



ARIZONA STATE BOARD OF DENTAL EXAMINERS

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MEETING OF THE ARIZONA STATE BOARD OF DENTAL EXAMINERS MINUTES OF THE BOARD MEETING THURSDAY, AUGUST 20, 2014

Board Members Present:

Michael R. Hauer, DDS, President
Robert H. Foster, DDS, Vice President
Robert B. Taylor, DDS
William G. Woods, DDS
Mr. Charles E. Jackson
Mr. Joshua Greer

Board Members Present (telephonically):

Ms. Carole A. Crevier
Howard Sorensen, DDS
Marilyn J. McClain, RDH

Board Members Absent:

Darren L. Flowers, DMD
Heather N. Hardy, RDH

Staff Present:

Ms. Elaine Hugunin, Executive Director
Ms. Nancy Chambers, Deputy Director
Ms. Mary DeLaat Williams, Assistant Attorney General
Ms. Terry Bialostosky, Investigations Supervisor
Ms. Yubeka James, Legal Administrator

Agenda Item No. 1 – Call to Order and Instructions

Dr. Hauer called the meeting to order at 4:00 p.m.

Ms. Hardy was running late. For the record, Ms. Crevier, Ms. McClain, and Dr. Sorensen attended the meeting telephonically.

Agenda Item No. 2 – Dr. Michael Wassef – Case No 201400061

A. Review, discussion and possible action regarding Administrative Law Judge recommendation.

Dr. Hauer made the opening statement to the Board. Ms. Mary DeLaat Williams introduced herself as the attorney for the State. Mr. Jeffrey Tonner was present representing Dr. Wassef.

The Board heard oral arguments from both parties on the recommended decision from the Administrative Law Judge.

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Ms. Williams addressed the Board first. A motion was filed by Ms. Williams asking the Board to modify the Administrative Law Judge's recommended decision. All of the Board members confirmed they had read the transcripts of the hearing as well as reviewed all of the exhibits.

Based upon the motion filed, it is the State's position that the Administrative Law Judge's decision is not supported by the record. Ms. Williams stated that the decision disregarded Dr. Sucher's uncontroverted testimony that Dr. Wassef's failure to comply with the interim order for a substance abuse evaluation did constitute a danger to the health, safety and welfare of patients and the public. Ms. Williams also stated that she believed the Administrative Law Judge erred in disregarding the nature of the interim order. By statute, an interim order for an evaluation or any interim order is not an appealable agency action. This is an interim action that the legislature has given Board's the authority to take during a pending investigation. It is an investigative tool to allow an agency to gather information to assist it with determining how to proceed with a pending investigation. It would appear to be a public policy and against public protection if an agency issued an interim order for a substance abuse evaluation because there are allegations that the licensee may be impaired and the licensee then be able to challenge that, which could take up to a year while the investigation is still pending.

Dr. Wassef had a legal avenue through the courts if he thought that the Board was outside of its authority. He chose not do to that. The Board had a right to rely on its order and expect Dr. Wassef to comply and get the evaluation. Based on this and as thoroughly detailed in the State's motion, citing all of the transcripts and testimony in the record, Ms. Williams believes the best course of action for the Board is to accept, reject, or modify the Findings of Facts, Conclusions of Law, and Order in accordance with the motion that was filed. Ms. Williams clarified two things originally in her motion. The first is for the Board to continue the suspension until such time as Dr. Wassef complies with the interim order. The interim order states getting the evaluation and getting the results back to the Board so that the Board can determine the best way to proceed. Dr. Wassef getting the evaluation does not end the suspension. The results of the evaluation have to come back to the Board for its review. The second point of clarification is in the Administrative procedure, if the Board is going to reject or modify an Administrative Law Judge's decision, the Board needs to articulate on the record and provide in writing to the Office of Administrative Hearings justification for the changes.

