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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Opinion No. 2012-UP-502 S.C. Ct. App. filed Sept. 5, 2012

Russell Charles Hurst, D.M.D. *Petitioner,*

~ vs. ~

South Carolina Department of Labor, Licensing, and Regulation,
South Carolina Board of Dentistry of *Respondent.*

**ANNEX TO THE
PETITION FOR A WRIT OF CERTIORARI**

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 11-ALJ-11-0037-AP
Appellate Docket No.

Russell Charles Hurst, D.M.D. *Appellant,*

~ vs ~

Board of Dentistry of South Carolina *Respondent.*

RECORD ON APPEAL

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Russell Charles Hurst, D.M.D.,

Appellant,

vs.

South Carolina Department of Labor, Licensing,
and Regulation, South Carolina Board of
Dentistry,

Respondent.

Docket No. 11-ALJ-11-0037-AP

ORDER

APPEARANCES: Aaron J. Kozloski, Esquire, for the Appellant
Patrick D. Hanks, Esquire, for the Respondent

STATEMENT OF THE CASE

This matter was initiated by the Petition of Russell Charles Hurst, D.M.D. (Hurst or Appellant) to the South Carolina Board of Dentistry (Board) to terminate the conditions of probation on his professional license. Appellant became subject to certain restrictions as to his practice pursuant to a Final Order by the Board, dated August 21, 2006. Appellant's Petition to Terminate Conditions of Probation was heard by the Board and an order denying the petition was issued on January 14, 2011. By timely notice of appeal filed on February 2, 2011, Appellant appeals that order.

Hurst's license to practice dentistry was suspended for a period of five years by a decision of the South Carolina State Board of Dentistry dated July 5, 2001. A Memorandum of Agreement and Stipulations signed June 7, 2001 sets forth the following facts which were stipulated by the parties. Appellant pled guilty to three counts of committing lewd acts upon a child under sixteen and to one count of contributing to the delinquency of a minor. As a result of the guilty plea, Appellant received a sentence of ten years confinement, suspended upon five years of probation and sex-offender counseling. Appellant was required to surrender his controlled substance registration issued by the S.C. Bureau of Drug Control. The July 5, 2001 Final Order allowed Hurst to petition for

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August 9, 2011

SC ADMIN. LAW COURT

reinstatement of his license after the completion of the suspension period and provided that the Board could then deny, impose requirements, or grant a license on such terms and conditions as it deemed fit.

On July 21, 2006, Appellant appeared before the Board to petition for reinstatement of his license to active practice. On August 21, 2006, the Board issued an Order of Reinstatement, finding that it was in the public interest to grant Appellant's petition and reinstate his license, and placed his license on probation for an indefinite period with terms and conditions, including:

1. Appellant's practice is limited to the treatment of adult patients over the age of twenty-one.
2. Appellant is required to submit to biannual and event-driven polygraph examinations, as directed by a qualified therapist.
3. Appellant must ensure that his office staff members are regularly provided Staff Surveillance Forms.
4. Appellant's patients must regularly provide to a qualified therapist Patient Satisfaction Forms to the Board quarterly.
5. Appellant is prohibited from using conscious sedation, oral or intravenous sedation, or anxiolysis to treat patients.
6. Appellant is prohibited from using a computer in his office.
7. Appellant is required to submit professional records for periodic review by the Board.

Appellant did not appeal these terms and conditions.

Hurst has petitioned the Board several times to amend its Order of Reinstatement and Probation. The Board has denied each of these attempts. In this case, Appellant petitioned the Board to terminate the terms of probation. By Order dated January 14, 2011 the Board denied the petition and this appeal to the ALC ensued.

ISSUES PRESENTED

1. Is the denial of the Petition by the Board clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record?
2. Is the Board's decision to continue the present sanctions arbitrary and capricious, characterized by abuse of discretion?

STANDARD OF REVIEW

This case is before the Court as an appeal of an agency action. As such, the Administrative Law Judge sits in an appellate capacity under the Administrative Procedures Act (APA), rather than as an independent finder of fact. In South Carolina, the provisions of the APA, specifically Section 1-23-380(5), govern the circumstances in which an appellate body may reverse or modify an agency decision. That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2010).

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (Ct. App. 1984). The well-settled case law in this state has also interpreted the "substantial evidence" rule to mean that a decision will not be set aside simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. Waters v. South Carolina Land Resources Conservation Comm'n, 312 S.C. 219, 467 S.E.2d 913 (1996); Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 466 S.E.2d 357 (1996), citing Kearse v. State Health and Human Services Finance Comm'n, 318 S.C. 198, 456 S.E.2d 892 (1995).

Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Grant, 319 S.C. 348, 461, citing Gibson v. Florence Country Club, 282 S.C. 384, 318 S.E.2d 365 (1984). Finally, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. 219, 467, citing Hamm v. AT&T, 302 S.C. 210, 394 S.E.2d 842 (1994).

DISCUSSION

Substantial Evidence

Appellant argues that the decision of the Board refusing to change the conditions of his probationary license is clearly erroneous in view of the evidence in the record. Appellant contends that the board's findings of fact are clearly erroneous and that the record is void of any evidence to support continued restriction of his dental license. In support of this position, Appellant argues that he has successfully completed treatment, is no longer a threat, has reached full medical benefit of his 10-year course of treatment, that he is being terminated as a patient and a medical opinion that he no longer requires board supervision. As noted above, the review of the findings supporting the agency's decision is limited to a determination of whether the Board's findings, inferences, conclusions or decisions are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (1984). More importantly, this tribunal cannot substitute its judgment for that of the Board based solely on the possibility that there is room for a difference of intelligent opinion. Chemical Leamen Tank Lines v. S.C. Pub. Serv. Comm'n, 258 S.C. 518, 189 S.E.2d 296 (1972). To the contrary, the Appellants must establish that the record is devoid of evidence that would allow a reasonable mind to reach the Board's conclusion. If such evidence exists, it is irrelevant as to whether the reviewing Court agrees with the position taken by the Board.

In this case, Appellant stipulated to the facts upon which the Board based its decision to require the probationary conditions and acknowledged that those facts are sufficient to support the indefinite or permanent imposition of the sanction imposed. The Board's finding of fact that the new evidence presented by Hurst in connection with his latest petition for relief did not suffice as an adequate ground to relieve him of the conditions upon his license is supported by substantial evidence on the record as a whole.

Abuse of Discretion

Appellant argues that the decision of the Board was arbitrary and capricious. A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure without adequate determining principles, or is governed by no fixed rules or standards. Deese v. South Carolina Bd of Dentistry, 286 S.C. 182, 332 S.E.2d 539 (S.C. App. 1985).¹ The Court found in Deese that the Board's decision was not arbitrary and capricious, notwithstanding allegations that others similarly situated had received lesser sanctions because the suspension of the doctor's license was within sanctions established by law for the dentist's "extensive" violations. The Court found that as judges, it lacked the competence to weigh and evaluate the record with that same expertise. Id. Additionally, in analyzing whether a decision is arbitrary, the Court has often reviewed whether the decision is supported by "substantial evidence" to determine if "there is evidence that would allow reasonable minds to reach the conclusion the administrative agency reached." Ruocco v. South Carolina State Bd. of Registration for Professional Engineers and Land Surveyors, 314 S.C. 111, 114, 441 S.E.2d 829, 831 (1994). If the sanction is supported by "substantial evidence" and is within the parameters of the sanctions established by law for the violations, the Board could not have acted arbitrarily.

Here, the Board had broad discretion to grant or deny Hurst's Petition to Terminate the Conditions of Probation. The 2006 Order reinstating Hurst's license with conditions provided for an indefinite period of probation with the conditions in question. The burden was upon Hurst, as the party asserting the affirmative of an issue, to prove that he was entitled to relief from those conditions. Leventis v. South Carolina Dept. of Health and Environmental Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000). Appellant's contention that the Board was required to grant his petition absent evidence in the record supporting the continued imposition of the sanctions is misplaced. Appellant has filed multiple petitions requesting relief from the conditions placed on his license. It would be unreasonable and repetitive to require the Board to make findings of fact based

¹ The Supreme Court has held that "[a]rbitrary conduct is readily definable and includes acts which are unreasonable, capricious or nonrational; not done according to reason or judgment; depending on will alone." Taylor v. Nix, 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992). Therefore, analysis of whether capricious conduct has occurred is subsumed in an analysis of whether arbitrary conduct occurred. Additionally, when examining whether a party's conduct is arbitrary or capricious, the Supreme Court commonly limits its examination to whether arbitrary conduct occurred. See Leventis v. South Carolina Dept. of Health and Environmental Control, 340 S.C. 118, 530 S.E.2d 643 (2000); Deese, supra. Consequently, my analysis is likewise limited to the examination of whether the Board's conduct was arbitrary.

upon new and updated data every time such a petition was filed where, as here, the probationary conditions were imposed for an indefinite period of time. There is no question that the conditions imposed were reasonable attempts to protect the public and were supported by the evidence presented in the 2006 proceedings. As discussed above, the substantial evidence supports the Board's conclusion that the restrictions and conditions on Appellant's license should not be terminated.

Because the decision of the Board was within its discretionary authority, it was not arbitrary and capricious.

ORDER

IT IS THEREFORE ORDERED that the Final Order of the Board of Dentistry is hereby affirmed.

AND IT IS SO ORDERED.

Deborah Brooks Durden
Administrative Law Judge

August 9, 2011
Columbia, South Carolina

**SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING, AND REGULATION
BEFORE THE STATE BOARD OF DENTISTRY**

In the Matter of:

Russell Charles Hurst Jr., DMD,
License No. DMD-2501,
Respondent

**ORDER DENYING RESPONDENT'S
PETITION TO TERMINATE CONDITIONS
OF PROBATION**

This matter came before the State Board of Dentistry (Board) on January 14, 2011, upon Respondent's request to be relieved of certain conditions previously imposed by the Board. The State was represented by Patrick D. Hanks, Assistant General Counsel of the South Carolina Department of Labor, Licensing and Regulation. Respondent appeared and was represented by Aaron J. Kozloski, Esquire.

