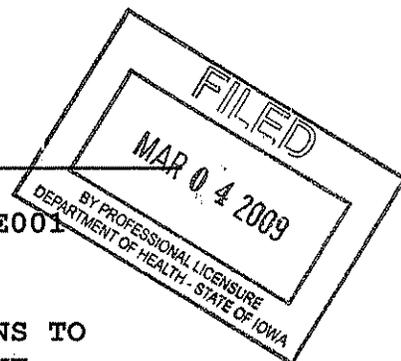


BEFORE THE IOWA BOARD OF PODIATRY



IN THE MATTER OF THE)	DIA NO. 08DPHPE001
STATEMENT OF CHARGES AGAINST)	NO. 06-003
)	
NAVIN KUMAR GUPTA, DPM)	RULING ON MOTIONS TO
)	DISMISS COMPLAINT
Respondent)	AND DISQUALIFY BOARD

I. Procedural History

On October 10, 2008, the Iowa Board of Podiatry (Board) found probable cause to file a three count Notice of Hearing and Statement of Charges against Navin Kumar Gupta, DPM (Respondent). The counts include professional incompetency, practice harmful or detrimental to the public, and negligence. All three counts are based upon Respondent's care and treatment of a single patient (AK) and factual allegations that Respondent failed to provide appropriate preoperative and postoperative care; failed to maintain appropriate medical records; engaged in inappropriate office surgery; and failed to recognize and perform the appropriate procedures. The hearing is currently scheduled to be heard by the Board on May 19 and May 20, 2009.

On February 10, 2009, Respondent's attorney filed a Motion to Dismiss the Board's Complaint and a Motion for Board Disqualification. On February 18, 2009, the state's attorney filed a Resistance to both motions. Respondent's attorney filed a Response to Resistance on February 23, 2009. The Board delegated ruling on the motions to the undersigned administrative law judge. A motion hearing was held by telephone on March 3, 2009. Respondent was represented by attorney Robert Goldstucker. The state was represented by Assistant Attorney General Emily Kimes-Schwiesow. Board Executive Roxanne Sparks was also present.

Respondent attached his own affidavit and two exhibits (A & B) to the motions. Exhibit A is the peer review report of Andrew C. Stanislav, D.P.M.¹, which was prepared at the

¹ The peer review report is undated and does not have a date stamp. During the motion hearing, Roxanne Sparks reviewed the Board's file and

request of the Board and which includes Dr. Stanislav's opinions as to whether Respondent met the standard of care in his professional treatment of AK. In the peer review report, Dr. Stanislav states, in relevant part:

...MRI postoperatively was indicated to confirm Dr. Gupta's diagnosis of infracalcaneal bursa as well as to identify possible scar tissue or incomplete release of the flexor retinaculum. In this case, a second opinion was obtained following surgery with Dr. Bratkiewicz who did order an MRI which revealed that the flexor retinaculum was indeed intact, and therefore the tarsal tunnel release most likely was not performed by Dr. Gupta...

Exhibit A, p. 3.²

Exhibit B is an April 24, 2006 letter drafted by Eric A. Barp, D.P.M. to Judy Manning, Board Administrator. Dr. Barp and Dr. Bratkiewicz are partners at The Iowa Clinic in Des Moines, Iowa. The body of Dr. Barp's letter states:

I am dictating this narrative on [AK]. I did review her MRIs with Dr. Bratkiewicz. Dr. Bratkiewicz is taking care of this patient and asked me to look at the MRIs. The MRIs did demonstrate that the flexor retinaculum was completely intact.

If you have any questions, please do not hesitate to give us a call.

Dr. Barp was appointed as one of seven members of the Board effective May 1, 2007, which is approximately one year after he drafted the letter concerning his review of AK's MRI. The Board's minutes disclose that all seven members of the Board, including Dr. Barp, met and made an initial probable cause finding to file charges against Respondent on July 11, 2008. On October 10, 2008, five members of the Board met to review and approve the draft of

reported that the Board office received the peer review report on May 2, 2008, and it was forwarded to all Board members on May 13, 2008.

