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**Before the
State of Wisconsin**

In the Matter of Disciplinary Proceedings Against
James F. Murphy, D.D.S., Respondent

FINAL DECISION AND ORDER

Order No. **ORDER 0006274**

Division of Legal Services and Compliance Case No. 17 DEN 080

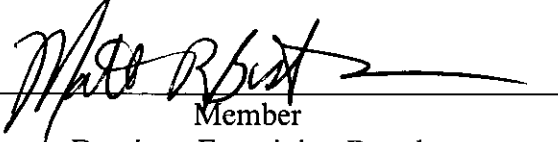
The State of Wisconsin, Dentistry Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make the following:

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 10th day of July, 2019.


Member
Dentistry Examining Board

ORDER 000857



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

In the Matter of Disciplinary Proceedings Against
James F. Murphy, D.D.S., Respondent

DHA Case No. SPS-18-0036
DLSC Case No. 17 DEN 080

PROPOSED DECISION AND ORDER

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

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Department of Safety and Professional Services, Division of Legal Services and
Compliance, by

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PROCEDURAL HISTORY

These proceedings were initiated on July 23, 2018, when the Wisconsin Department of Safety and Professional Services (“Department”), Division of Legal Services and Compliance (“Division”), filed a formal Complaint against Respondent James F. Murphy (“Respondent”), alleging that Respondent, a dentist, engaged in unprofessional conduct pursuant to Wis. Admin. Code § DE 5.02(15) by violating any law or being convicted of a crime the circumstances of which substantially relate to the practice of dentistry. The Complaint specifically referred to Respondent’s conviction on September 5, 2017 in Dane County Circuit Court Case Number 2016CF1906 for one count of party to the crime of fraud/rendering income tax return, in violation of Wis. Stat. §§ 71.83(2)(b)1. and 939.05, a Class H felony. The tax returns which were the subject of the criminal conviction included income from Respondent’s dental clinic.

Respondent filed an Answer on August 8, 2018, which admitted the facts set forth above but denied that the facts constituted a violation of Wis. Admin. Code § DE 5.02(15), as alleged. However, during a telephone prehearing conference on August 22, 2018, counsel for Respondent stated that he believed Respondent would stipulate that the conduct constituted the violation alleged and that instead of a hearing, the matter could be briefed on the issues of discipline and costs. On September 20, 2018, Respondent filed an Amended Answer, in which he admitted that he violated Wis. Admin. Code § DE 5.02(15).

At an additional telephone conference held on October 15, 2018, the parties agreed that the Complaint and Amended Answer constituted the stipulated facts and violation. However, counsel for the Division stated that she also wished to submit additional information on the issues of discipline and costs. Counsel for Respondent objected to consideration of such information. As a result, a briefing schedule was agreed to, and on October 15, 2018, the undersigned administrative law judge (“ALJ”) issued a briefing order on whether consideration of the Division’s additional information was appropriate and on the issues of discipline and costs.

On December 14, 2018, the Division filed four documents, Exhibits 1-4, which the Division requested be considered on the issues of discipline and costs. Exhibits 1 and 2 are the criminal complaint and the judgment of conviction, respectively, in the Dane County criminal case. Exhibit 3 is the plea and sentencing hearing transcript in the criminal matter and Exhibit 4 is a witness impact statement from Dr. Richard Salm dated August 22, 2017, submitted in the criminal case. Respondent moved to exclude Exhibits 3 and 4, which the ALJ granted. With regard to Exhibit 3, the ALJ concluded that the statements from the prosecutor and defense counsel were irrelevant because they represented third parties’ views of the facts, and that the facts were contained in the criminal complaint and speak for themselves. The ALJ also concluded that the judge’s views in the criminal matter were not relevant to the issues of discipline or costs in a licensing case. Regarding Exhibit 4, Dr. Salm’s statement, the ALJ concluded that the statement had little to do with the conviction and was instead, Dr. Salm’s account of Respondent’s poor treatment of him.

The parties subsequently submitted briefs in this matter on the issues of discipline and costs.