Respondent is duly licensed to practice dentistry in the state of South Carolina. Respondent became subject to certain restrictions as to his practice pursuant to a Final Order by the Board, dated July 5, 2001. Respondent's license was reinstated by Order dated August 21, 2006, subject to certain terms and conditions imposed by the Board, including among others:

1. Respondent's practice was limited to the treatment of patients not less than twenty- one (21) years of age;
2. Respondent must submit to biannual and event driven polygraph examinations; and
3. Respondent must ensure that office staff members regularly provide Staff Surveillance Forms and that patients regularly provide Patient Satisfaction Forms.

The Board finds that there is no reason at this time to alter, amend, or otherwise release Respondent from the conditions placed upon him in the previous order.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Respondent's petition is denied and all restrictions, terms and conditions previously placed upon him by this Board remain in full force and effect.

AND IT IS SO ORDERED.

Thomas M. Dixon DMD President
Thomas M. Dixon DMD, President
State Board of Dentistry

1/14, 2011

CERTIFICATE OF SERVICE BY MAIL

This is to certify that the undersigned has this date served this Order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party (ies) or their attorney (s), to the following address: P.O. Box 1946 Lumberton, SC 29071

This 20 day of January 2011
By: Shirley R. A. [Signature]
Printed name: see signature

CERTIFICATE OF SERVICE BY MAIL

This is to certify that the undersigned has this date served this Order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party (ies) or their attorney (s) to the following address: 360 W. Hammond St. Lumberton, SC 29071

This 20 day of January 2011
By: Shirley R. A. [Signature]
Printed name: see signature

**SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING AND REGULATION
BEFORE THE BOARD OF DENTISTRY OF SOUTH CAROLINA**

In the Matter of:

RUSSELL CHARLES HURST, JR., DMD,

License #2501,

Respondent.

**ORDER ON PETITION
TO AMEND ORDER OF
REINSTATEMENT AND
PROBATION**

This matter came before the Board of Dentistry of South Carolina for hearing on April 18, 2008 to consider the Petition to Amend Order of Reinstatement and Probation, said Petition was filed by the above Respondent on or about February 25, 2008. A quorum of Board members was present. The hearing was held pursuant to applicable sections of the Dental Board's Practice Act and the SC Administrative Procedures Act. Respondent was present, along with his attorney, Aaron J. Kozloski, Jr., Esquire. Marvin G. Frierson, Esquire, Associate General Counsel, SC Department of Labor, Licensing and Regulation, appeared on behalf of the State.

On July 5, 2001, the Board issued a Final Order suspending the Respondent's dental license for a period of five years after Respondent admitted that he violated laws governing the practice of dentistry when he pled guilty to three counts of committing lewd acts upon a child under 16 and one count of contributing to the delinquency of a minor. After serving the five years suspension, Respondent petitioned to have his license reinstated. A hearing on Respondent's reinstatement petition was held on July 21, 2006, and the Board issued an Order of Reinstatement on August 21, 2006. The August 21, 2006 Order required Respondent to take and pass the ADEX or SRTA examination prior to reinstatement, and upon reinstatement, the license was placed in a probationary status for an indefinite period, with terms and conditions.

On or about September 25, 2007, Respondent filed a Petition to Amend Order of Reinstatement and Probation. Said Petition was denied and no written order was issued. Respondent filed a second Petition to Amend Order of Reinstatement and Probation on or about February 25, 2008, and incorporated by reference the September 25, 2007 Petition.

Under the terms and conditions of his probation, Respondent's practice is limited to patients age 21 and over, he must submit to biannual and event driven polygraph examinations, and he is prohibited from using a computer in the office. In his Petition, Respondent requested that the Order be amended to eliminate these requirements, and that the Board establish clear limits to the duration of his probation.

When considering Respondent's initial petition to have his license reinstated and determining appropriate practice restrictions, the Board considered the serious nature of Respondent's criminal violations and the fact that minors, a very vulnerable segment of our population, were the victims of his criminal actions. The Board also carefully reviewed the evaluation and recommendations of Dr. Gene Abel of the Behavioral Medicine Institute of Atlanta, and included most, if not all, of Dr. Abel's recommendations as part of the probation terms and conditions. Two letters from Dr. Abel, dated October 4, 2007 and March 26, 2008, were provided to the Board. Both letters state that Respondent is compliant and doing well in his treatment. Although Dr. Abel states in his letters that currently the Respondent poses no threat to his patients, there is no recommendation from Dr. Abel that any of the restrictions be terminated. The restrictions imposed upon Respondent's practice were put in place to protect the public and the Respondent, and without appropriate medical support for termination of certain terms and conditions, the Board must deny Respondent's request.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Respondent's request to amend the Order of Reinstatement shall be, and hereby is, denied.

AND IT IS SO ORDERED.

SOUTH CAROLINA BOARD OF DENTISTRY

BY:

John D. Snowden, Sr., D.M.D.
JOHN D. SNOWDEN, SR., DMD
President

5-20-08, 2008.

BEFORE THE STATE BOARD OF DENTISTRY OF SOUTH CAROLINA

In the Matter of:

RUSSELL CHARLES HURST, JR., D.M.D.,

License # 2501,

Respondent.

ORDER
OF
REINSTATEMENT

WHEREAS, Respondent was disciplined by the State Board of Dentistry (the Board) for misconduct by Final Order, dated July 5, 2001, which suspended Respondent for a period of five (5) years. Respondent now has petitioned the Board for reinstatement to the active practice of dentistry; and

WHEREAS, on July 21, 2006, Respondent appeared before the Board, with counsel, Aaron J. Kozloski, Esq., in support of the Petition for Reinstatement; and

WHEREAS, the Board finds that it is in the public interest to grant Respondent's petition and reinstate Respondent to active practice upon the terms and conditions provided below.

THEREFORE, IT IS ORDERED THAT:

1. Respondent's license to practice dentistry in this State shall be reinstated to active practice upon compliance with the following pre-condition for reinstatement:

- (a) Respondent shall take and pass the American Dental Licensure Examination (ADEX) or the Southern Regional Testing Agency, Inc. (SRTA) Dental Examination. Completion of this requirement must be satisfactorily documented in writing to the Board's staff. Respondent is hereby authorized to identify suitable patients to participate in this clinical examination by examining those patients and their dental records, including x-rays, as may be necessary and appropriate for this purpose only.

2. Thereafter, upon compliance with all requirements for reinstatement, Respondent's license shall be reinstated in a probationary status for an indefinite period upon the following terms and conditions of probation:

- (a) Respondent's practice shall be limited to the treatment of patients not less than twenty-one (21) years of age.
- (b) Respondent shall submit to biannual and event driven polygraph examinations, as directed by Gene G. Abel, MD, or another qualified therapist designated by Dr. Abel or the Board or its representatives.
- (c) Respondent shall ensure that office staff members regularly provide Staff Surveillance Forms and that patients regularly provide Patient Satisfaction Forms, as directed by Gene G. Abel, MD. Such forms must be completed in the manner directed by Dr. Abel and forwarded at specified intervals to Dr. Abel or another qualified therapist designated by Dr. Abel for review. A summary of the results of such forms shall be provided directly to the Board on a quarterly basis, unless sooner required in order to protect the public.

- (d) Respondent shall not use conscious sedation or oral or IV sedation or anxiolysis in the treatment of patients.
- (e) Respondent shall not personally use a computer in the office. Any computer entries must be made by a person other than Respondent.
- (f) Licensee shall appear and report to the Board as requested by the Board.
- (g) Licensee shall promptly advise this Board in writing of any changes in employment, address, practice, professional status, or compliance with this Order. Correspondence and copies of reports and notices mentioned herein shall be directed to:

LLR - Board of Dentistry
P.O. Box 11329
Columbia, SC 29211-1329

- (h) Respondent shall comply with the terms of this Order and all federal or state statutes and regulations.
- (i) Respondent's professional records shall be subject to periodic review by Board representatives. The cost of such reviews shall be borne by Respondent.
- (j) Respondent shall execute and deliver to the Board, within ten (10) days of request, an authorization for the release to the Board of any and all records, reports, or other information concerning Respondent by any and all persons or entities involved, notwithstanding any privilege provided by federal or state law. Failure to comply with this requirement within the prescribed time shall automatically result in the immediate temporary suspension of Respondent's license to practice until such time as full compliance has been made by Respondent and further Order of the Board.
- (k) Any and all costs of complying with the foregoing conditions of probation shall be borne by Respondent.

3. If Respondent fails to abide by any of the aforementioned terms and conditions, or if it should be indicated from reliable reports submitted to the Board that Respondent is otherwise unable to practice with reasonable skill and safety, then Respondent's license may be immediately temporarily suspended until further Order of the Board following hearing into the matter.

4. Pursuant to the South Carolina Freedom of Information Act, this Order is a public document.

5. Respondent shall cooperate with the Board, its attorneys, investigators, and other representatives in the investigation of Respondent's practice and compliance with the provisions of this Order. Respondent may be required to furnish the Board with additional information as may be deemed necessary by the Board or its representatives. In addition to such requests, the Board in its discretion may require Respondent to submit further documentation regarding Respondent's practice. It is Respondent's responsibility to demonstrate compliance with each and every provision of this Order. Failure to satisfactorily comply with such requests will be deemed a violation of this Order.

AND IT IS SO ORDERED.

**STATE BOARD OF DENTISTRY
OF SOUTH CAROLINA**

Effective: 8/21/06
Date

BY: Michelle D. Bedell D.M.D.
MICHELLE D. BEDELL, D.M.D.
President of the Board

BEFORE THE SOUTH CAROLINA STATE BOARD OF DENTISTRY

In the Matter of:)

Russell Charles Hurst, Jr., D.M.D.)

License No. 2501,)

Respondent.)

FINAL ORDER

This matter came before the Board of Dentistry (the Board) for hearing on June 22, 2001, as a result of a Memorandum of Agreement and Stipulations signed on June 7, 2001 by the Respondent and his counsel in which the Respondent waived the filing and service of a Formal Accusation, and advised of his wish to waive formal hearing procedures and dispose of this matter pursuant to S.C. Code Ann. §1-23-320(f)(Supp. 2000). A quorum of Board members was present. The hearing was held pursuant to S.C. Code Ann. §§40-15-180 and 200, S.C. Code Ann. §40-1-70(6), and the provisions of the Administrative Procedures Act (the APA), S.C. Code Ann. §1-23-10, et seq., as amended. The State was represented by Patrick D. Hanks, Esquire. The Respondent was represented by Andrew J. Savage, III, Esquire, John A. Massalon, Esquire, and Kenneth R. Young, Jr., Esquire.