² This paragraph is somewhat ambiguous but Respondent's attorney clarified that Dr. Bratkiewicz performed surgery on AK approximately ten months following the surgery by Respondent.

the Notice of Hearing and Statement of Charges against Respondent.³

II. Summary of the Motions

The Motion to Dismiss and the Motion for Board Disqualification are based on Dr. Eric Barp's involvement in the review of treatment provided to AK at a time prior to his appointment to the Board. Respondent asserts that Dr. Barp's involvement with the case and his subsequent participation in finding probable cause to file charges is so prejudicial that it requires dismissal of the Statement of Charges and disqualification of the entire Board, not just Dr. Barp. At the motion hearing, Respondent conceded that even if the charges were dismissed, the Governor could appoint a new Board to review the investigative file and determine whether charges should be filed against Respondent.

The state agrees that Dr. Barp should withdraw from further participation in the case as a Board member but asserts that there is no basis to dismiss the complaint or to disqualify the entire Board. In addition, the state points out that Iowa Code section 17A.11(4) provides that a "person whose disqualification is requested shall determine whether to grant the request, stating facts and reasons for the determination." The state asks the undersigned administrative law judge to assist the individual Board members in responding to whether there are grounds for their disqualification. In the event that additional Board members disqualify themselves, the Governor could appoint one or more substitute Board members if needed.⁴

III. Disqualification of Dr. Barp

The Board is required to serve as the presiding officer in a licensee disciplinary contested case but may be assisted and advised by an administrative law judge at hearing and may delegate prehearing matters to an administrative law judge.⁵ Parties involved in adjudicative proceedings are

³ Roxanne Sparks provided this information after consulting the Board's meeting minutes during the motion hearing. She further reported that one of the Board's public members resigned after the July 11, 2008 meeting and before the Board's October 10, 2008 meeting and that Board position remains vacant at this time. In addition, Board member Jill Schloz, DPM was not present at the October 10, 2008 meeting.

⁴ Iowa Code section 17A.11(5).

⁵ Iowa Code section 272C.6(1); 645 IAC 11.8.

entitled to the "same fairness, impartiality and independence of judgment as are expected in a court of law."⁶

An individual who participates in the making of any proposed or final decision in a contested case (including any licensing Board member) shall not have personally investigated, prosecuted, or advocated in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related controversy that may culminate in a contested case, involving the same parties. In addition, such an individual shall not be subject to the authority, direction, or discretion of any person who has personally investigated, prosecuted, or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy, involving the same parties. However, this section shall not be construed to preclude a person from serving as a presiding officer solely because that person determined that there was probable cause to initiate the proceeding.⁷

In addition, an individual designated or serving as presiding officer alone or with others is required to withdraw or be disqualified if the person has a personal bias or prejudice concerning a party or representative of a party or has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case.⁸

Any party may timely request the disqualification of a person as a presiding officer by filing a motion supported by an affidavit asserting an appropriate ground for disqualification, after receipt of notice indicating that the person will preside or upon discovering facts establishing grounds for disqualification, whichever is later.⁹ The Board shall determine the matter as part of the record in the case.¹⁰ The governor shall appoint a

⁶ Rodine v. Zoning Board of Adjustment of Polk County, 434 N.W.2d 124, 126(Iowa App. 1988)

⁷ Iowa Code section 17A.17(8); 645 IAC 11.10(b), (c).

⁸ Iowa Code section 17A.11(2); 645 IAC 11.10(a), (e), (f).

⁹ Iowa Code section 17A.11(3); 645 IAC 11.10(4).