FINDINGS OF FACT¹

1. Respondent James F. Murphy, D.D.S., is licensed in the State of Wisconsin to practice dentistry, having license number 4761-15, first issued on December 22, 1995, and current through September 30, 2017.² (Complaint ¶ 1 and Amended Answer ¶ 1)

¹ Respondent objects to some of the findings proposed by the Division which are taken from the criminal complaint, Exhibit 1. He claims that some of the proposed findings constitute triple hearsay or are irrelevant or repetitive. Because Respondent did not object to admission of Exhibit 1 when he objected to Exhibits 3 and 4, and because the allegations set forth in the criminal complaint formed the basis of Respondent’s guilty plea and conviction, this decision includes information from the criminal complaint that is relevant to understanding the nature of Respondent’s conduct.

² Respondent’s license remains active at this time per Wis. Stat. § 227.51(2), as the Board has not yet acted upon the Respondent’s request to renew such license.

2. At all times relevant to this proceeding, Respondent was employed as a dentist at a dental clinic he co-owned in Waukesha, Wisconsin. (Complaint ¶ 3 and Amended Answer ¶ 3)

3. Between 2009 and 2012, Respondent co-owned and operated Your Family Dentist at 411 North Grand Avenue, Waukesha, Wisconsin 53186, in partnership (the Partnership) with Michael LaFratta, D.D.S.³ (Ex. 1, pp. 3, 6-7)

4. Respondent and Dr. LaFratta provided dental services to patients which generated business income for the Partnership. (Ex. 1, pp. 3, 7)

5. Respondent and the Partnership utilized MOGO, an accounting and billing application to track patient treatments, appointments, receipts, billing statements, submitted insurance claims and actual collections received. (Ex. 1, p. 5).

6. Respondent and Dr. LaFratta engaged in a skimming operation to underreport business income generated by the Partnership to avoid paying taxes. (Ex. 1, pp. 3-4).

7. Respondent and Dr. LaFratta skimmed modestly to lessen the chance of a tax audit by making the Partnership revenues appear somewhat even from month to month. (*Id.*)

8. In order to facilitate the skimming scheme, Dr. LaFratta provided the Partnership's accountant handwritten documents which underreported the monthly business income. If the amount of skimmed Partnership income was deemed a large amount for the month, the documents provided to the Partnership's accountant stated, "official." If the amount of skimmed Partnership income was deemed a smaller amount for the month, the documents provided to the Partnership's accountant stated, "actual and official." (*Id.*)

9. Respondent directly participated in, and reaped financial benefit from, the skimming scheme. Respondent did not think he would be caught for skimming Partnership business income because the amounts skimmed off were small compared to the amounts that were reported. (*Id.*)

10. On April 14, 2012, Respondent filed a false and fraudulent income tax return with intent to defeat or evade tax assessment for business income generated by the Partnership in 2011. (Ex. 1, p. 7)

11. By filing a false and fraudulent income tax return, Respondent evaded paying state income taxes on \$94,602 in business income generated by the Partnership in 2011 which was not reported on Respondent's individual tax return. (Ex. 1, pp. 6-7)

12. By underreporting Partnership income of \$94,602 on the April 14, 2012 tax return, Respondent evaded \$7,331 in Wisconsin state income taxes. (Ex. 1, p. 7)

13. On September 15, 2016, Respondent was named a defendant in Dane County Circuit Court Case number 2016CF1906 and charged with two counts of party to the crime of rendering

³ On September 5, 2018, the Board issued Final Decision and Order 0005863 accepting the permanent surrender of the five-year renewal right of Michael LaFratta, D.D.S., credential number 5001794-15.

a false or fraudulent income tax return, in violation of Wis. Stat. §§ 71.83(2)(b)1., and 939.05, a Class H felony. Specifically, Respondent was charged with underreporting \$101,554 in 2010 Partnership income on his Wisconsin state income tax return filed on April 14, 2011 (Count 3), and underreporting \$94,602 in 2011 Partnership income on his Wisconsin state income tax return filed on April 14, 2012 (Count 4). (Complaint ¶ 4 and Amended Answer ¶ 4; Ex. 1, pp. 2, 7)