FINDINGS OF FACT

Based upon the preponderance of the evidence on the whole record, the Board finds the facts of the case to be as follows:

1. The Respondent was duly licensed by the Board to practice dentistry in South Carolina at all times relevant to the misconduct asserted herein. The Respondent's license is currently temporarily suspended. The Respondent has voluntarily surrendered his controlled substance registration.

2. The Respondent admitted in the Memorandum of Agreement and Stipulations that he had pled guilty to three (3) counts of committing lewd acts upon a child under 16 and one (1) count of contributing to the delinquency of a minor in Indictment Numbers 00-GS-14-039, 00-GS-43-525, and 00-GS-43-447. Copies of the sentencing worksheets and Indictments were provided to the Board and placed into the record of this case. The Respondent did not contest the allegations contained within the Indictments. The Respondent received a sentence of ten (10) years confinement to the Department of Corrections, suspended upon the service of five (5) years probation and sex offender counseling.

3. The Respondent admitted in the Memorandum of Agreement and Stipulations that Judge Thomas Cooper set five conditions of probation as set forth in an exhibit, which was provided to the Board and made a part of the record of this case.

4. The Respondent admitted in the Memorandum of Agreement and Stipulations that he was the subject of a law enforcement investigation which resulted in the seizure of three (3) of his personal computers. Two (2) computers were located in the Respondent's home and one (1) was seized from his dental office. An examination of the hard drives of these computers found thirty-two (32) images of child pornography. An additional thirteen (13) images of highly probable child pornography as defined by a forensic pediatrician employed by the United States Attorney were also found.

5. As of April 17, 2001, the Respondent had completed 132 treatment sessions at the Behavioral Medicine Institute of Atlanta. Dr. Gene Abel drafted two summaries relating to the Respondent. The Respondent had further committed to a course of periodic treatment with Dr. Abel or his staff.

6. In the Memorandum of Agreement and Stipulations signed on June 7, 2001 by the Respondent and his counsel, the Respondent stipulated and admitted the aforementioned facts, and admitted that the aforementioned acts of the Respondent present grounds for violation of S. C. Code Ann. §§40-15-190(A)(2), (9), and (16)(Supp. 1999), and 40-1-110(1)(f), (h), and (j)(Supp. 1999), and S. C. Code Ann. Regs. 39-11(1-C)(Supp. 1999).

7. At the hearing, the State and the Respondent made presentations to the Board regarding an appropriate sanction in this matter. The Respondent answered questions from the Board, and submitted the evaluation and recommendations of Dr. Abel of the Behavioral Medicine Institute of Atlanta, as well as correspondence from various individuals regarding the Respondent. Dr. Abel's evaluation recommended that the Respondent be allowed to return to practice subject to a number of restrictions (his summaries and recommendations are included in the record of this case). Dr. Abel recommended that the Respondent be restricted to the treatment of adult patients, that the Respondent remain in treatment, that a check and balance system be created in the dental office to establish feedback from staff and patients, that the Respondent submit to polygraph examination every six months, and that the Respondent be placed on probation by the Board for at least five years. The State submitted an article regarding the efficacy of treatment of child molesters, as well as correspondence regarding the Respondent.

CONCLUSIONS OF LAW

Based upon careful consideration of the facts in this case, the Board finds and concludes as a matter of law that:

1. The Board has jurisdiction in this matter and, upon finding that a licensee has violated any of the provisions of S.C. Code Ann. §40-15-190, has the authority, pursuant to S.C. Code Ann. §40-15-200, to revoke or suspend a license or registration certificate, publicly or privately reprimand a licensee, or take any other reasonable action short of revocation or suspension, such as probation or the imposition of a civil penalty of up to ten thousand dollars, or requiring the person to undertake additional professional training subject to the direction and approval of the Board, psychiatric evaluations, controlled substances restrictions, institutional practice under supervision, and any other actions considered appropriate by the Board. Upon finding that grounds for discipline exist, S.C. Code Ann. §40-1-120 provides that the Board has the authority to: issue a public reprimand; impose a fine not to exceed five hundred dollars; place a licensee on probation or restrict or suspend the individual's license for a definite or indefinite time and prescribe conditions to be met during probation, restriction, or suspension including, but not limited to, satisfactory completion of additional education, of a supervisory period, or of continuing education programs; permanently revoke a license; and impose the reasonable costs of the investigation and prosecution of a case.

2. The Respondent has violated S. C. Code Ann. §§40-15-190(A)(2), (9), and (16)(Supp. 1999); and 40-1-110(1)(f), (h), and (j)(Supp. 1999), and S. C. Code Ann. Regs. 39-11(1-C)(Supp. 1999), as evidenced by his admissions contained in the Memorandum of Agreement and Stipulations signed on June 7, 2001 by the Respondent and his counsel, and mentioned above, that his acts were grounds for these violations.

3. The sanction imposed is consistent with the purpose of these proceedings and has been made after weighing the public interest and the need for the continued services of qualified dentists against the countervailing concern that society be protected from professional misconduct.

4. The sanction imposed is designed not to punish the Respondent, but to protect the public.

5. Recidivism is a serious concern in child molestation cases. No restrictions placed by the Board on the practice environment can assure an absence of contact with children in a dental practice. Adult patients frequently bring children to a dental office when they are treated. Although the Respondent's admitted misconduct with children did not take place in the dental office, the Respondent possessed child pornography on a computer in his dental office. This demonstrated a potential danger to the public in the practice environment.

6. The Board concludes from the evidence presented that the public cannot be adequately protected from potential misconduct by the Respondent until the Respondent has demonstrated for a period of time that he would not present a danger to the public should he be returned to practice.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that:

1. The Respondent's license to practice dentistry be, and it hereby is, suspended for a period of five years commencing upon the service of this order upon the Respondent or his counsel. After the completion of this period of suspension, the Respondent may petition the Board for reinstatement of his license. Such reinstatement, if any, shall be in the sole discretion of the Board. At the time the Respondent petitions the Board for reinstatement, he shall appear before the Board and present evidence satisfactory to the Board, in its discretion, regarding the Respondent's fitness and qualifications to be licensed as a dentist in this state. At that time, the Board, in its discretion, may deny licensure, impose requirements before licensure may be granted, or grant licensure upon such terms and conditions as it may deem appropriate.

2. This final order shall take effect upon service of this order on the Respondent or his counsel.

AND IT IS SO ORDERED.

THE BOARD OF DENTISTRY

Charles B. Maxwell, DMD
Dr. Charles B. Maxwell
President of the Board

7-5

, 2001.

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CULP
MATTERS

BEFORE THE STATE BOARD OF DENTISTRY OF SOUTH CAROLINA

In the Matter of:

RUSSELL CHARLES HURST, JR., D.M.D.,

License # 2501.

Respondent.

**ORDER
OF
SUSPENSION**

WHEREAS, Respondent is duly licensed by the State Board of Dentistry (the Board) to practice in this State; and

WHEREAS, Respondent was convicted on or about September 12, 2000, of three counts of committing lewd acts upon a child under sixteen and two counts of contributing to the delinquency of a minor, in Cases No. 00-GS-14-039, 00-GS-43-525, and 00-GS-43-447. A copy of the sentencing worksheets and indictments are attached hereto and incorporated herein; and

WHEREAS, the Board finds that committing lewd acts upon a child under sixteen and contributing to the delinquency of a minor constitutes a serious threat to the public health, safety, or welfare; and

WHEREAS, the Board further finds that the public interest imperatively requires that Respondent's continued practice of dentistry be immediately temporarily suspended pending hearing and further Order of the Board; and

WHEREAS, the Board has authority to require a licensee to submit to a physical and mental examination by physician(s) designated by the Board.

THEREFORE, IT IS ORDERED THAT, in accordance with the S.C. Code Ann. §1-23-370(c)(1986), Respondent's license to practice dentistry in this State is hereby temporarily suspended, effective immediately, pending hearing and until further Order of the Board.

IT IS FURTHER ORDERED THAT, in accordance with S.C. Code Ann. §40-15-190(B)(Supp. 1999), Respondent must immediately contact Gene G. Abel, M.D., at the Behavioral Medicine Institute of Atlanta, 1401 Peachtree Street, NE, Suite 140, Atlanta, Georgia, 30309 (tel. 404-872-7929/404-872-2588) to arrange for an in-patient evaluation as to whether Respondent is fit to practice dentistry or whether respondent has sustained a physical or mental disability which renders further practice by him dangerous to the public. This evaluation period shall be for not less than four (4) days and shall continue until such time as the attending physician(s) deem appropriate in order for a satisfactory determination to be made as to Respondent's fitness to practice. During said in-patient evaluation period, Respondent must cooperate fully with the facility staff and submit to any and all mental or physical examinations of any kind as may be deemed appropriate by the

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Page 1 of 2

Dgd
2501

attending physician(s), and comply with any recommendations as to further treatment or restrictions on Respondent's practice of dentistry. Respondent must execute an authorization for the release to the Board of any and all records, reports, or other information concerning Respondent by any and all persons or entities involved, notwithstanding any privilege provided by federal or state law. Before discharge, the attending physician(s) shall provide an oral report to the Administrator, which shall be promptly followed by a written report and copy of Respondent's complete medical record while a patient at the facility. Said written report and medical report must be received by the Board not later than ten (10) days after discharge. All costs of said evaluation and reports to the Board shall be borne by Respondent.

AND IT IS SO ORDERED.

STATE BOARD OF DENTISTRY
OF SOUTH CAROLINA

Effective: September 13, 2000 By: W. Ronald Barrett, D.M.D.
Date: _____ W. RONALD BARRETT, D.M.D.
President of the Board

South Carolina Department of Labor, Licensing and
Regulation Before the State Board of Dentistry

IN RE:

Russell Charles Hurst,

Jr., DMD

License No.: 2501

)
)
)
) Statement

)
) of

R. CHARLES HURST, JR., DMD

The within hearing was taken before, Robin L.
Spaniel, Verbatim Court Reporter and Notary Public in
and for the State of South Carolina, commencing at the
hour of 9:21 a.m., Friday, January 14, 2011, at the
offices of South Carolina Department of Labor, Licensing
and Regulation, Columbia, South Carolina.

Reported by:

Robin Spaniel

Appearances

President:

Thomas M. Dixon, D.M.D.

Board members:

David W. Jones, D.D.S.