Jeff Tonner, attorney for Dr. Wassef, addressed the Board. At the April Board meeting, the Board suspended Dr. Wassef's license on an interim order based on two grounds. Dr. Wassef then took this to the Office of Administrative Hearings and there were four reasons given why the suspension was illegal. The first reason for the suspension was based on ARS §32-1201-21(v) which states that unprofessional conduct does not fall under a final board order. It was an interim order, the legislature could have said interim or final board order, but it did not; using that as grounds to justify the suspension was illegal. The second reason was ARS §32-1201-18(n), unprofessional conduct is anything that is a danger to the health, safety, and welfare of the public.

At the OAH hearing, Dr. Sucher testified that he did not know if Dr. Wassef was a danger or not and that was the purpose of sending Dr. Wassef to get evaluated. Mr. Tonner stated that if Dr. Sucher did not know if Dr. Wassef was a danger, he later could not say now he does know that Dr. Wassef is a danger to the health, welfare, or safety. The second reason provided by the Administrative Law Judge was after the interim order in April, Dr. Sucher testified that when he said in-house evaluation, he did not mean Dr. Wassef had to stay at the facility. He said it had to be at the facility and he left it up to those people to determine whether or not Dr. Wassef stayed not the Board. Dr. Wassef went to Betty Ford for an evaluation, he checked in and informed them he was staying at a hotel down the road. The facility, for some reason, called Ms. Hugunin and she informed them that Dr. Wassef had to stay or it's no good. The judge found a conflict between what Ms. Hugunin told Betty Ford and what Dr. Sucher testified as what was needed. If that information had not been given to Betty Ford, Dr. Wassef would have in fact completed the

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evaluation and would not be present today. The judge saw the conflict between Ms. Hugunin and Dr. Sucher as the third reason, but the second reason under ARS§ 32.1201.21.

The fourth reason found by the judge was the lack of due process. When the State, which is the Dental Board, takes away a person's liberty or property and a dental license is property it must give the person a hearing, notice of hearing and a reasonable opportunity to defend themselves. The judge found there was no hearing to satisfy due process or a reasonable opportunity for Dr. Wassef to defend himself.

In response to what Ms. Williams said, an interim order is appealable. Dr. Wassef could have taken that had he known to do that. He is not an attorney. This doesn't have anything to do with why we are here. We are here because we have gone to the Office of Administrative Hearings and we are here to look at that reason. The second thing is the interim order isn't appealable or shouldn't be appealable. If the legislature had intended that they would have said unprofessional conduct does not fall under an interim or final order. They only said final.

The judge issued his opinion on July 16th. On the order it says it takes five days to become effective. Those five days would be Monday, July 21st. The statute then says you have 30 days to have a hearing. If you do not have a hearing within thirty days, the Office of Administrative Hearing automatically accepts the Administrative Law Judge's decision. Dr. Wassef emailed Ms. Hugunin requesting that this be set for an emergency hearing because the Administrative Law Judge is saying this is illegal. Dr. Wassef then said would you please set this for the full board meeting since the Board was all here. The Board could have set a special hearing immediately following the June meeting and it was not done. The bottom line is that this is very easy to follow the judge's reasoning as to why the interim order is illegal. Mr. Tonner asked the Board to set aside the interim order and go back to square one as if the case started over again.

Mr. Greer asked Mr. Tonner what should the Board have done. The Board received a call and Dr. Wassef was asked to come in for an evaluation with Dr. Sucher. Dr. Wassef did not want to see Dr. Sucher. There were two additional names given and Dr. Wassef did not want to see them. Mr. Tonner stated that the Board should have had a hearing where due process was satisfied according to the Administrative Law Judge. After the hearing, the Board should have issued a final order. In the final order, Dr. Wassef could have gone to Superior Court and asked the judge to stay the order while the case is ongoing and have someone look at it.