14. On September 5, 2017, Respondent pled guilty to Count 4 in Dane County Circuit Court Case number 2016CF1906 and was convicted of one count of party to a crime/rendering income tax return, in violation of Wis. Stat. §§ 71.83(2)(b)1. and 939.05, a Class H felony. Count 3 was dismissed but read in. (Complaint ¶ 5 and Amended Answer ¶ 5; Ex. 2)

15. On September 5, 2017, the court sentenced Respondent to two years of probation, with sentence withheld. As conditions of probation, the court ordered Respondent to serve six months of jail, to pay all future taxes owed, on time, and to complete a “risks and needs” assessment. (Complaint ¶ 6 and Amended Answer ¶ 6)

16. Respondent admits that by the conduct described above, he engaged in unprofessional conduct pursuant to Wis. Admin. Code § DE 5.02(15), by violating any law or being convicted of a crime the circumstances of which are substantially related to the practice of dentistry. (Complaint ¶ 8 and Amended Answer ¶ 8)

DISCUSSION

Violation

The Wisconsin Dentistry Examining Board (“Board”) may reprimand a dentist or may deny, limit, suspend, or revoke his or her license if the Board finds that the dentist has engaged in unprofessional conduct or has been convicted of a crime, the circumstances of which substantially relate to the practice of dentistry. Wis. Stat. § 447.07(3)(a) and (e), respectively. Wisconsin Admin. Code § DE 5.02(15) defines unprofessional conduct to include “[v]iolating any law or being convicted of a crime the circumstances of which substantially relate to the practice of a dentist.” Wisconsin Stat. § 447.07(7) provides that in addition to or in lieu of a reprimand, denial, limitation, suspension or revocation, the Board may assess a licensee a forfeiture of not more than \$5,000 for each violation enumerated in § 447.07(3).

Respondent concedes that he engaged in unprofessional conduct, pursuant to Wis. Admin. Code § DE 5.02(15). The parties dispute what discipline and costs, if any, are appropriate.

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 Division recommends that Respondent's license be suspended for a period of two years, with no stay of the suspension for the first two weeks, and that his license be limited for a period of at least two years, requiring that Respondent:

- practice only under general supervision by a dentist approved by the Board who is at the premises at least 50% of the time;
- provide a copy of this order to any supervisory personnel at his dental clinic;
- be prohibited from owning any interest in a dental office or clinic, and from having responsibility for any accounting or financial duties of any dental office or clinic;
- provide to the Department on a quarterly basis reports from the supervising dentist which address the hours worked by the Respondent each week, when the supervising dentist was on the premises during each week, whether Respondent had access to financial documents, and any indication of potential violation of this Order;
- provide to the Department on a quarterly basis financial audit reports prepared by an accountant, which address the income generated by the dental practice and verifies that the income derived from Respondent's dental practice is appropriately accounted for and reported to federal and state tax authorities;
- pay all costs and expenses incurred in conjunction with the monitoring, screening, supervision and any other expenses associated with compliance with the terms of this Order; and
- report to the Board any change of employment status, residence, address or telephone number within five days of the date of change.

The Department requests that after two weeks, Respondent could petition for a stay of the suspension which could be granted by the Board if Respondent provides proof that he has been in compliance with the provisions of the Board's Order. In addition, the Division seeks a forfeiture in the amount of \$5,000, to be paid within 120 days of the final order in this case.

Respondent states that the discipline recommended by the Division is unnecessary for the protection of the public welfare, serves no rehabilitative purpose, and is inconsistent with the level of discipline imposed in other similar disciplinary actions. He asserts that the limitations proposed by the Division would almost certainly put him out of business. Specifically, he states that precluding him from owning an interest in a dental clinic would limit his income and would make it impossible for him to cover the costs of finding a dentist to monitor him and submit the requested reports and for Respondent to pay for the costs of the quarterly financial audit reports from an accountant. Respondent recommends a reprimand and a modest financial forfeiture. He further contends that no limitations are necessary, but that if this tribunal disagrees, such limitations should only include Respondent's compliance with the terms of his probation and/or completion of six hours of ethics coursework.

