



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

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December 18, 2015

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Las Vegas Dental Association
8960 W Cheyenne Ave #190
Las Vegas, NV 89129

Re: Nevada State Board of Dental Examiners

To Whom It May Concern:

The Office of the Attorney General ("OAG") is in receipt of your Complaint dated on or about August 14, 2015, consisting of the following:

- OAG complaint form and documentation from Lyle S. Brooksby
- OAG complaint form and documentation from Adrian R. Ruiz
- OAG complaint form and documentation from Thien T. Tang
- OAG complaint form and documentation from Nahid Mohammadi
- OAG complaint form and documentation from Erin N. Wilson
- 11 form letters captioned "Signed Extortion Letters" signed by the aforementioned individuals and others, some of whom cannot be identified.
- Additional documentation captioned "Personal Stories" from the aforementioned individuals and others.
- Documentation of a website petitioning "To Update the Dental Practice Act to make it more dentist friendly."

The Complaint makes various allegations against the Nevada State Board of Dental Examiners ("Board"), the Board's Executive Director, Debra Shaffer-Kugel, and the Board's Legal Counsel, John A. Hunt. Please note that while Mr. Hunt is retained by the Board pursuant to NRS 631.190, the OAG also serves as Board Counsel pursuant to NRS 228.110.

The Applicable Laws Governing the Board

The Board is governed by, and charged with enforcing, the provisions of Chapter 631 of the Nevada Revised Statutes and Chapter 631 of the Nevada Administrative Code, regarding the practice of dentistry and dental hygiene in Nevada. As a regulatory body, the Board is also governed by the provisions of Chapter 622 of the Nevada Revised Statutes. NRS 622.080 provides: "In regulating an occupation or profession pursuant to this title, each regulatory body shall carry out and enforce the provisions of this title for the protection and benefit of the public."

The Board has implemented a procedure to investigate complaints and take any appropriate action against licensees in conformance with NRS Chapter 631. NAC 631.250(1) provides: "If the Board conducts an investigation upon a complaint against a licensee, the Board will not limit the scope of its investigation to the matters set forth in the complaint but will extend the investigation to any additional matters which appear to constitute a violation of any provision of chapter 631 of NRS or of this chapter."

In summary, investigations may be initiated by the Board or upon receipt of a verified complaint setting forth specific charges. NRS 631.360(1); NAC 631.240(1). The licensee is provided a notice and a copy of the complaint and must file a response and produce any requested records to the Board within 15 days. NAC 631.240(2). The matter is assigned to a Disciplinary Screening Officer ("DSO")¹ for a preliminary review; if the DSO finds sufficient evidence that a violation has occurred, the DSO will conduct an informal hearing.² NRS 631.363(1). The licensee is served with notice of the informal hearing at least 10 days in advance, together with a subpoena for any requested records; the notice specifies the reasons for the investigation, the statutory procedure under which the Board operates, and the legal rights of the licensee. NRS 631.363(2).

Before or at the informal hearing, the licensee may be offered a stipulation to resolve the matter, which may require corrective action, or alternatively, disciplinary action. NRS 233B.121; NRS 622.330; NRS 631.350. A corrective non-disciplinary stipulation is generally considered when the licensee does not have a history of prior corrective non-disciplinary stipulations. A disciplinary stipulation is generally considered when the licensee does have a history of prior corrective or disciplinary stipulations.

Any action involving revocation, suspension, probation, fine and/or public reprimand is disciplinary and must be reported to the National Practitioners Data Bank.³

¹ For complaints against dentists, the DSO is a dentist; if the complaint involves a special branch of dentistry, the DSO has the appropriate qualifications. For complaints against dental hygienists, the DSO is a dental hygienist.

² At any point prior to an informal hearing a matter may be remanded by staff to the Board's file with no further action. If a matter is remanded, notice is provided to the complainant and the licensee.

³ The NPDB is a federal information repository established pursuant to the Health Care Quality Improvement Act of 1986 (HCQIA), as amended, title IV of Public Law 99-660 (42 U.S.C. 11101 *et seq.*). Section 1921 of the Social Security Act, as amended (42 U.S.C. 1396r-2), expanded

All stipulations, whether corrective or disciplinary, must be approved by the Board in a public meeting and are public records, and the Board is prohibited from administering a private reprimand. NRS 241.020; NRS 622.330(1) and (3); NRS 631.350(5) and (6).