Felicia L. Goins, D.M.D.

Charles F. Wade, D.M.D.

John M. Whittington, D.M.D.

Douglas J. Alterman, D.M.D.

Dr. Z. Vance Morgan, IV, D.D.S.

Ms. Genie M. Duncan

For the Respondent:

Aaron J. Kozloski, Esquire

Capitol Counsel, LLC

1201 Main Street

Columbia, SC 29201

For the

State/Complainant:

Patrick D. Hanks, Esquire

L.L.R. Office of General Counsel

Kingstree Building at Synergy Business Park

110 Centerview Drive

Columbia, SC 29201

Advice Counsel:

Dean Grigg, Esquire

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Exhibits

Exhibit No. 1: Petition to terminate terms of probation

Exhibit No. 2: 12/2/10 Letter from Dr. Abel

Exhibit No. 3: 11/4/10 Letter from Dr. Abel

Exhibit No. 4: Order on Petition to amend order

Exhibit No. 5: Order of Reinstatement

Exhibit No. 6: Final Order

Exhibit No. 7: Order of Suspension

Exhibit No. 8: Summary of Evaluation by Dr. Abel

1 P R O C E E D I N G S

2 DR. DIXON: We have a hearing on a petition to
3 terminate conditions of probation from Russell
4 Charles Hurst, Jr. D.M.D. Is his -- is he
5 here yet?

6 MS. ROBINSON: Yes, sir.

7 DR. DIXON: Dr. Hurst, welcome to the South Carolina
8 Board of Dentistry. If you would Genie, if we
9 all could introduce ourselves once again for
10 Dr. Hurst.

11 MS. DUNCAN: Genie Duncan, West Columbia, public
12 member.

13 DR. ALTERMAN: Doug Alterman, Charleston.

14 DR. GOINS: Felicia Goins, Columbia.

15 DR. WADE: Charlie Wade from Lancaster.

16 DR. DIXON: I'm Tommy Dixon from Belton.

17 DR. JONES: David Jones, Spartanburg.

18 DR. WHITTINGTON: John Whittington from Marion.

19 DR. MORGAN: Van Morgan, Columbia.

20 DR. DIXON: This is a hearing in the matter of Dr.
21 Charles Russell Hurst, Jr. being held in
22 Columbia, South Carolina on January 14, 2011.

23 MR. GRIGG: Mr. President, I apologize for
24 interrupting, but is Mr. Hanks coming?

25 MR. KOZLOSKI: I understand Pat's on his way down he

1 should be here.

2 MR. GRIGG: Somebody went to get him? Okay.

3 DR. DIXON: So we'll wait on him?

4 MR. GRIGG: We probably -- we need to wait.

5 DR. DIXON: Okay..

6 MR. GRIGG: Yeah, let's make sure he's here. Yeah.

7 DR. DIXON: Okay.

8 (Short Break)

9 DR. DIXON: This is a hearing in the matter of Dr.
10 Charles -- or Dr. Russell Charles Hurst, Jr.
11 being held in Columbia, South Carolina on
12 January 14, 2011. My name is Dr. Thomas
13 Dixon, I am the Chairperson. The other
14 members of the board on the hearing on this
15 case are: you got, Ms. Genie Duncan, Doug
16 Alterman, Felicia Goins, Charlie Wade, David
17 Jones, John Whittington and our newest member
18 Dr. Vance Morgan. The attorney advising the
19 board is Dean Grigg and the Respondent is
20 represented by Aaron Kozloski. The State is
21 represented by Patrick D. Hanks, Assistant
22 General Counsel. Licensee will be sworn and
23 we'll begin.

24

25 Whereupon,

1 Russell Charles Hurst, Jr., D.M.D., being duly
2 sworn and cautioned to speak the truth, the
3 whole truth, and nothing but the truth,
4 testified and deposed as follows:

5
6 DR. DIXON: Mr. Kozloski, would you like to begin?

7 MR. KOZLOSKI: Thank you, Mr. President. I'll be
8 very, very brief. I think in your packet you
9 have two letters from Dr. Abel summarizing his
10 professional medical opinion of Dr. Hurst,
11 releasing him from treatment and also saying
12 he believes he poses no threat and is not in
13 need of further supervision. Those are self
14 explanatory. Dr. Hurst is here today and very
15 happy to answer whatever questions you may
16 have. I have no particular questions for him,
17 but if you wish to know a little bit more
18 about the nature of his practice, how it's
19 been going for him and kind of how he see's
20 his future playing out, I invite you to ask.
21 Thank you.

22 DR. DIXON: If you need a minute to take a look over
23 this -- there's a good bit of information.
24 We're a little bit late getting our disks due
25 to the ice. So if you need some time to take

1 a look over this, and anybody that has some
2 questions for Dr. Hurst.

3 DR. WHITTINGTON: Dr. Hurst, have you actually been
4 practicing since your probationary time, how
5 many years?

6 A I've returned to practice for the last two and a
7 half years. I retook the dental board in 2007, I
8 believe it was, and my license was reinstated in
9 April of 2008.

10 DR. WHITTINGTON: And you practice with an
11 associate?

12 A Yes.

13 DR. DIXON: Dr. Hurst, can you tell us what the
14 limitations that are set forth? I know it's
15 in the report but tell us what the limitations
16 set on your practice are currently.

17 A I'm unable to see anyone under the age of 21. I
18 cannot use any type of sedition or analgesia, a
19 general type, other than local aesthetics. Unable
20 to use the office computers. I think those are the
21 three big, the three big stipulations on my
22 license.

23 DR. DIXON: Are you currently still under counseling
24 at all?

25 A I have been up until November. I received a letter

1 from Dr. Abel stating that he was terminating my
2 treatment and supervision and I still was
3 continuing to do the staff surveys and the patient
4 surveys which I submitted in December to the board
5 and to Dr. Abel. I have not seen a report so I'm
6 assuming that he is just holding those surveys and
7 waiting on, I guess, whatever direction he's been
8 given from here out.

9 DR. ALTERMAN: Was the termination by Dr. Abel on
10 his recommendation or was it something you
11 asked him to initiate?

12 A Well, he had been telling me that they -- after ten
13 years would terminate the supervision and so when
14 it came time, I asked him if he was ready to do
15 that and he said he would.

16 DR. DIXON: And there's no other restrictions on
17 your practice, no . . .

18 A Not with the board.

19 DR. DIXON: Okay.

20 DR. ALTERMAN: What would they be, because you said
21 not with the board, but what restrictions are
22 you referring to?

23 A Well, I can't participate in any federally funded
24 programs like Medicaid, so stuff like that. I mean
25 I've been turned down for insurance, loans

1 different things like that.

2 DR. DIXON: The counseling was not a requirement
3 from the Board of Dentistry though, is that
4 right?

5 A Well, it was, yeah, because it was his supervision
6 and reporting to the board so it was at the board's
7 direction that I continue with Dr. Abel.

8 DR. DIXON: But on termination of that the board has
9 not authorized anybody to terminate that,
10 whether it be he or yourself, is that correct?

11 A That's correct.

12 DR. DIXON: But it had been terminated as of -- what
13 was the date?

14 A Well, I don't really know that he actually
15 terminated it. He's recommended that it no long be
16 continued.

17 DR. DIXON: Was that on a monthly basis that you
18 were meeting with him?

19 A It's quarterly.

20 DR. DIXON: Quarterly.

21 A Right.

22 DR. DIXON: So the last time you met with him was
23 when?

24 A Well, the last report I submitted was in December.
25 I talked to him in December.

1 DR. DIXON: Okay. So there's been no lapse in it?

2 A No.

3 DR. DIXON: Okay.

4 MR. KOZLOSKI: Mr. President, may I add something to
5 that very quickly. In looking at the November
6 4, 2010 letter from Dr. Abel, the last line
7 says, "This letter is to notify you that we
8 believe Dr. Hurst has received full benefit
9 from therapy and his therapy is therefore
10 being terminated." I'm reading that as Dr.
11 Abel discharging him from treatment, so. It's
12 certainly up to the board whether Dr. Hurst
13 needs to continue or not but it looks like
14 he's been discharged as a patient to me.

15 DR. DIXON: Okay. But that's something that the
16 board --

17 DR. ALTERMAN: That was the question we were trying
18 to figure out.

19 DR. DIXON: Yeah, the board --

20 DR. ALTERMAN: Was the discharge by his request or
21 by the physician's request. That's still
22 unclear and it looks like there was something
23 in there that states there was no specific
24 recommendation by Dr. Abel for the
25 discontinued treatment.

1 MR. KOZLOSKI: Well, he didn't comment one way or
2 the other. Now, there's a follow on letter of
3 December 2nd, from Dr. Abel, which I believe
4 you all have, and Dr. Abel characterizes this
5 as addendum to the earlier letter and he's
6 making a recommendation here apparently for
7 your consideration.

8 DR. DIXON: Any more questions for Dr. Hurst?

9 DR. ALTERMAN: I just have one other. The
10 restrictions that have been placed on you: the
11 computer, the 21-year-old and the analgesic,
12 what impact has that had on your practice
13 since the -- in other words, reinstating it
14 how would that affect what you do?

15 A How would it affect what I do . . .

16 DR. ALTERMAN: Now. I mean, how different would
17 that make -- how much difference would that
18 make for you?

19 A Well, for the last ten years I've had to have an
20 associate in the practice in order to continue to
21 see the under 21 age group and patients who wanted
22 Nitrous oxide or whatever. It's been difficult to
23 find someone competent to fill that position. I've
24 probably worked with 15 or 20 different dentist
25 over the last ten years and I've had drug addicts,

1 alcoholics, thieves, philanders, you name it,
2 pretty much. I mean, I've got all kinds of people
3 coming and going in my office.