I agree that the discipline recommended by the Division is overly severe, given the facts of this case, Respondent's record, his cooperation in this proceeding and in the criminal matter, and the Board's past treatment of similarly situated dentists. Respondent has been a dentist in Wisconsin for over 23 years and has no prior history of discipline by the Board. The conduct forming the basis of this proceeding last occurred when he filed his taxes in 2012, seven years ago, and there is no indication that he has engaged in any misconduct since that time. Although the

conduct at issue was serious and wrong, it did not result in harm to patients, and, as conceded by the Division, involved relatively modest amounts of money, \$7,331 for tax year 2011. Moreover, no patients or insurance companies were deceived.

In addition, Respondent has accepted responsibility for his actions, most notably, by pleading guilty to a felony in the criminal matter, being placed on probation for two years and serving a jail term of six months. He also cooperated in this matter, not only stipulating to the underlying facts but also to the violation – *i.e.*, that a conviction for tax fraud is substantially related to the practice of dentistry. He also agreed to the imposition of some form of discipline. Further, a review of the decisions cited by the parties demonstrates that the Division's proposed discipline is inconsistent with prior Board decisions.⁴

In support of its recommended discipline, the Division relies primarily on three prior Board decisions. The first is *In the Matter of Disciplinary Proceedings Against Frederick G. Kriemelmeyer, D.D.S.*, Case No. LS0801182DEN (July 2, 2008), in which a dentist, Dr. Kriemelmeyer, was convicted of four counts of fraud and false statements, in violation of 26 U.S.C. § 7206(1). The convictions were based on his failure to report \$380,857 in gross receipts from his dentistry practice on federal tax returns in 2000, 2002, 2003 and 2004. Dr. Kriemelmeyer was sentenced to a thirty-six-month federal prison term and was fined \$143,766. The Board revoked his license. The decision noted that Dr. Kriemelmeyer's "conviction for underreporting the gross receipts from his dental practice in order to evade paying taxes demonstrates dishonesty, untrustworthiness, and unlawfulness," that the "public must have the confidence in those who are licensed as health care professional[s]," and that such professionals "are expected to abide by the law, particularly as to the business aspects of their profession." *Kriemelmeyer* at 8.

Kriemelmeyer is distinguishable in a number of respects. First, Dr. Kriemelmeyer's failure to pay taxes was based on his belief that the federal government had no authority to impose taxes on him because the Internal Revenue Service is unconstitutional. In addition, Dr. Kriemelmeyer "obstructed the investigation prior to being indicted," "lied under oath," and put the government through a three-day trial in federal court. *Id.* at 3. He remained unrepentant in his disciplinary proceedings, filing submissions in which he "asserted that he ha[d] violated no law, nor been lawfully convicted of a crime, that he [was] a victim of sham legal proceedings, and that he [was] totally innocent." *Id.* at 5. Given these statements, it is not surprising that the Board concluded that "if given an opportunity to earn income as a dentist, [he] would engage in the same behavior," and revoked his license. *Id.* at 8. In contrast, Respondent pled guilty, thereby accepting responsibility for his crime, he has expressed remorse, and the record contains no indication that he will engage in similar conduct in the absence of a license suspension and the limitations requested. Moreover, the conviction in *Kriemelmeyer* was for four counts of failure to pay taxes rather than one, and the amounts involved were substantially greater than those at issue here.

The Division also relies on *In the Matter of the Disciplinary Proceedings Against Anneke Wagner, R.D.H.*, Case No. LS#0704301DEN (Sept. 5, 2007), in which a dental hygienist, Ms. Wagner, filed 32 false claims with her personal insurance company over the course of more than a year for dental services she falsely claimed were provided by her employing dentists. She

⁴ These prior decisions are attached to the parties' briefs and may also be found on-line on the Department's website.

then cashed reimbursement checks for the claims. In a stipulated Final Decision and Order, the Board imposed a one-year suspension and permanent practice limitations. Pursuant to the practice limitations, Ms. Wagner was prohibited from having any responsibility for, or connection with, billing for dentistry services or practices. She was also required to provide the Order to all employers and to any of her dental service insurers.