The licensee is not required to attend an informal hearing, but must comply with any subpoena issued by the Board.⁴ NRS 631.366. The informal hearing is recorded and transcribed by a court reporter. NAC 631.255. The Board's Executive Director and Legal Counsel participate in the informal hearing as part of the administrative investigatory process. If, after the informal hearing, the parties have not agreed to a stipulation resolving the matter and the DSO determines that the Board should take further action, the DSO provides written findings of fact and conclusions to the Board and the licensee. NRS 631.363(3). If the licensee consents to the findings and conclusions of the DSO, the Board may adopt them as its final order without conducting a full hearing. NRS 631.363(5).

If the licensee does not consent to the findings and conclusions of the DSO, or if the Board refuses to adopt them, the Board shall, before initiating any disciplinary action, hold a hearing pursuant to NRS 631.360. At least 10 days in advance of the hearing, the licensee is served with notice of the hearing and a formal statement of charges. NRS 631.360(2). The Board may consider, but is not bound by, the findings and conclusions of the DSO, but the DSO cannot participate in the Board hearing. NRS 631.363(4). Board hearings are held in conformance with the provisions of NRS Chapter 233B, NRS 631.360 and NAC 631.370-410.

At the conclusion of a Board hearing, the Board may take disciplinary action upon finding a violation of any provision of NRS Chapter 631 or NAC Chapter 631. NRS 631.350. A licensee may petition for judicial review of the Board's final decision in a contested case in conformance with NRS 233B.130. If the parties agree to a stipulation or if the Board enters an order finding a violation, the Board may seek recovery of reasonable attorney's fees and costs pursuant to NRS 622.400.

An agency's interpretation of its governing statutes and regulations carries substantial weight. *Nev. Pub. Emps. Ret. Bd. v. Smith*, __ Nev. __, 310 P.3d 560, 564 (2013). This is particularly true where the Legislature has acquiesced in the agency's interpretation for a significant period of time. *Imperial Palace, Inc. v. State, Dept. of Taxation*, 108 Nev. 1060, 1068, 843 P.2d 813, 818 (1992).

The Complaints from Brooksby, Ruiz, Tang, Mohammadi, and Wilson

The Complaints submitted by Brooksby, Ruiz, Tang, Mohammadi, and Wilson all contain an identical form letter signed by the complainants alleging 1) civil extortion; 2) duress; 3) abuse of power; 4) violation of due process; and 5) fraud.⁵

the requirements under the NPDB and requires each state to adopt a system of reporting adverse licensure or certification actions taken against health care practitioners, including dentists and dental hygienists.

⁴ Informal hearings may be continued to a later date to allow the licensee a reasonable amount of time to consider any proposed stipulation or to further consult legal counsel.

⁵ Dr. Brooksby has also submitted complaints alleging violations of the Nevada Open Meeting Law ("OML"), NRS Chapter 241, to the OAG. Those allegations were investigated in

Dr. Brooksby has faced past disciplinary action from the Board, in which he was represented by legal counsel, and there is an open investigation pending. Most recently, the Board issued an order on August 10 placing Dr. Brooksby's dental license on probation for a period of one year; the respondent did not petition for judicial review of the Board's decision.

Dr. Ruiz has faced past disciplinary action from the Board, in which he was represented by legal counsel, and there is an open investigation pending. Most recently, Dr. Ruiz consented to amended findings and recommendations and received disciplinary action from the Board on May 22, 2010.

Dr. Tang entered into a corrective non-disciplinary stipulation with the Board in 2013. Most recently, Dr. Tang entered into a disciplinary stipulation agreement and received disciplinary action from the Board on May 22, 2015. In both matters the respondent was represented by legal counsel.

Dr. Mohammadi entered into corrective non-disciplinary stipulations with the Board in 2009 and again in 2011; in both matters the respondent was represented by legal counsel.

There is an open complaint and investigation pending against Ms. Wilson, a licensed dental hygienist; an informal hearing in the matter was held on August 12, 2015, which the respondent did not attend. Ms. Wilson has subsequently retained legal counsel to represent her in this matter.

In alleging civil extortion, the complainants state that Mr. Hunt and Ms. Shaffer-Kugel "use fear to obtain money Fear induced by threat of taking away the Health Care Provider's license to practice and the excessive attorney's fees that will be incurred to defend before the Dental Board." In general, extortion is a criminal offense of making a threat to elicit actions, money, or property. See NRS 205.320. Civil extortion is not a claim recognized under Nevada law. However, to the extent the Board through its Executive Director and Legal Counsel represented to each of the complainants that in the absence of a stipulation the matter would be taken to the Board for a hearing, this accurately reflects the statutory process enacted by the Nevada Legislature. Moreover, it is typical for parties that are unable to settle a dispute to take the litigation to the next level; since the parties are simply availing themselves of the legal process, there is no extortion if they settle to avoid incurring additional costs.