4 MS. DUNCAN: From dentist?

5 DR. ALTERMAN: You're talking about dentists?

6 A Yes. It's difficult to find competent dentist to
7 work in the practice. I've had young people just
8 out of dental school that really didn't know what
9 they were doing. I've had elderly dentist who
10 basically had retired and were contract dentist for
11 companies to come fill in. Some of them would stay
12 -- I had one dentist from Columbia who came and
13 worked two weeks and then didn't show up for
14 practice and I couldn't find him. I was getting
15 ready to go out of town and he was supposed to
16 cover for me, I didn't know where he was, couldn't
17 find him. You know I've got four hygienists that
18 work for me so when they have a full schedule of
19 patients and half of them are under 21 and the
20 doctor comes in and says that he's going to be off
21 tomorrow afternoon to go skiing or whatever and
22 then I have to reschedule their schedules and then,
23 you know, they're depending on me for their salary
24 and it's just difficult, I mean, extremely
25 difficult to operate a practice like that. So, I

1 mean, I'm not going to say that if, you know, you
2 all allow or ease the restrictions that anything's
3 going to change Monday but it does give me more
4 flexibility to be able to continue to operate under
5 normal conditions without having to always be
6 trying to reschedule and jump through hoops and
7 keep everybody happy. My wife also is a hygienist
8 in the practice and has been experiencing these
9 same difficulties for the last ten years. She
10 knows how difficult it's been.

11 DR. DIXON: With the law being changed a few years
12 ago, I mean, I'm sure that is difficult. But
13 with the law being changed if that patient has
14 been seen within the office within the last
15 year, --

16 A If you're talking about general supervision, we
17 have used that on occasion but, again, I mean, if
18 we have five new patients scheduled one afternoon
19 and that's going to be probably a couple hygienists
20 are going to get sent home because there's nothing
21 to do and there's nobody to check those patients.

22 DR. MORGAN: How does that affect you financially
23 the way you're running?

24 A I mean, my finances are month to month. I've never
25 -- I haven't been able to really accumulate any

1 savings towards retirement or anything like that
2 but, you know, I think the other day I had \$14 in
3 my checking account. But, I mean, so far I've
4 managed to keep the doors open, keep people
5 employed and I just take it one day at a time, one
6 month at a time.

7 DR. MORGAN: You said you had four hygienists. How
8 many total staff members do you have?

9 A Eight.

10 DR. MORGAN: Including yourself?

11 A No. I have two front, but one's part time. Got
12 two [sic] hygienists, two of them are part time.
13 I've got two assistants. So that's four, six,
14 eight. Yeah.

15 DR. DIXON: Any more questions? Mr. Hanks?

16 MR. HANKS: Dr. Dixon, I'd like to enter six
17 exhibits -- eight exhibits of which I've
18 provided to Respondent's counsel, Mr.
19 Kozloski.

20 MR. KOZLOSKI: No objection.

21 MR. HANKS: And you all have those eight documents
22 as part of your record.

23

24 (Whereupon, Petition to terminate terms
25 of probation, consisting of 1 page, was

1 marked Exhibit No. 1 for identification.)
2 (Whereupon, 12/2/10 Letter from Dr. Abel,
3 consisting of 1 page, was marked Exhibit
4 No. 2 for identification.)
5 (Whereupon, 11/4/10 Letter from Dr. Abel,
6 consisting of 1 page, was marked Exhibit
7 No. 3 for identification.)
8 (Whereupon, Order on petition to amend
9 order, consisting of 3 pages, was marked
10 Exhibit No. 4 for identification.)
11 (Whereupon, Order of Reinstatement,
12 consisting of 4 pages, was marked Exhibit
13 No. 5 for identification.)
14 (Whereupon, Final Order, consisting of 4
15 pages, was marked Exhibit No. 6 for
16 identification.)
17 (Whereupon, Order of Suspension,
18 consisting of 2 pages, was marked Exhibit
19 No. 7 for identification.)
20 (Whereupon, Summary of Evaluation by Dr.
21 Abel, consisting of 18 pages, was marked
22 Exhibit No. 8 for identification.)
23

24 MR. HANKS: Dr. Dixon, and members of the board,
25 it's the State's position that we should be in

1 a situation where Dr. Hurst should essentially
2 crawl before he walks. To put him in a
3 position to where he would go from having
4 several restrictions on him: the polygraph,
5 the sedation, the staff surveys, not seeing
6 people under 21 and not being able to use his
7 office computer at all, not even for billing,
8 much less the internet. To throw him out
9 there without any of these restrictions, which
10 if he's honest with us, he would probably tell
11 you that he's benefitted from those
12 restrictions because it's probably what's been
13 able to crutch him and he's been able to
14 maintain his ability to practice from 2006 up
15 until this day. As I look around the room I
16 note that there is only one board member, Dr.
17 Dixon and members of the board, that was
18 actually here in the year 2000 when this case
19 originally came in front of the board, and
20 what I recollect about the case itself, and
21 it's contained in Dr. Abel's eval, was that
22 some of his issues were kind of longstanding.
23 You know, from the time he was a young boy he
24 had some issues. Some of those issues
25 extended three or four years and then they

1 cleared up and when he was 12 some of those
2 same issues flared up again. And as best we
3 can tell he didn't have any other problems
4 until he was about 40-years-old. At age
5 forty, he's a grown man, he's a dentist and it
6 was at that point he, you know, began to watch
7 some of the kids of his children -- some of
8 the friends of his children, watch them, you
9 know, undress and built a pool. And as part
10 of his activities as a Boy Scout leader, you
11 know, they played some games with a nerf ball
12 that involved him going into their swimsuits
13 and retrieving the nerf ball and during that
14 period he both saw the young boys and at
15 certain points he touched them. And that's
16 kind of what got us here today. Two of those
17 individuals happened to be patients of his,
18 but the conduct itself did not occur in the
19 dental office.

20 Dr. Hurst was arrested in the year 1999
21 for three counts of a lewd acts on a minor and
22 one count of contributing to the delinquency
23 of a minor. He was also looked at by the
24 federal government as it relates to having
25 photographs on his home computer and on his

1 office computer. Not only were they nude
2 photographs of children, because nude
3 photographs of children aren't exactly
4 illegal. They're disgusting. But they aren't
5 illegal. To constitute pornography it has to
6 be children, it has to be children engaged in
7 certain acts of sex with each other. That's
8 what constitutes pornography and pornography
9 is illegal. So the federal government looked
10 at that issue. There were thousands of nude
11 photographs of children on the computers.
12 Only -- just slightly over a dozen, it was ten
13 to fifteen of which they said constituted
14 pornography.

15 So the Respondent was arrested, he was --
16 as condition of his bond, he bonded out, they
17 told him he couldn't see kids under a certain
18 age, and they told him not to go around the
19 Boy Scouts anymore, and I believe he was a
20 little league baseball coach at the same time,
21 so all those activities had to decrease. And
22 that's when the dental board became involved
23 with the situation. The dental board sent Dr.
24 Hurst down to Dr. Abel and Dr. Abel provided
25 some pretty intensive, I call it kind of

1 diversion treatment. Some it may have
2 involved ammonia and electrical shocks and
3 things of that nature. But at any rate, the
4 board saw fit even after considering Dr.
5 Abel's recommendations to go ahead and suspend
6 Dr. Abel [sic] for a period of five years with
7 the ability to come back at some indefinite
8 point. And five years after the year 2000 he
9 did petition the courts and he came back and
10 the board imposed certain restrictions. I'll
11 back up one moment and say that during this
12 period of the board hearing back in 2000, it
13 was about a year after his arrest, we still
14 had issues with the Respondent unfortunately
15 going on the internet and looking at pictures.
16 I don't know if he knew we had a way of
17 knowing but we -- fortunately law enforcement
18 people did have a way of knowing. But that
19 cleared itself up. And the Respondent,
20 eventually, as I said, he was suspended by the
21 board, he had to take either the ADEX or SRTA
22 and he was reinstated with all those
23 conditions. The Respondent has taken a
24 polygraph, I believe, about twice a year and
25 those things, as best we can tell, members of

1 the board, those things have worked. The
2 Respondent hasn't had any additional problems
3 that we know of. As best we can tell the
4 Respondent was able to bring additional
5 dentist in and those dentist were not subject
6 to the same restrictions that Dr. Hurst is
7 subject to. That is to say that they were
8 able to see children of any age, those kids
9 were able to come in and they were able to be
10 sedated by other dentist. Apparently the
11 insurance companies including the government
12 TRICARE didn't mind the fact that Dr. Hurst
13 himself had these restrictions. The other
14 dentists in his office have been able to treat
15 patients of that age and nature.

16 But I'll wind up quickly and say that to
17 phase out all the restrictions in this
18 situation would really, I think, be an
19 unfortunate situation. I think the board
20 should consider a phasing process and I'm just
21 giving examples but obviously Dr. Abel has
22 said that there's not an additional need for
23 therapy and that's something the board may
24 consider, has he fully benefitted from
25 therapy? It's my understanding that he hasn't

1 seen Dr. Abel in a therapeutic setting since
2 October of 1999. Also as it relates to the
3 polygraph and/or staff surveys. Those kinds
4 of things I think the board can consider
5 spreading out. The age, I believe the age
6 currently is 21, which he's prohibited from
7 seeing children under that age. The board
8 might entertain lowering that age, then that
9 may be a valid course of action at this point.
10 But as it relates to the Respondent being able
11 to see patients of any age, to sedate patients
12 of any age, I honestly don't believe that
13 would be beneficial for the Respondent. I
14 don't believe that would serve him. And
15 without a process where he -- we can see that
16 he can crawl, that he can practice safely
17 without some of these restrictions and
18 lessening these restrictions I think we'd end
19 up in a situation where -- because this is my
20 thought in this is that the other issue that
21 we have is if we have complaints where there
22 were possible actions by Dr. Hurst, it's
23 really going to create a situation where he's
24 going to have to spend a lot of time and
25 effort defending those kind of complaints.

1 And I think the board can go a long way at
2 keeping him from those kind of allegations for
3 a period of time to, again, to make sure that
4 he can stand up on his own and that he will be
5 successful. Because two things Dr. Abel said
6 that Dr. Hurst was obsessive and compulsive
7 and he also said that he suffers from
8 pedophile and I don't know if those things
9 will ever go away. I don't know if he's on
10 any medication for his obsessive compulsive
11 disorder. I don't know that there's anything
12 you can do about the pedophile but I don't
13 think it would be wise to remove all
14 restrictions at once. I'm just asking the
15 board to consider phasing these things down as
16 the board might. I'm sorry to take up so much
17 of your time. Thank you very much.

18 DR. DIXON: Thank you, Pat, we appreciate that. Any
19 further questions for Mr. Hanks or . . .

20 DR. ALTERMAN: I've got one other question. Going
21 back to Dr. Abel, you've mentioned that he's
22 not had any face to face therapy since 1999,
23 is that true? So it's just been like a
24 telephone type conversations over the last ten
25 years?