¹⁰ 645 IAC 11.10(4).

substitute, if necessary, for a Board member who is disqualified or becomes unavailable for any other reason.¹¹

Dr. Barp was not a Board member when he was consulted by his partner about AK and when he drafted the April 24, 2006 letter to the Board. However, Dr. Barp's involvement in the care of the patient and his letter to the Board clearly constitute a level of personal interest and advocacy that disqualifies him from sitting as an impartial decision maker with respect to Respondent's case. When Respondent's case came before the Board for a probable cause finding, Dr. Barp should have withdrawn.

Pursuant to the procedure established by Iowa Code section 17A.11(4), Dr. Barp should be given the opportunity to voluntarily withdraw from further participation in this case as a Board member. There is no reason to believe that he will decline to withdraw but in the event he did refuse, the Board should require his disqualification.

IV. Motions to Dismiss/Disqualify Entire Board

Respondent essentially argues that Dr. Barp's involvement in the care of the patient and his participation in the probable cause finding is so prejudicial to his case that it cannot be cured other than with dismissal of the Board's complaint and disqualification of the entire Board.

Respondent asserts that the Board is unable to exercise independent judgment as to the intactness of the patient's flexor retinaculum, a contested fact in this matter, because any finding of fact by the Board which opposes Dr. Barp's conclusion will be a statement by the Board that it does not trust the medical judgment of Dr. Barp or his partner. Respondent also asserts that Dr. Barp's involvement with the Board taints the whole Board with bias because there is no way for Respondent to know the extent of bias and prejudice created within the Board based on communications between its members and Dr. Barp.

A. Independent Judgment

Respondent's motion to disqualify the entire Board is based in large part on the broad premise that either the Board members are intellectually and emotionally unable to

¹¹ Iowa Code section 17A.11(5)(a).

impartially judge the merits of a case in which a co-Board member was personally involved or that the appearance of impropriety is so great that the Board members should not be permitted to serve regardless of actual bias or prejudice. However, the relationship between professional licensing board members is not akin to the relationships that the law recognizes as automatically disqualifying, such as a spouse or relative within the third degree of relationship.¹²

Board members can and do become personally involved in disciplinary matters before their own licensing Boards. For example, like all professional licensees, Board members are obligated to report acts or omissions of other licensees that constitute violations of Board statutes or rules.¹³ Board members have their own patients, whose care may be placed in issue before the licensing board. A Board member may also have complaints or charges filed against them personally. It is unreasonable, unnecessary, and unworkable to automatically disqualify an entire licensing Board based on a presumption that they cannot fairly and impartially weigh and evaluate evidence in a disciplinary proceeding if the evidence should include the professional opinion or professional interest of a co-Board member. If any presumption is made, it should be that the remaining Board members are able to objectively evaluate the evidence in this disciplinary proceeding, unless there is sufficient evidence suggesting otherwise or unless the Board member determines that they are unable to be impartial and elect to withdraw.¹⁴

B. Ex Parte Communication/Duty To Disclose

A presiding officer in a contested case is prohibited from communicating, directly or indirectly, in connection with any issue of fact or law in that contested case, with any person or any party, except upon notice and opportunity for all parties to participate.¹⁵ Delivery of the notice of hearing constitutes commencement of the contested case

¹² 645 IAC 11.10(1)"f"; 481 IAC 10.29(3)"b"(6).

¹³ Iowa Code section 272C.9(2); 645 IAC 224.2(23).

¹⁴ See Anstey v. Iowa State Commerce Commission, 292 N.W.2d 380, 390(Iowa 1980)(stating that in reviewing an allegation of bias of an agency member under Iowa Code §17A.17(4), the burden of showing reversible bias is on the objectors, because there is a rebuttable presumption of regularity attending official acts).