The Nevada Legislature has authorized the Board to seek recovery of attorney's fees and costs under NRS 622.400 and it is reasonable for the Board to do so. The Board does not receive State General Fund support and funds its operations through licensing fees it receives when dentists and dental hygienists apply for licensure and/or renew their licenses. See NRS 631.345. If the costs expended by the Board in investigating violations of NRS Chapter 631 are not charged against the licensees committing the violations, the other licensed dentists and dental hygienists must bear this costs.

In alleging duress, the complainants state that Mr. Hunt "used wrongful pressure or threat of revocation of license to induce the Health Care Provider to enter into a Stipulation." Again, in carrying out the statutory mandate to enforce the provisions of Nevada law regulating dentistry and dental hygiene for the protection and benefit of the public, the Nevada Legislature has empowered the Board to take disciplinary action for violations, including revoking or suspending a license. NRS 631.350(1). Since this is a potential sanction for misconduct, it is appropriate for the Board's Legal Counsel to disclose this possibility to licensees when there is sufficient evidence of violations. The prospect of license revocation is a critical factor for a licensee to consider when presented with a stipulation proposal. Furthermore, in each instance in which the complainants entered into a stipulation they were represented by legal counsel, who presumably advised their clients in conformance with all ethical obligations. In each instance the complainants acknowledged that they entered into the stipulation voluntarily and with an understanding of the terms of the stipulation.

In alleging abuse of power, the complainants assert that Mr. Hunt has violated provisions of NRS Chapter 281A, the Nevada Ethics in Government Law. The Nevada Legislature has vested the Commission on Ethics with exclusive jurisdiction to investigate and take appropriate action regarding an alleged violation of NRS Chapter 281A. Any complaint alleging a violation of the NRS Chapter 281A should be submitted to the Commission; further information is available at <http://ethics.nv.gov/>.

In alleging violation of due process, the complainants state that Mr. Hunt "intentionally deprives Health Care Providers of their Due Process rights by systematic scheme of harassment and intimidation." The Nevada Supreme Court has recognized that a health care professional has a property interest in a license to practice that is protected by due process. *Potter v. State Bd. of Medical Examiners*, 101 Nev. 369, 371, 705 P.2d 132, 134 (1985). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Burleigh v. State Bar of Nevada*, 98 Nev. 140, 145, 643 P.3d 1201, 1204 (1982) (citations omitted).

As the basis for alleging violation of due process, the complainants assert that in each of their respective cases they were not provided adequate notice of the complaint that initiated the investigation, nor of the charges against them, prior to the informal hearing. However, while NRS 631.360(2) requires that the Board "notify the accused person in writing of any charges made" before holding a hearing, NRS 631.363(2) only requires notice "describing the reasons for the investigation" prior to an informal hearing before a DSO.

The Board's records document that, in each investigation at issue, the complainants were provided with 1) a copy of any complaint against them that initiated the investigation (in conformance with NAC 631.240(2)), and 2) notice describing the reasons for the investigation prior to an informal hearing (in conformance with NRS 631.363(2)). Furthermore, the complainants were served notice that under NAC 631.250(1) the Board would not limit the scope of its investigation to the matters set forth in the complaint but extend the investigation to any additional matters which appear to constitute a violation.

In each instance in which the complainants entered into a stipulation, they did so with the benefit of legal counsel, and knowingly and voluntarily waived specific rights, including their right to a Board hearing under NRS 631.360. Had they chosen to exercise their right to a Board hearing, they would have been served with a formal statement of charges pursuant to NRS 631.360(2). The complainants were accorded the necessary due process at each stage of the investigation and proceedings. "[W]ithout an adjudication of legal rights, due process rights are not triggered." *Hernandez v. Bennett-Haron*, __ Nev. __, 287 P.3d 305, 313 (2012) (citing *Aponte v. Calderon*, 284 F.3d 184, 193-95 (1st Cir. 2002)). Furthermore, "[i]t is not uncommon in administrative law to find the combination of investigating, prosecuting and judging functions. As a general proposition, such a combination, standing alone, does not constitute a denial of due process." *Rudin v. Nevada Real Estate Advisory Commission*, 86 Nev. 562, 565, 471 P.2d 658, 660 (1970) (citation omitted).

