Admin. Code § SPS 1.08(4), which states:

(4) BURDEN OF PROOF. The applicant has the burden of proof to show by evidence satisfactory to the credentialing authority that the applicant meets the eligibility requirements set by law for the credential.

Accordingly, Dr. Kisby has the burden of proof in this case. Moreover, in addition to the standard set forth in Wis. Admin. Code § SPS 1.08(4), the standard articulated in Wis. Admin. Code § SPS 1.07(3) also applies here – *i.e.*, that the applicant must show a mistake in fact or law which constitute reasonable grounds for reversing the decision to deny the application. Thus, Dr. Kisby has the burden of proof to show by evidence satisfactory to the credentialing authority that he meets the eligibility requirements set by law for the credential and that there was a

mistake of fact or law which constitutes reasonable grounds for reversing the Board's decision denying his application.<sup>2</sup>

Wisconsin Admin. Code §§ DE 2.04(1)(d) and DE 1.02(2)

The governing statutory provision in this matter is Wis. Stat. § 447.04(1)(b)(1) which provides:

(b) Except as provided in par. (c), the examining board may grant a license to practice dentistry to an individual who is licensed in good standing to practice dentistry in another state or territory of the United States or in another country if the applicant complies with all of the following requirements:

1. Meets the requirements for licensure established by the examining board by rule.

The issue in this case is whether Dr. Kisby met the following requirement, set forth in Wis. Admin. Code § DE 2.04(1)(d):

(1) The board may grant a license as a dentist to an applicant who holds a valid license issued by the proper authorities of any other jurisdiction of the United States or Canada upon payment of the fee authorized by s. 440.05 (2), Stats., and submission of evidence satisfactory to the board that all of the following conditions are met:

...

(d) The applicant has been engaged in the active practice of dentistry, as defined in s. DE 1.02 (2), in one or more jurisdictions in which the applicant has a current license in good standing, for at least 48 of the 60 months preceding the application for licensure in Wisconsin.

The phrase "active practice of dentistry" is defined as "having engaged in at least 750 hours of the practice of dentistry within the 12-month period preceding application for licensure in Wisconsin. . . ." Wis. Admin. Code § DE 1.02(2).

It is difficult to make sense of these two administrative code provisions which must be read together.<sup>3</sup> Read literally together, these provisions require the applicant to have engaged in at least 750 hours of the practice of dentistry within the 12-month period preceding application for licensure in Wisconsin in one or more jurisdictions in which the applicant has a current

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<sup>2</sup> At hearing, it was assumed that Wis. Admin. Code § HA 1.07(2) also applies. This provision states: "(2) BURDEN OF PROOF. Unless the law provides for a different standard, the quantum of evidence for a hearing decision shall be by the preponderance of the evidence." Wis. Admin. Code § HA 1.07(2). However, because Wis. Admin. Code § SPS 1.08(4) provides for a different standard than the preponderance of the evidence standard articulated in Wis. Admin. Code § HA 1.07(2), (*i.e.*, "evidence satisfactory to the credentialing authority"), the more specific standard in Wis. Admin. Code § DE 1.08(4) applies.

<sup>3</sup> Dr. Pietz testified at hearing that the Board is in the process of eliminating the active practice requirement in the rules and that if the change had been completed, it is conceivable that Dr. Kisby could have been granted licensure. (Tr., at 65-66) At a minimum, these rules should be modified so that they are more easily understood.

license in good standing, for at least 48 of the 60 months preceding the application for licensure in Wisconsin. The parties attempt to make sense of these combined provisions in different ways.

Dr. Kisby argues that, read together, these two code provisions establish that a dentist meets the “active practice” requirement so as to be eligible for Wisconsin licensure by endorsement if he or she: (a) was engaged in the practice of dentistry for at least 750 hours over the 12-month period preceding submission of the application; and (b) practiced 750 hours in at least four 12-month periods (*i.e.*, 48 months) during the 60 months preceding his or her application. Under this interpretation, there is no dispute that Dr. Kisby would have met the requirements for licensure at issue here as he engaged in the practice of dentistry for more than 750 hours in each of the 12-month periods comprising the 60 months (5 years) preceding his application. He worked 6,084 hours in 2013, 1,428 hours in 2014 and at least 750 hours in each of the years 2015, 2016, and 2017.