¹⁵ Iowa Code section 17A.17(1).

proceeding.¹⁶ The Board's rules governing ex parte communication clearly establish issuance of the notice of hearing as the point in time when the ex parte communication prohibition is triggered.¹⁷ Nevertheless, promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be disclosed so long as such documents have been or will shortly be provided to the parties.¹⁸

Pursuant to Iowa Code section 17A.17(3) and 645 IAC 11.22(9), the Board members who serve as presiding officers in this disciplinary proceeding have an affirmative obligation to disclose any material factual information communicated to them by Dr. Barp concerning any issue of fact or law in this contested case. Dr. Barp's April 24, 2006 letter is part of the investigative file and has already been disclosed to the parties. However, if Dr. Barp provided any additional factual information or opinions to Board members concerning the treatment of patient AK by his partner, Dr. Bratkiewicz, or concerning his own evaluation of the patient's MRI, this information must be disclosed in writing to the parties. Each Board member must disclose any additional material factual information received from Dr. Barp whether the communication occurred during or outside of a Board meeting.

C. *Withdrawal of Individual Board Members*

In addition, pursuant to Iowa Code section 17A.11(4), each Board member must determine whether they are able to serve as independent and impartial fact finders and decision makers in this pending disciplinary proceeding or whether they should withdraw, as requested in Respondent's Motion for Disqualification. Board members who serve as presiding officers must impartially hear, evaluate, and decide this case based solely on the evidence presented at the time of hearing. If a Board member is not confident in

¹⁶ Iowa Code section 17A.12(1).

¹⁷ 645 IAC 11.22(1), 11.22(2).

¹⁸ Iowa Code section 17A.17(3); 645 IAC 11.22(9).

their ability to do this, whether due to Dr. Barp's involvement in the case or for some other reason, they must withdraw. This is a personal decision, which must be made by each Board member individually. The Governor may appoint substitute Board members, if necessary, to achieve a quorum for consideration of this case.

V. Dismissal of Statement of Charges Without Prejudice/Remand for New Determination Re: Probable Cause

Neither this record nor the substantial public interest in regulating licensed podiatrists justifies a dismissal of this case with prejudice. However, it is clear that Dr. Barp should have withdrawn and should not have participated in the Board's probable cause finding. At this stage, this can be remedied by dismissing the pending Notice of Hearing and Statement of Charges, without prejudice. After a quorum of eligible Board members has been established for this case, that group of Board members should reconvene to consider whether there is probable cause to file charges.

ORDER

IT IS THEREFORE ORDERED that the Notice of Hearing and Statement of Charges filed against Respondent Navin Kumar Gupta on October 10, 2008 is hereby DISMISSED without prejudice. IT IS FURTHER ORDERED that:

A. Eric Barp, DPM, shall submit a written withdrawal from participation as a Board member in this disciplinary proceeding and any and all Board discussions of this case. In the unlikely event that Dr. Barp refuses to withdraw, the Board should order his disqualification.

B. The remaining Board members shall individually consider Respondent's request for their disqualification and determine whether they are able to serve as independent and impartial decision makers in this case. The Board members shall individually respond, in writing, to the Board's Executive, Roxanne Sparks, stating whether or not they are withdrawing as presiding officer.

C. Any Board member who is not withdrawing shall disclose, in writing, any communication that they received from Dr. Barp, through any medium, concerning

material factual matters involved in this case or his opinions as to the merits of the case. This disclosure need not include Dr. Barp's April 24, 2006 letter to the Board, which has already been disclosed to the parties. The Board member shall affirmatively state why they are able to impartially serve as a decision maker despite such communication. Any such disclosures shall be sent to Ms. Sparks at the Board office.

D. Roxanne Sparks shall immediately provide copies of this Order to all Board Members. As they are received, Ms. Sparks shall promptly provide copies of each Board member's written response regarding disqualification and any disclosure of ex parte communication to both attorneys of record in this case and to the undersigned administrative law judge.

E. When a quorum of qualified Board members is identified, they shall convene to consider whether to file new charges in this case.

Dated this 4th day of March, 2009.

Margaret LaMarche

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Administrative Law Judge
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