1 A No, not over the ten years over the last -- since I
2 started back into practice. But I did go for
3 maintenance therapy on a quarterly basis with him
4 for a number of years after the active therapy.

5 DR. ALTERMAN: Maintenance meaning sat down in his
6 office with him?

7 A Right.

8 DR. DIXON: When was your last maintenance?

9 A I don't remember exactly. It was probably -- I
10 probably continued for another couple, three years
11 after the active therapy.

12 DR. DIXON: So it's been more than a couple of years
13 ago?

14 A Yes.

15 DR. ALTERMAN: Since then, it's just been telephone,
16 like, every quarter, he calls, you call, that
17 type of thing?

18 A Right.

19 DR. DIXON: And as far as the - I had forgotten
20 about the lie detector - those have continued
21 biannually?

22 A Right.

23 DR. DIXON: So, we're up to date on that. When was
24 the last time for that?

25 A The last one was I think in May of 2010.

1 DR. DIXON: Okay.

2 A So I would be due for one depending on your
3 decision today.

4 DR. ALTERMAN: Are those results submitted
5 someplace?

6 DR. DIXON: Pat, do you know the answer to that?

7 DR. ALTERMAN: The polygraph results are they
8 submitted to the board saying that he passed
9 or whatever?

10 MR. HANKS: I believe they summarize it, his BMI
11 letter I believe on the -- you have two
12 letters in your material from BMI. I believe,
13 I'm not positive, I believe that the November
14 2010 letter I recall discussed the results of
15 this. He successfully passed five polygraph
16 exams on April, November of 2008. May and
17 November of 2009. And then his most recent
18 one was June of this year, sir.

19 DR. ALTERMAN: They've all been passed?

20 MR. HANKS: Yes, sir.

21 DR. WHITTINGTON: Dr. Hurst, on a personal basis you
22 are listed as a registered sex offender?

23 A Yes.

24 DR. WHITTINGTON: Mr. Hanks, how does that work in a
25 personal basis, who is in charge of -- or is

1 there any oversight in that on a personal
2 level?

3 MR. HANKS: To my knowledge there's not. I believe
4 as a registered sex offender he has certain
5 things that he can and can't do that are going
6 to be upon him for an indeterminate period of
7 time. But the enforcement of those things, as
8 I understand there's no one. I don't think
9 he's under a probationary status where he
10 would have to report to a probation officer or
11 a probation officer could show up at his
12 practice from time to time or his church or
13 anything.

14 MR. KOZLOSKI: Actually, I think that's behind us.
15 He was on probation and he completed it
16 successfully --

17 MR. HANKS: Right.

18 MR. KOZLOSKI: -- and then was released.

19 DR. ALTERMAN: There's no restrictions on you --
20 being as a registered sex offender are there
21 still existing restrictions? Not in the
22 dental world. I'm talking about just in the
23 real world.

24 A I report to an officer in the sheriff's office
25 twice a year and then he checks up on me at my

1 residence and my business periodically, you know,
2 unannounced. So, as far as restrictions go though,
3 you know, I have to notify them of my residence if
4 I change residence or businesses. But I don't
5 think there's any other kind of really restrictions
6 on my personal life.

7 DR. ALTERMAN: Okay.

8 DR. JONES: Dr. Hurst, you have not been allowed to
9 use any computers in your practice?

10 A Correct.

11 DR. JONES: If you have to look up something you
12 have somebody else do it?

13 A Correct.

14 DR. JONES: How much -- how does the use of internet
15 impact your practice or lack of use of
16 internet?

17 A Well, I mean the internet is used for more and more
18 stuff every day. I mean just in the last three
19 months, I believe it was - probably most of you all
20 know - that Blue Cross/Blue Shield had gone to
21 electronic EOBs, so. That's the only way we can
22 find out --

23 DR. WHITTINGTON: But that doesn't personally affect
24 you, that's your office staff that does that -

25 -

1 **A** Yeah, the staff does that.

2 DR. ALTERMAN: What about digital x-rays, is that
3 something you can't -- do you have that.

4 **A** Yeah, we have digital x-rays.

5 DR. ALTERMAN: So you can't even pull up an x-ray
6 yourself?

7 **A** I can look at them, yes.

8 DR. WHITTINGTON: I can't even pull them up in my
9 office, so I don't think that's a big deal.
10 My girls pull them up for me.

11 DR. JONES: But for you personally, on a day to day
12 practice, tell me why you would have to have
13 access to the internet.

14 **A** Well, I mean, it would make it easier to run the
15 business so I can check on bank statements, you
16 know, insurance payments because of electronic
17 deposits going into the checking account, paying
18 bills and that kind of thing.

19 DR. JONES: But you could have staff members doing
20 that. I mean I have it in my practice and
21 there are certain things that are checked on
22 every day by my staff and I couldn't tell you
23 how to get into it.

24 **A** That's true. I can't -- I'm getting ready to lose
25 my number one person that does all of that. She's

1 going through a separation with her husband, gave
2 me notice this week that she's leaving. So we're
3 going to have to train somebody else to be able to
4 do that before she goes.

5 DR. DIXON: Any other questions for Dr. Hurst? Mr.
6 Grigg, is this the point we go into executive
7 session?

8 MR. GRIGG: If y'all want to.

9 MR. KOZLOSKI: I'm sorry, may I briefly respond?

10 DR. DIXON: Sure.

11 MR. KOZLOSKI: And, I mean, I'll try to be brief.

12 It's not polite to interrupt a colleague but I
13 did want to raise an objection to Mr. Hanks
14 going into Dr. Abel's initial report. I think
15 it's very difficult to discuss a report like
16 that without Dr. Abel actually here to, you
17 know, offer his professional medical opinion.
18 So I simply ask the board to remember that my
19 friend is offering you argument, not evidence,
20 when he summarizing what's going on in Dr.
21 Abel's report. And unfortunately Dr. Abel had
22 a professional conflict and could not be here
23 today.

24 It's been ten years, ten long years for
25 Dr. Hurst. He has done everything the board

1 has asked him to do. He has done everything
2 that Dr. Abel has asked him to do. The
3 evidence that you have before you suggests
4 that he has - in Dr. Abel's own words -
5 "Benefitted maximally from therapy". I
6 understand the position of the State
7 regarding, perhaps, an incremental relaxation
8 of these restrictions. We've actually come to
9 the board before and asked for this, but
10 previous boards, previous board members have
11 wanted to see more from Dr. Abel and it's here
12 now.

13 What amazes me about this case -- I did
14 not initially represent Dr. Hurst until the
15 mid 2000s. I was not his attorney when he
16 first came before the board. And a case that
17 is this serious, truly, as an advocate and as
18 a former board administer, I was surprised his
19 license was not revoked. I've been in this
20 room when licenses have been personally --
21 permanently revoked. Apparently, the board at
22 the time that decided to suspend him saw some
23 potential for his return to practice, full
24 practice down the road. And actually that's
25 the job of boards. You have the public

1 protection problem on one hand but you balance
2 that against the need of services for
3 qualified professionals. You know, for Dr.
4 Hurst I think the restriction that is probably
5 most impaired his practice and has least
6 benefitted the community in the long run would
7 be not being able to see patients under 21.
8 That cuts out a lot of Medicaid patients who,
9 you know, may or may not go to the dentist
10 anywhere. So I think you do have a balance
11 here to do, but, you know, I'd just like to
12 say ten years. It's been a long road and he's
13 done everything and I think we can have some
14 faith in Dr. Abel's report and I think we can
15 have some faith in Dr. Hurst and his
16 willingness to comply and go on with the
17 program. Unless you have any questions for
18 me, thank you for all your time in this case.

19 DR. WHITTINGTON: Mr. Kozloski?

20 MR. KOZLOSKI: Yes, sir.

21 DR. WHITTINGTON: You just stated a minute ago that
22 that's federal law, and is this a stipulation
23 as being a registered sex offender that
24 Medicaid would not allow you to see any of
25 their patients?

1 MR. KOZLOSKI: Well, yes, sir, that's part of the
2 problem. That's a legal problem --

3 DR. WHITTINGTON: That's whether we -- whatever we
4 do here?

5 MR. KOZLOSKI: No. No. Actually, the reason that he
6 is not allowed to see federally funded
7 patients is because he has restrictions
8 imposed on his license.

9 DR. WHITTINGTON: Okay.

10 MR. KOZLOSKI: Once those restrictions are removed -
11 - any kind of incumbrance by a state licensing
12 authority will debar you from Medicare and
13 Medicaid. You know, you have to apply for
14 reinstatement. I can tell you specifically
15 with Medicaid until the restrictions are
16 lifted here, health and human services is
17 going to continue to send him rejection
18 letters.

19 DR. DIXON: Refresh my memory. As far as the
20 criminal case itself, take us back through the
21 history, briefly, through the history of the
22 criminal case.

23 MR. KOZLOSKI: I'm going to let you do that.

24 A The criminal case was -- I was arrested in 1999 and
25 I pled guilty to committing a lewd act,

1 contributing to delinquency in 2000. Was on
2 probation for five years and completed the
3 probation in 2005. And I was on the sex offender
4 registry and again subject to their conditions
5 started out reporting once a year, I went to twice
6 a year with the in home checks as well as an
7 ongoing basis. That's pretty much in a nutshell.

8 DR. DIXON: Dean Grigg would like to ask a question.

9 MR. GRIGG: Dr. Hurst, just on what you just said
10 can I ask one question. To your knowledge
11 have you complied and kept up to date with all
12 the requirements of the sex offender registry,
13 if there's been any change of addresses or any
14 thing like that, you've informed them as
15 you're required to do?

16 A Yes, I have.

17 DR. DIXON: Pat, Mr. Hanks, do you have anything
18 further?

19 MR. HANKS: No.

20 DR. WADE: I move we go into executive session.

21 DR. ALTERMAN: Second.

22 DR. DIXON: Okay.

23 EXECUTIVE SESSION

24 DR. DIXON: Okay. So a motion was made by Dr. Goins
25 to come back into executive session [sic] and

1 second by Dr. Atlerman. Okay. So we're back
2 in public session now. Do we have any
3 motions?

4 DR. WADE: I make the motion that we deny the
5 petition to remove restrictions and that the
6 restrictions continue as they are.