Wagner is distinguishable from the instant case. First, it is not a tax fraud case. Moreover, Ms. Wagner actively defrauded her insurance company on more than 30 occasions, using her employing dentists, who were innocent third parties, in the scheme. Her acts therefore involved dishonesty with respect to both her insurance company and her employers. And although the Division is correct that in both cases, the dental practice was used as a conduit for personal financial gain, there is a big difference between using one's own dental practice in the scheme and using the dental practice of one's employer in the scheme without the employer's knowledge or consent. Thus, *Wagner* is of minimal relevance to the instant case.

The same is true of *In the Matter of Disciplinary Proceedings Against Michael O'Connell, D.D.S.*, Case No. LS0705181DEN (Feb. 7, 2008), another case upon which the Division relies. In that case, a dentist, Dr. O'Connell, knowingly operated a dental practice with an expired dental license. His dental credential had lapsed due to his delinquency in payment of taxes and child support. Dr. O'Connell stated that he knew his license was not active but that he continued to practice because of his substantial financial obligations. He practiced without a license for nearly two years. Moreover, he had been disciplined for the same conduct – practicing dentistry without a license due to tax delinquency -- seven years prior, receiving a reprimand and forfeiture in the prior case. Following contested disciplinary proceedings, the Board ordered Dr. O'Connell to pay a \$2,500 forfeiture and suspended his credential indefinitely until he satisfied his outstanding state tax and child support delinquencies, whereupon he could petition the Board for reinstatement.

The Division states that *O'Connell* is similar to the instant case because both dentists made conscious decisions to engage in misconduct and both were financially motivated. However, I agree with Respondent that *O'Connell* is inapposite. There is a substantive difference between underrepresenting partnership income to the Department of Revenue and practicing dentistry without a license. Patient welfare is undermined when an individual practices dentistry without a credential, particularly when the dentist does so for a substantial period of time and on more than one occasion, as in *O'Connell*. Also, as pointed out by Respondent, Dr. O'Connell's conduct could have involved dozens, if not hundreds, of patients, whereas this case does not involve any patients. In addition, unlike Dr. O'Connell, Respondent has no prior disciplinary action against him. It makes sense to suspend the license of a dentist who has shown by virtue of his recidivism that he is likely to repeat the misconduct if given the opportunity. It is also notable that when Dr. O'Connell practiced without a license the first time due to tax delinquency, he received only a reprimand and a forfeiture, not a suspension or any of the limitations requested here.

Respondent is correct that this case is more factually analogous to three other decisions issued by boards in disciplinary proceedings. The first, *In the Matter of Disciplinary Proceedings Against Eugene A. Darkow, D.D.S.*, Case No. 0004682 (May 4, 2016), involved a dentist, Dr. Darkow, who failed to pay the majority of taxes that he owed for the years 2008 through 2011, including taxes on the income derived from his dentistry practice. He ultimately pled guilty to two

counts of willfully failing to pay federal income tax, and as a condition of probation was required to pay \$557,813.93 -- presumably, the amount he had failed to pay in taxes. In a stipulated Final Decision and Order, the Board reprimanded him and limited his license by requiring him to comply with the conditions of his probation, pass the dentistry ethics examination, and arrange for monthly reports from his probation agent to the Department indicating whether he was in compliance with probation requirements. The Board did not suspend his license or impose any of the license limitations recommended by the Division here. It also imposed no forfeiture.