It was reiterated by Mr. Greer that Dr. Wassef could have gone to Superior Court with the interim order and asked the judge to stay the order. Mr. Tonner agreed that Dr. Wassef could have done that; however, he did not and Dr. Wassef did not know to do that. The Board should have held a more expansive hearing prior to entering into the interim order or prior to entering the suspension order. Mr. Tonner stated that the Board should have held the hearing before the Board did the suspension order, which was done in April.

Dr. Wassef went to Betty Ford, checked in and he is unsure as to why Betty Ford then called Ms. Hugunin. Ms. Hugunin told Betty Ford that Dr. Wassef had to stay there in order for it to be effective. Dr. Wassef said that was not his understanding from Dr. Sucher and so he went home. Dr. Taylor wanted to know if Dr. Wassef has gone anywhere else to get evaluated. Mr. Tonner stated that he has not as there is still a conflict between what is required

Ms. Williams addressed the Board with a rebuttal to Mr. Tonner. Based on the motion filed by Ms. Williams, the Board was asked to accept the Administrative Law Judge's conclusion of law regarding 32-1201-21(v) because this was not a final order, it was an interim order. The record before the Board clearly supports unprofessional conduct under ARS 32-1201-21(n). Dr. Wassef was represented by an attorney when the Board issued the interim order as well as when Dr. Wassef's license was summarily suspended. The issue before the Administrative Law Judge was Dr. Wassef's non-compliance with the interim order. When the Board issued the interim order,

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his license was not suspended. Dr. Wassef could keep practicing, but he needed to get the substance abuse evaluation.

When he did not comply with those deadlines, it was brought back to the Board for you to determine whether Dr. Wassef was a danger to the public. At that time, the Board decided that a summary suspension was in order. It was an action taken that the Board has the authority to do and a hearing was given within thirty days as required. Dr. Wassef had the opportunity to challenge the suspension, which he did. In regards to Dr. Sucher's testimony, he did testify at the time the interim order was issued he was not able to say Dr. Wassef was safe to practice because Dr. Wassef refused to see him. That was the purpose of issuing the interim order. The issue before the Administrative Law Judge was based upon Dr. Wassef's non-compliance, was he a danger to the public not when the interim order was issued.

The last point Ms. Williams addressed was in regards to Mr. Tonner's comment about holding this meeting. She stated if an Administrative Law Judge's decision is received less than thirty days before the Board is scheduled to meet, the Board does not have to hold it until the Board's second regularly scheduled meeting. The Administrative Law Judge's decision was issued on July 16th; the next board meeting was August 1, which is only about two weeks. The Board was not required to address the decision at that time. Legally, under that statute, the Board could have waited until the October meeting. The Board is holding this meeting now to address it. There was nothing illegal or mean spirited about that. The Board is following the law as it is written in Title 41.

Dr. Sorensen asked if Ms. Williams could explain the difference between an interim order and a final order. A final order, under the Board's procedures, is when a complaint comes in it goes through the investigative and adjudicated process. The investigation is complete, then there is a formal interview, the Board issues its first order, which issues discipline. The licensee then has a chance to petition for rehearing. Once that is done, the order becomes final and can then go to Superior Court for an appeal.

The legislature has given the Board authority in ARS 32-1207(b)(6) to issue an interim order, which is again a part of your investigation. The Board is not at the point where it is ready to finally adjudicate the case. The case is still in the investigative phase and the legislation has said if there are allegations of substance abuse or incompetence or things of that nature, the Board has the authority to issue an interim order to order the licensee to undergo some type of evaluation. The results of that then come back to the Board and then the Board proceeds with the investigation.

Mr. Greer asked when Dr. Wassef should have challenged the interim order. The hearing was whether or not Dr. Wassef complied with the interim order. It is Ms. Williams' position that he did not. Ms. Williams stated that the Board noticed Dr. Wassef about the meeting in which the interim order was issued. His attorney attended and the order was issued. At that point, because there was not an administrative appeal process, Dr. Wassef could have gone to court. He was represented by counsel and could have filed a special action. Another opportunity would have been after the Board summarily suspended his licensee. A court will always intervene and issue some kind of temporary restraining order or injunction from getting the suspension to go through.