7 DR. DIXON: We have a motion on the floor. Do we
8 have a second?

9 MS. DUNCAN: Second.

10 DR. DIXON: I have a second from Ms. Duncan. All in
11 favor aye?

12 THE BOARD: Aye.

13 DR. DIXON: Any opposition? Being none said the
14 sanctions will remain as they are. Dr. Hurst,
15 the other thing I would remind you of is that
16 the order to be under counseling was something
17 that was set forth by the board itself and the
18 board has the right to say when it's time to
19 stop that, not your counselor, not you. And
20 my suggestion would be that you return to
21 active counseling on a quarterly basis and not
22 something over the phone. By doing that
23 you're violating what the board set out to
24 start with for you to do and you're putting
25 your license in danger by doing that. But you

1 need to be back in active counseling and you
2 need to make sure your polygraphs are six
3 months apart not May to January.

4 **A Okay.**

5 DR. DIXON: Okay. Thank you for your time, Dr.
6 Hurst.

7 - - - - -

8 (Whereupon, at 10:13 a.m., the
9 Examination in the above-entitled matter
10 was concluded.)

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State of South Carolina)
County of Lexington)

CERTIFICATE

Be it known that I took the foregoing hearing;

That I was then and there a Notary Public in
and for the State of South Carolina-at-large;

That by virtue thereof I was duly authorized
to administer an oath;

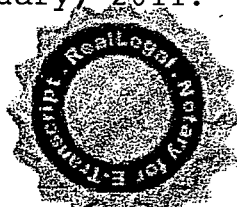
That the witness was by me first duly sworn to
testify the truth, the whole truth, and nothing but the
truth, concerning the matter in controversy aforesaid;

The foregoing transcript represents a true,
accurate and complete transcription of the testimony so
given at the time and place aforesaid to the best of my
skill and ability;

That I am familiar with and agree to adhere to
the provisions contained in title 35 of the South
Carolina Code of Laws, Uniform Securities Act;

That I am not related to nor an employee of
any of the parties hereto, nor a relative or employee of
any attorney or counsel employed by the parties hereto,
nor interested in the outcome of this action.

Witness my hand and seal this 3 day of
February, 2011.



Robin L. Spauld

Notary public for south carolina

My commission expires: June 2, 2015

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STATE OF SOUTH CAROLINA
BEFORE THE BOARD OF DENTISTRY

In the matter of:

Russell Charles Hurst, Jr., DMD

License No. 2501.

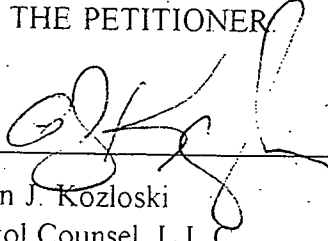
)
)
) **PETITION TO TERMINATE**
) **CONDITIONS OF PROBATION**
)
)

PETITIONER Dr. Hurst respectfully moves the Board to terminate the conditions of probation imposed in its Order of August 21, 2006, wherein his license to practice dentistry was reinstated with conditions. Petitioner further requests a hearing and personal appearance on this Petition to present evidence, argue his request in detail and answer any questions for the Board.

Petitioner so moves the Board on grounds that he has received full benefit of treatment and therapy, has been relapse free for over 10 years, has been at all times in full compliance with the conditions of the Order of reinstatement, and poses no threat to the public.

WHEREFORE, Petitioner requests a hearing and appearance on this Petition and that he be granted the relief sought herein.

FOR THE PETITIONER

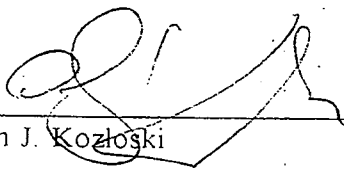


Aaron J. Kozloski
Capitol Counsel, L.L.C.
P.O. Box 1996, Lexington, SC 29071
803-748-1320 Fax 888-513-6021
aaron@capitolcounsel.us
Counsel for Petitioner

November 30, 2010
Lexington, South Carolina.

CERTIFICATE OF SERVICE

The is Petition and its exhibit were served upon counsel for the the S.C. Dept. of Labor, Licensing & Regulation by first class mail on December 1, 2010, addressed to Pat Hanks, P.O. Box 11329, Columbia, SC 29211.



Aaron J. Kozloski



November 4, 2010

South Carolina State Board of Dentistry
P.O. Box 11329
Columbia, SC 29211-1329

RE: Charles Hurst, DMD
Third Quarter Report, 2010

Dear Sir or Madam:

This letter summarizes my ongoing treatment of Charles Hurst, DMD, who is being followed for inappropriate sexual behavior unrelated to patient contact. Dr. Hurst continues to do well and is compliant with treatment. He has been in treatment with us for ten years and so we now have only infrequent contact with him. Our last contact was on October 13, 2009 when we spoke to him by telephone. He took and passed his most recent polygraph examination on June 4, 2010. We reviewed 6 *Staff Surveillance Forms* and 13 Patient Satisfaction Surveys, all of which indicated he is practicing in an ethical and professional manner.

Dr. Hurst initially entered our specialized therapy program for inappropriate sexual behavior in late 2000 and successfully completed our eight-week, intensive "Fast Track" therapy program in early 2001. Since that time, he has participated in maintenance therapy on a gradually decreasing frequency and, as noted above, is now seen only infrequently. He returned to the practice of dentistry in April 2007 and, as part of his therapy, he was then required to undergo semiannual polygraph examinations and to utilize *Staff Surveillance Forms* on a monthly basis and *Patient Satisfaction Surveys* on a quarterly basis. Dr. Hurst has taken and successfully passed five polygraph examinations (April 28, 2008; November 18, 2008; May 22, 2009; November 25, 2009; and June 4, 2010). Additionally, all of the accountability forms from his staff and patients have indicated Dr. Hurst is, and has been practicing in an ethical and appropriate manner.

Based upon my education and training and with reasonable medical and psychiatric certainty, I continue to believe he poses no threat to his patients and that he is no longer in need of continued therapy for his inappropriate sexual behavior with young boy. This letter is to notify you that we believe Dr. Hurst has received full benefit from therapy and his therapy is therefore being terminated.

If you have any questions regarding his case, please contact me.

Sincerely yours,

Gene G. Abel, M.D.

cc: Russell Charles Hurst, DMD
2860 Porcher Drive
Sumter, SC 29150

December 2, 2010

South Carolina Board of Dentistry
P.O. Box 11329
Columbia, South Carolina 29211-1329
Attn: Pat Hanks

RE: Russell Charles Hurst, D.M.D

Dear Mr. Hanks:

This letter is an addendum to our letter of November 4, 2010 regarding Charles Hurst, D.M.D. In that letter, we stated that we believed Dr. Hurst no longer needed continued therapy at the Behavioral Medicine Institute of Atlanta related to his past problematic sexual behavior. We also stated that, with reasonable medical and psychiatric certainty, we believe he poses no threat to his patients. However, we did not specifically address his possible need for continued supervision. It is our professional opinion that Dr. Hurst is no longer in need of supervision by the Dental Board, no longer needs to undergo semi-annual polygraph examinations, and no longer needs to have patients and staff complete Patient Satisfaction Surveys or Staff Surveillance Forms.

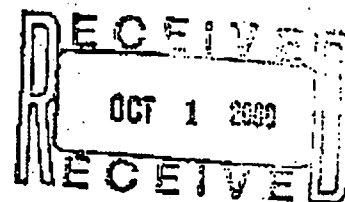
We hope this answers any remaining questions you may have regarding Dr. Hurst. If you need any additional information, please free to contact us.

Sincerely,



Gene G. Abel, M.D.

BEHAVIORAL
MEDICINE
INSTITUTE OF ATLANTA



Gene G. Abel, M.D.

1401 Peachtree Street
Suite 140
Atlanta, GA 30309
(404) 872-7929
Fax: (404) 872-2588

SUMMARY OF EVALUATION
(Personal and Confidential)

of

Russell Charles Hurst, Jr., D.M.D.

Submitted to

Jay Evans
State Board of Dentistry
South Carolina Department of Labor
Licensing and Regulation
110 Centerview Drive
P. O. Box 11329
Columbia, South Carolina 29211-1329

BY

Gene G. Abel, M.D.

September 26, 2000

SUMMARY OF EVALUATION

Russell Charles Hurst, Jr., D.M.D.

September 26, 2000

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INTRODUCTION

Russell Charles Hurst is a 45-year-old, married dentist from Sumter, South Carolina, referred to the Behavioral Medicine Institute of Atlanta by Windy Cartledge, Esq., of the State Board of Dentistry of South Carolina, following the temporary suspension of his dental license on September 13, 2000. Dr. Hurst was convicted on 9/12/00 of three counts of committing lewd acts on a child under 16 and two counts of contributing to the delinquency of a minor, and the Board action of temporary suspension occurred the day following his convictions.

WAIVER OF CONFIDENTIALITY

Dr. Hurst was fully informed prior to beginning this evaluation that any information he provided during the course of this evaluation could be provided to the licensing board of dentistry of South Carolina. He agreed to this release of information, as evidenced by his signing a release of psychiatric records to the South Carolina Dental Board. This summary is for the exclusive use of the licensing board of the State of South Carolina and its use in any other circumstances would be inappropriate. Furthermore, in spite of Dr. Hurst signing a release of psychiatric records to the Dental Licensing Board of South Carolina, this report contains personal information regarding a South Carolina dentist, and it should not be advanced forward or duplicated without the written consent for the release of psychiatric records signed by Dr. Hurst.

WARNING REGARDING RELEASE OF INFORMATION

This psychiatric evaluation summary should not be released to the evaluatee other than under the supervision of a psychologist or psychiatrist because the information in this summary may be detrimental to the evaluatee's emotional health.

SOURCES OF INFORMATION

Information was gathered during approximately 6 hours of clinical psychiatric interview conducted by Gene G. Abel, M.D. (psychiatrist); an interview of Dr. Hurst's wife, Teri Hurst, conducted by Kenneth A. Hosier, M.S., N.C.C.; and Dr. Hurst's report of the factors that led to his conviction (approximately seven pages). Additional information was obtained from telephone conversations with Windy Cartledge, Esq., General Counsel for the South Carolina Department of Labor, Licensing and Regulation; a copy of the Order of Suspension of Dr. Hurst's license, dated 9/13/00; copies of indictments against Dr. Hurst; the condition of Dr. Hurst's probation, dated 9/12/00; indictments by the State of South Carolina against Dr. Hurst; a history, physical and laboratory measures completed by J. Dale Cannon, Jr., M.D., on 6/9/00; and a discussion with Jay Evan of the South Carolina Dental Board. In addition, Dr. Hurst underwent a variety of testing, as indicated below.