The Division attempts to distinguish *Darkow* by noting that Dr. Darkow accurately reported his tax obligations but failed to pay the taxes owed, whereas here, Respondent engaged in a deliberate scheme to avoid paying taxes and used his dental practice as a conduit for financial gain. The *Darkow* decision does not indicate why Dr. Darkow failed to pay his taxes; however, his criminal conviction was for *willfully* failing to pay federal income tax. Moreover, the Division is correct that there was no indication that Dr. Darkow was engaged in any falsification with regard to the reporting of income from his dental practice, as occurred here. Nevertheless, I conclude that the facts of *Darkow* are more similar than dissimilar to those here and that discipline should therefore be similar. Indeed, in some respects, Dr. Darkow's conduct was more egregious than Respondent's. Dr. Darkow was convicted of two counts of failure to pay taxes, involving four years, whereas this case involved a conviction for one count involving one year, with another count involving a different year read in at sentencing. In addition, the amount Dr. Darkow failed to pay in taxes appears to be significantly greater than the amount Respondent failed to pay -- approximately \$557,814 rather than \$7,331.

Respondent also relies on *In the Matter of Disciplinary Proceedings Against Lawrence J. Polidori, D.D.S.*, Case No. 92 DEN 97 (May 5, 1993), in which Dr. Polidori, a dentist, was convicted of two felony counts for filing false income tax returns. Specifically, Dr. Polidori stated on his returns that he did not have any financial accounts in foreign countries when he actually had an offshore account with substantial assets. In addition, at a bond hearing held on the criminal case, Respondent falsely told the court that he had no offshore assets; however, at a subsequent hearing, the government informed the court that it had documentation of Respondent's offshore assets. The Board reprimanded him and required that he pay a civil forfeiture of \$2,500. His license was not suspended or limited in any way. As in *Polidori*, Respondent engaged in a tax-related crime that had no impact on patients, and there is no evidence that he is likely to repeat this conduct. Thus, similar discipline should be imposed.⁵

Finally, Respondent relies on *In the Matter of Disciplinary Proceedings Against James L. Flowers, M.D.*, Case No. LS0208062MED (May 21, 2003), in which a physician, Dr. Flowers, was convicted of two counts of filing false corporate income tax returns for underreporting income from his medical clinic. In his disciplinary proceeding, he maintained that he had no need for rehabilitation and argued that no discipline should be imposed. The Division argued that Dr. Flowers' license should be limited and that he should have a mentor who would review Dr. Flowers' practice with respect to fiscal matters and make periodic reports to the Department indicating whether there was cause for concern. The Medical Examining Board concluded that in the absence of corrective measures, Dr. Flowers was "likely to cause injury and harm to his patients

⁵ The Division does not seek to distinguish *Polidori* but instead notes that it is a 1993 decision, whereas the cases the Division cites are more recent.

and the public in the future.” *Id.* at 7. Despite this express finding, however, Dr. Flowers’ medical license was not suspended, nor was a mentor ordered, as requested by the Division. Instead, the Medical Examining Board reprimanded Dr. Flowers and ordered that his license be limited until he completed educational coursework approved by the Medical Examining Board in topics including medical ethics. No forfeiture was imposed.

Both *Flowers* and this case involve fraudulent tax returns. Moreover, unlike Dr. Flowers, Respondent does not object wholesale to the imposition of discipline, demonstrating an acceptance of responsibility that was absent in *Flowers*. In addition, the tribunal in *Flowers* specifically found that Dr. Flowers was likely to cause harm in the absence of discipline, whereas this record does not suggest Respondent is likely to re-offend. Notably, he has been practicing since 2012 without further incident. Further, in *Flowers*, the Division did not even request a suspension, and the Medical Examining Board imposed a level of discipline less than that requested by the Division (*i.e.*, a reprimand and ethics coursework). Consistent with *Flowers*, the license suspension and the majority of limitations requested by the Division are unwarranted.