Upon MOTION by Dr. Hauer, second by Mr. Greer, the Board voted to ENTER into Executive Session for the purpose of legal advice. MOTION PASSED UNANIMOUSLY.

****Executive Session****

RETURN TO OPEN MEETING

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Ms. Crevier expressed her concern as a public member of the Board. The doctor's history of exacerbating back pain, substance abuse and relapses were adequate reasons for ordering a comprehensive evaluation to determine whether he poses a danger to the public, health, safety and welfare.

Upon MOTION by Ms. Crevier, second by Ms. McClain, the Board voted to REJECT the Administrative Law Judge's decision and ACCEPT the motion made by the State with the modifications recommended. The grounds for the motion are as stated in the reasoning and citations set forth in the motion.

Dr. Woods stated that he was concerned about the danger to the public as well. After thoroughly reading through the transcripts of Dr. Sucher's testimony, when the Board issued the interim order, Dr. Sucher was not necessarily sure. However in his testimony before the Administrative Law Judge, Dr. Sucher testified that Dr. Wassef's refusal to comply with the interim order, his prior history of abuse led him to believe that Dr. Wassef could be a danger to the public. Dr. Woods stated he would support the motion of leaving the suspension in place until the Board is able to obtain the information to know what it should do about Dr. Wassef's license.

Mr. Greer reviewed the evidence presented. This case was opened due to a call from the pharmacy. The Board obtained the pharmacy records and then subpoenaed the patient records for some of the prescriptions. In the transcript on page 25-26, where it was uncontested testimony, the owners of the practice said these aren't patients of record. These are not people that we have files for, there was prior substance abuse history, the refusals to meet with evaluator, the refusal to meet with Dr. Sucher. On page 216-217 of the transcript, Dr. Sucher gives a pretty good synopsis of some things that are just big red flags. None of this information was ever controverted. Dr. Wassef never took the stand. He never explained this at the hearing. There is a lot of evidence in the record about not only this particular case and additionally the evidence was this is how the Board does things. On page 210 of the transcript, it was stated that if a licensee refuses to meet with our addictionologist and have an evaluation, they are sent for an in-patient evaluation. This isn't that the Board stepped out of bounds and is punishing the doctor. This is the way the Board always does it and Mr. Greer thought that was very persuasive.

Mr. Greer indicated there was never any testimony on why Dr. Wassef left. The only testimony is that Betty Ford called Ms. Hugunin and she told them it had to be an in-patient evaluation because that is what the Board Order said. There is no other testimony on why Dr. Wassef left, what happened there, or why he even went there. Ms. Crevier was shocked that the judge ignored the issue of substance abuse and patient safety. She also felt the judge was biased against the Dental Board.

Upon MOTION by Ms. Crevier, second by Ms. McClain, the Board voted to REJECT the Administrative Law Judge's decision and ACCEPT the motion made by the State with the modifications recommended. The grounds for the motion are as stated in the reasoning and citations set forth in the motion. MOTION PASSED UNANIMOUSLY

B. Review, discussion and possible action regarding the continued effectiveness of the interim order for evaluation issued to Dr. Wassef.

There is no board action required for agenda item 2B based upon the motion that passed in agenda item 2A.

Ms. Crevier would like the issue of in-patient vs. outpatient to be a future agenda item so that the Board's wishes are clear for future orders.

Agenda Item No. 3 – Adjournment

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Upon MOTION by Woods, second by Dr. Taylor, the Board voted to ADJOURN the Board meeting.
MOTION PASSED UNANIMOUSLY.

Dr. Hauer adjourned the meeting at 4:48 p.m.

Minutes APPROVED at the October 10, 2014 Board Meeting.

Elaine Hugunin, Executive Director