The Division argues that Dr. Kisby’s interpretation eliminates the “48 of 60 months” requirement. The Division further asserts that because Wis. Admin. Code § DE 2.04(1)(d) refers to “months,” “the question of how many hours are needed to count as a ‘month’ is unavoidable.” (Division’s Brief at 12) Therefore, the Division argues that Dr. Pietz’s methodology of calculating a 60-hour per month requirement was reasonable. Under this methodology, Dr. Pietz took the 750 hours required per year, divided the 750 by 12 (for each month in a year) to get an average of 62.5 hours per month, then rounded down to obtain a requirement of 60 hours of dentistry practice per month. She then multiplied the number of hours per week reported on the application by a factor of four to obtain what she viewed as the hours the applicant worked per month. If that figure was less than 60 hours, the entire month was not counted toward the required 48 of 60 months.

Dr. Kisby counters that Dr. Pietz’s methodology has the following fatal flaws: (a) it is contrary to Wis. Admin. Code § DE 1.02(2), which allows a full 12-month period for accumulation of the 750 hours; (b) it recasts the rule requirement as a per month requirement based on a weekly average; (c) it employs a division, multiplication, rounding up and rounding down exercise that leads, at each stage, to admittedly arithmetically inaccurate results; and (d) it conflicts with the 750 hour per 12-month period requirement in that, at 60 hours per month, a dentist would fail to meet the 750 hour requirement, given that 60 hours multiplied by 12 months is only 720 hours. (Applicant Brief at 8-9)

Dr. Kisby’s argument is persuasive. The most fundamental problem with the Division’s interpretation is that it improperly reads into the governing provisions a per month requirement that they do not contain and reads out of the provisions the 750 hours per year requirement that they actually do contain. *See Kollasch v. Adamany*, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1981) (internal citation omitted) (“When construing statutes, meaning should be given to every word, clause and sentence in the statute, and a construction which would make part of the statute superfluous should be avoided wherever possible.”). I conclude that Dr. Kisby’s approach is the only one which harmonizes the code provisions and gives effect to all of their terms. Although it is true that Wis. Admin. Code § DE 2.04(1)(d) refers to 48 and 60 “months,” this fact does not permit transforming the provision into an “hours per month” requirement, particularly when that interpretation contravenes the code’s language stating that an applicant has a full year to complete 750 hours, and when the hours per month decided upon (60) does not add up to the required 750 hours per year.

I conclude that Dr. Kisby's approach of analyzing the 48 and 60-month periods in terms of one-year increments to determine whether an applicant practiced 750 hours per year is the only way to reconcile and give effect to both of the provisions at issue. *See Pritchard v. Madison Metropolitan School Dist.*, 2001 WI App 62, ¶15, 242 Wis. 2d 301, 625 N.W.2d 613. ("Conflicts between statutes are not favored, and courts are to harmonize statutes to avoid conflicts when a reasonable construction of the statutes permits that."). It appears to be no mistake that the provisions refer to blocks of one-year increments. The first block is a period of one year, *i.e.*, the 12-month period preceding the application during which the applicant must engage in at least 750 hours of the practice of dentistry. Wis. Admin. Code § DE 1.02(2). The other blocks of time are 48 months, which is four years, and 60 months, which is five years. Rather than creating a per month hourly requirement, especially one that does not actually add up to the 750 hours per year requirement, it is reasonable and logical to read these provisions to require that for four of the five years preceding the application, the applicant must have practiced dentistry for at least 750 hours per year.

Relying on Wisconsin case law, the Division argues that the Board's initial interpretation of its own rules in this matter is entitled to controlling weight unless the interpretation is inconsistent with the language of the rules or clearly erroneous. However, none of the cases relied on are on point because they involve a court's review of an administrative agency's or board's decision, whereas this case involves a decision by an administrative law judge, and ultimately, by the Board, following a hearing.

Based on the foregoing, I conclude that Dr. Kisby met the requirements of Wis. Admin. Code §§ DE 2.04(1)(d) and 1.02(2). Because these were the only requirements about which there was any dispute in this matter, Dr. Kisby should have been granted a Wisconsin license.

#### ORDER

For the reasons set forth above, IT IS ORDERED that the Board's March 30, 2018 Notice of Denial issued to Dr. Kisby is reversed, and the matter is remanded to the Board with instructions to issue Dr. Kisby a Wisconsin license.

Dated at Madison, Wisconsin on November 30, 2018.

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By: \_\_\_\_\_

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