The Division argues that *Flowers* is distinguishable because at the time the order was issued in that case, Dr. Flowers did not operate his own medical clinic and was instead, an employee of a clinic, whereas Respondent operates his own clinic without oversight. The Division asserts that the Medical Examining Board’s decision to impose ethics coursework rather than practice monitoring and financial oversight was “undoubtedly” driven by Dr. Flowers’ employment status. (Division’s Reply Brief at 6) This conclusion is speculative. It is equally plausible that the 2003 decision not to impose monitoring in *Flowers* was driven by testimony that “the events which took place relating to [Dr. Flowers’] conviction occurred from 1994 through 1996” and that since 1998, he had paid “all taxes in all subsequent years.” *Flowers* at 5. Likewise, the events in this case last occurred in 2012, seven years ago, and there is no indication that Respondent has failed to pay taxes owed since that time. Moreover, the record is silent as to where Respondent is currently employed, although he appears to concede that he either has or wishes to have an ownership interest in a dental clinic. (Respondent’s Brief at footnote 3)

As with *Darkow*, *Flowers* demonstrates that license suspension is unwarranted, as are the majority of the Division’s proposed limitations. Notably, Respondent’s two-year period of probation, imposed on September 5, 2017, includes paying all future taxes owed, and on time. Nevertheless, assuming that Respondent has or will have an ownership interest in a clinic, it is appropriate to require the quarterly financial audit reports from a pre-approved accountant requested by the Division.

Consistent with these prior disciplinary decisions, the facts of this case and the criteria set forth in *Aldrich*, it is appropriate that Respondent be reprimanded and that his license be limited for a period of two years to include the following limitations: (1) compliance with the terms of his remaining probation; (2) completion of six hours in ethics coursework pre-approved by the Board; (3) submission of quarterly reports from a pre-approved accountant as set forth below; and (4) informing the Board of any change in employment status, address or telephone number. In addition, a forfeiture in the amount of \$2,000 is warranted, particularly given that Respondent’s misconduct involved financial wrongdoing motivated by greed.

Costs

The Board is vested with discretion concerning whether to assess all or part of the costs of this proceeding against Respondent. *See* Wis. Stat. § 440.22(2). In exercising such discretion, the Board must look at aggravating and mitigating facts of the case; it may not assess costs against a licensee based solely on a “rigid rule or invocation of an omnipresent policy,” such as preventing those costs from being passed on to others. *Noesen v. State Department of Regulation & Licensing, Pharmacy Examining Board*, 2008 WI App 52, ¶¶ 30-32, 311 Wis. 2d 237, 751 N.W.2d 385.

In previous orders, many factors have been considered when determining if all or part of the costs should be assessed against a respondent. These factors have included: (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 respondent’s cooperation with the disciplinary process; (5) prior discipline, if any; and (6) the fact that the Department is a “program revenue” agency, whose operating costs are funded by the revenue received from licenses, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct. *See In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz, D.C.*, LS0802183CHI (Aug. 14, 2008). It is within the Board’s discretion as to which, if any, of these factors to consider, whether other factors should be considered, and how much weight to give any factors considered.

The Division requests that the full costs of this proceeding be imposed on Respondent. Based on the facts of this case, full costs are not warranted. First, the Division alleged only one count, and although the Division proved the count alleged, it did so through the cooperation of Respondent, who conceded that the violation occurred. The Division notes that in his initial Answer to the Complaint on August 8, 2018, Respondent denied that the criminal conviction for tax fraud was substantially related to the practice of dentistry. However, it was only shortly over a month later, on September 20, 2018, that Respondent admitted the violation in his Amended Answer and in a Stipulation of Facts which it entered into with the Division that same day.

Second, Respondent’s conduct of underreporting his dental income to avoid paying taxes was serious and is the only reason these proceedings were initiated. As the person responsible for these proceedings, Respondent should bear a substantial portion of the costs, particularly as any costs not imposed on him will be borne by all licensees, including those who have not engaged in misconduct. However, Respondent’s conduct did not result in harm to patients, does not implicate his professional competency, and does not suggest he will engage in similar misconduct. In addition, as concluded above, the level of discipline sought by the Division was excessive and was therefore not imposed. Instead, a reprimand, more limited conditions, and a lower forfeiture were ordered, discipline which is on the less serious end of that available. Further, Respondent has been very cooperative throughout this proceeding, including conceding the violation and agreeing to stipulated facts and briefing, thereby making a hearing unnecessary. I also note that Respondent, through counsel, was compelled to move for exclusion of two of four exhibits which the Division sought to introduce, and his motion was granted. In addition, Respondent understandably contests the discipline recommended by the Division, which, as set forth above, is inconsistent with *Aldrich* and other disciplinary cases, and he also contests the Division’s recommendation that full costs be imposed, a recommendation which this tribunal also rejected. And although Respondent was

likewise not granted the precise discipline he sought, the discipline imposed was more in line with that sought by Respondent. Also relevant is that fact that Respondent has no prior discipline in his more than 23 years as a dentist and has not had any issues with his practice for the past seven years.