In alleging fraud, the complainants state: "Mr. Hunt arbitrary [sic] assigns a monetary investigative cost and conceals billing invoices and accounting to justify the fees imposed. A fee breakdown has been requested and never been provided." Generally, fraud is a deliberate misrepresentation to secure unfair or unlawful gain. See *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998) (setting forth elements of a civil claim for fraud). Fraud is never presumed; it must be clearly and satisfactorily proven. *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 292, 89 P.3d 1009, 1018 (2004).

While the complainants provide no actual evidence of fraud to support this allegation, documentation of attorney's fees and costs⁶ that the Board incurs would presumably be provided in response to a public records request made pursuant to NRS Chapter 239.010(1) ("unless otherwise declared by law to be confidential, all public books and public records of a governmental entity must be open"). The recovery of reasonable attorney's fees and costs in civil actions requires sufficient documentation and itemization. See generally NRS Chapter 18; see also *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (party seeking recovery of attorney's fees should submit evidence supporting the hours worked and rates claimed); *Gibellini v. Klindt*, 110 Nev. 1201, 1205, 885 P.2d 540, 542 (1994) (recoverable costs must be sufficiently detailed to permit a court to determine that they are reasonable). Any attorney's fees and costs the Board seeks to recover pursuant to NRS 622.400 should be sufficiently documented at a level commensurate with that required under NRS Chapter 18.

The Complainants also take issue with the compensation provided the Executive Director and Legal Counsel. However, NRS 631.160(3) provides that "[t]he Executive Director shall receive such compensation as determined by the Board." NRS 631.190(2) empowers the Board to "[a]ppoint such . . . attorneys . . . and incur such expense as it may deem proper or necessary to carry out the provisions of this chapter." Furthermore, the contract between the Board and Legal Counsel was reviewed and approved by the State Board of Examiners pursuant to NRS 333.700.

⁶ Costs that are recoverable in investigative, administrative and disciplinary proceedings are set forth in NRS 622.400(2).

Finally, to the extent the complainants allege that the Board engages in fraudulent accounting practices, it should be noted that the Board submits financial accounting documents every fiscal year to the Legislative Auditor and the Director of the Budget Division of the Department of Administration. NRS 218G.400. Additionally, the Board is subject to audit by the Legislative Auditor. *Id.*

Form Letter Complaints of Extortion

As previously detailed above, to the extent the Board through its Executive Director and Legal Counsel represented to each of the complainants that in the absence of a stipulation the matter would be taken to the Board for a hearing, and that the Board might seek recovery of attorney's fees and costs under NRS 622.400, this accurately reflects the statutory procedure enacted by the Nevada Legislature. It is not extortion for a party to express an intent to avail itself of legal rights and remedies.

Personal Stories

The documentation captioned "Personal Stories" from the aforementioned individuals and others generally expresses displeasure with NRS Chapter 631 and the statutory framework within which the Board operates. A response to those concerns is set forth below.

Request to Amend the Nevada Dental Practice Act

The Board operates within a statutory framework enacted by the Nevada Legislature. The Nevada Legislature creates occupational and professional licensing boards and sets public policy governing them. These boards are vested with authority to adopt regulations regarding licensing and practice of the various professions, subject to review by the Nevada Legislature. Members of these boards are appointed by, and serve at the pleasure of, the Governor.

The Nevada Legislature exercises oversight of the Board in a variety of ways. During the interim, the Board is subject to oversight by the Legislative Commission. NRS 218E.150. As previously mentioned, the Board is subject to fiscal oversight under NRS 218G.400. Furthermore, the Board must submit quarterly reports of disciplinary actions and regulatory activities to the Director of the Legislative Counsel Bureau. NRS 622.100.

The power to amend the laws governing the Board's operations and its regulation of dentistry and dental hygiene lies exclusively with the Nevada Legislature. The OAG is informed that the Board has been selected for review by the Sunset Subcommittee of the Legislative Commission pursuant to NRS 232B.220. The Las Vegas Dental Association, the complainants and the public at large will thus be afforded an opportunity to raise any concerns with the Board, the manner in which the Board discharges its duties, or its governing laws. Further information is available at <http://www.leg.state.nv.us/Interim/78th2015/Committee/StatCom/Sunset/?ID=25>.

Las Vegas Dental Association
December 18, 2015
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The OAG will be closing our file on this matter. If you have any questions, please do not hesitate to contact me at 684-1201 or bkandt@ag.nv.gov.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: 

Brett Kandt
Chief Deputy Attorney General

WBK/klr

cc: Lyle S. Brooksby
Adrian R. Ruiz
Thien T. Tang
Nahid Mohammadi
Erin N. Wilson