Considering all of the facts of this case, it is appropriate to impose 50 percent of the costs of these proceedings upon Respondent.

CONCLUSIONS OF LAW

1. Respondent violated Wis. Stat. § 447.07(3)(a) and (e) and engaged in unprofessional conduct under Wis. Admin. Code § DE 5.02(15) by violating any law and being convicted of a crime the circumstances of which substantially relate to the practice of a dentist.

2. As a result of these violations, Respondent is subject to discipline pursuant to Wis. Stat. § 447.07(3)(a) and (e), and Wis. Admin. Code § DE 5.02(15).

3. A reprimand, a forfeiture in the amount of \$2,000, and the license limitations set forth in the Order section below are warranted under Wis. Stat. § 441.07(3) and (7), Wis. Admin. Code § N 7.03, the facts of record in this case, and the criteria set forth in *Aldrich*.

4. Pursuant to Wis. Stat. § 440.22(2) and the facts of this case, imposition of 50 percent of the costs of this proceeding on Respondent is reasonable and appropriate.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that:

1. Respondent is REPRIMANDED.
2. Respondent's license to practice dentistry in the State of Wisconsin (license number 4761-15) is LIMITED for a period of two years, as follows:
 - i. If Respondent has an ownership in any dental clinic, he shall arrange for written financial audit reports prepared by an accountant, preapproved by the Board or its liaison, to be provided to the Department Monitor on a quarterly basis, as directed by the Department Monitor. The written financial audit reports shall address income generated by the dental practice and verify that the income derived from Respondent's dental practice is appropriately accounted for and reported to federal and state tax authorities.
 - ii. Respondent shall comply with all terms of probation set out in Dane County Circuit Court Case number 2016CF1906.
 - iii. Respondent shall successfully complete six hours of educational coursework pre-approved by the Board on the topic of ethics. Upon completion of the

educational coursework, Respondent shall arrange for the course sponsor(s) to certify to the Board the results of the coursework and to release all records of his attendance.

iv. Respondent shall report to the Board any change of employment status, residence, address or telephone number within five days of the date of change.

3. Within 120 days from the date of this Order, Respondent shall pay a forfeiture in the amount of \$2,000.00.

4. Respondent shall pay 50 percent of the costs of this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18.

5. Requests, reports, petitions and payment of forfeiture and costs (made payable to the Wisconsin Department of Safety and Professional Services) shall be sent by Respondent to the Department Monitor at the address below:

Department Monitor
Division of Legal Services and Compliance
Department of Safety and Professional Services
P.O. Box 7190, Madison, WI 53707-7190
Telephone (608) 267-3817; Fax (608) 266-2264
DSPSMonitoring@wisconsin.gov

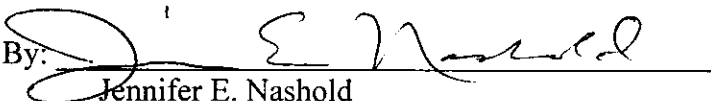
Respondent may also submit this information online via DSPS' Monitoring Case Management System at <https://app.wi.gov/DSPSMonitoring>.

6. In the event Respondent violates any term of this Order, Respondent's license (4761-15), or Respondent's right to renew his license, may, in the discretion of the Board or its designee, be SUSPENDED, without further notice or hearing, until Respondent has complied with the terms of the Order. The Board may, in addition and/or in the alternative refer any violation of this Order to the Division for further investigation and action.

Dated at Madison, Wisconsin on May 28, 2019.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, 5th Floor North
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By:


Jennifer E. Nashold
Administrative Law Judge