SUMMARY OF EVALUATION

Russell Charles Hurst, Jr., D.M.D.

September 26, 2000

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TESTS ADMINISTERED

- Abel and Becker Sexual Interest Cardsort
- Beck Depression Inventory
- Sexual Addiction Screening Test
- Minnesota Multiphasic Personality Inventory-2 (MMPI-2)
- Millon Clinical Multiaxial Inventory (MCMI-III)
- PDQ-4
- Wender Utah Rating Scale
- History and Physical completed by J. Dale Cannon, Jr., M.D., on 6/9/00
- Abel Assessment Questionnaire
- Reaction Time Assessment
- Polygraph Testing

PSYCHIATRIC HISTORY

Dr. Hurst attended the University of South Carolina at Sumter for 2 years, then Clemson University for 2 years, graduating in 1977 with a Bachelor's in zoology. He applied, but was not accepted, for dental school at age 21, but then he was accepted in the dental school at the Medical University of South Carolina from age 22 to age 26 (1978-82). During dental school, 1½ years prior to his marriage, he met his future wife, Teri. They were married when he was 26 (she, 23) in 1982.

At age 26, he began practice in Sumter and has continued in practice there up to the present time. He reports that his interest in boys began when he was approximately 40, at which time his sons, ages 9 and 6, had friends over and he would look at the male friends as they undressed at his home. He describes this as curiosity. He reports that this became more problematic when he finished building a swimming pool in his backyard and children would come to the swimming pool to swim. He reports being a Little League coach from age 36 to 43, and becoming a Boy Scout leader at age 42, which brought him into further proximity to boys. At approximately age 44, he reports that he would horseplay with boys in his swimming pool and would play a game with Nerf balls, putting Nerf balls in boys' swimming suits and then retrieving these Nerf balls. He reports that he never grasped a boy's penis, never masturbated a boy, never fellated a boy, but admits that he has seen some boys' naked penises (as he retrieved the Nerf balls) and may have touched their penises during the course of this horseplay.

In March of 2000, while a Boy Scout leader, a boy came to the Boy Scout meeting without wearing his troop shirt; when this happened, boys were required (by Dr. Hurst) to sing before the scout troop the song "I'm a Little Teapot" or a Barney love song. By Dr. Hurst's report, the boy said that he was going to strip while he sang the song; Dr. Hurst reports that he thought this was just talk, until he saw the boy had taken off all of his clothes and was singing.

SUMMARY OF EVALUATION

Russell Charles Hurst, Jr., D.M.D.

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Apparently other Boy Scouts teased the boy, not letting him have his clothes back; at the end of this event, Dr. Hurst did not tell the boy's parent, since he thought it was a child's prank.

Dr. Hurst reports that a final incident involved two brothers, Phillip B. and Chris B. The accusations made against Dr. Hurst involved inappropriate touching of the boys, possibly the Nerf ball incident, possibly other situations (he reports no details were given). He also reports that a neighbor, an adult male, came to talk with him about the neighbor's perception that he was a pedophile and that he needed help about this; Dr. Hurst denied to the neighbor that he was a pedophile.

On 6/3/99, charges were brought against Dr. Hurst; in June of 1999, he was excluded from the Boy Scouts after these charges were brought; he was placed on bond and, as part of the bond, he was to treat no children under 16 years of age in his dental practice. In practicality, all the children in his practice under 16 were transferred to the care of his partner, William T. Noonan, and Dr. Hurst only treated individuals 16 or older.

Another issue involves Dr. Hurst's use of the Internet. During the course of the investigation regarding inappropriate touching of boys, Dr. Hurst was also under investigation regarding his possible acquisition of child pornography. There is considerable disagreement as to the extent of pornography found on computers at either his home or his office. The licensing board indicates there may have been as many as 10,000 images on his computers; Dr. Hurst reports that although he had not seen the pictures that were found on his computers, his lawyer indicates that there were 100 to 125 pictures, most of them legal, but 10 or 12 which would be considered child pornography. Dr. Hurst reports that he believes that some of these pictures were acquired through others using his computers, either at work or at his home. He does admit that he has gone onto the Web, onto a site entitled "Free Spirit," and has viewed pictures of nude children, some of them children 8 to 12 years of age. He also reports that he has continued to go to that website after he was originally charged 6/3/99, up until August of 2000. He indicates at this time that he is going to promptly discontinue his connection with the Worldwide Web.

Dr. Hurst reports that there were two situations in his past that may have contributed to his curiosity regarding boys. When he was 4 years of age, he was spending the night with a friend somewhat older than he. They became involved in mutual touching and genital fondling on approximately six occasions over a 3-year period.

In addition, at age 12, he also participated, with a boy of the same age as he, in mutual masturbation on approximately three occasions over a 1-year period.

Dr. Hurst was questioned extensively regarding any inappropriate touching of any of his patients under dental care. He was adamant that he had never become involved in any inappropriate touching of patients. He did report that two of the boys with whom he plead

SUMMARY OF EVALUATION

Russell Charles Hurst, Jr., D.M.D.

September 26, 2000

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guilty to inappropriate behavior were patients, but he is adamant that he has never been inappropriate with them during his dental care of them. Furthermore, he was adamant that his interest in boys had never extended into his own family (his own sons, daughter, nieces or nephews).

Other than his interest in boys 8 to 12 years of age, he denies other paraphilias, drug and alcohol use or DUIs. At the time he was initially seen, Dr. Hurst indicated that he had spoken with his wife about his experiences as a child, but had not revealed to her his more recent interest in boys, beginning at approximately age 40.

There has been considerable reaction in his community to his convictions. His country club has indicated that he can no longer attend the country club, although his wife and children can. He is no longer allowed on the school grounds of the private school where his children go to school. His wife heard rumors that she was going to be asked to resign her Junior Welfare League position, and she subsequently resigned.

MENTAL STATUS

Dr. Hurst was on time for all of his appointments; he actively participated in the interview process. Initially he was somewhat vague about his interest in boys, but this changed dramatically on the first day of his assessment. He was much more forthcoming and reflected that he had indeed continued to look at the Web to view pictures of children, until last month. He was oriented to time, place and person, showed no evidence of a thought disorder, auditory or visual hallucinations, and denied homicidal or suicidal thoughts. Although he was vague about the extent to which he may have accidentally touched boys' genitals during the course of the Nerf ball game described above, he admitted and showed considerable insight into the realities of his sexual interest in boys.

SOCIAL HISTORY

Dr. Hurst was born on September 13, 1955, in Sumter, South Carolina. He is the oldest of three children born to Russell and Betty Hurst. He has two younger twin sisters, Melanie and Michelle, currently age 42. His father, currently age 68, is the owner of a furniture store, a business which he inherited from his father. His mother died at the age of 62, approximately 5 years ago, of kidney failure, secondary to congestive heart disease. He reported that she had suffered from high blood pressure, hardening of the arteries, etc., prior to her death. His father had open heart surgery last year and is in deteriorating health. Dr. Hurst suspects that he may be in the early stages of Alzheimer's disease or may have Parkinson's disease. His father is a hard worker who has been dedicated to providing for his family. Dr. Hurst described his father as a quiet, loving, responsible individual. Because of the hours required at his job, Dr. Hurst's father did not have a lot of time to spend with his children. He now feels as though his father may have harbored some resentment regarding having to work in, and

SUMMARY OF EVALUATION

Russell Charles Hurst, Jr., D.M.D.

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eventually take over, the family business. His mother was the primary caregiver for the children and he described her as an overprotective, very outgoing, friendly and energetic individual who worried a lot. He now feels as though she may have suffered bouts of depression which were never diagnosed. He reported that his mother was the primary disciplinarian. She utilized spanking with her hand when the children were young but utilized restriction and "guilt trips" when they got older, as her primary forms of discipline. Occasionally, she would threaten them with additional punishment when their father got home but this rarely actually happened. Overall, Dr. Hurst stated that he felt his parents were fair in their discipline but felt that, at times, they were stricter with him than they were with his younger sisters. His family attended a local Methodist church and he described them as fairly religious. They attended church on a frequent basis but missed church when they had other things to do. Once the children became teenagers, his parents allowed them to make their own decision regarding church attendance.

Dr. Hurst stated that his father was a social drinker and never drank to excess. His mother did not drink alcohol. He denied any family history of alcohol or drug abuse. He also reported no history of psychiatric problems in his family (other than the possible depression in his mother noted above).

Dr. Hurst suffered from chronic bronchitis as a young child and missed a lot of school during the first through the third grade. Although he had the standard childhood illnesses such as measles, chicken pox, and mumps, he denied any serious injuries as a child and reported that he was never hospitalized. He currently describes his health as very good although the doctor has identified sporadic heart palpitations. According to Dr. Hurst, these are not felt to be significant. Approximately 1 year ago, Dr. Hurst broke his ankle when he was flipped out of a raft during a whitewater rafting trip. He currently has two pins in his ankle and, as a result, is unable to jog, run, play tennis, etc. He reported no other significant health problems.

At age 5, Dr. Hurst started the first grade. He attended public schools through the seventh grade but then transferred to a secular private school for the eighth through the twelfth grades. While in public school, Dr. Hurst was an average student but, after he transferred to private school, he became an above average student who was consistently on the "B" honor roll. However, to accomplish this, he stated that he had to work very hard. He got along well with his teachers and had a close circle of approximately 12 to 14 friends. The private school he attended was relatively small and his graduating class consisted of approximately 30 to 35 individuals. During elementary and junior high school, he participated in Little League for approximately 2 to 3 years, Cub Scouts for about 2 years, and attended the youth group at his church. He also was on a swim team. In high school, he played sports, was in the Honor Society, the Key Club, and was on the annual staff. He stated that, for those sports that he could not play, he participated as a scorekeeper or some other sort of assistant. He was never diagnosed with any form of learning disability, never had to repeat any grades, and was never suspended or expelled for any reason. While in high school, he worked part-time at his

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father's furniture store, primarily for extra spending money. Starting at age 15, he also worked as a life guard during his summer breaks.

The fall after he graduated from high school, he entered college. For the first 2 years, he attended the University of South Carolina at Sumter, a community college. During this time, he lived at home. He then transferred to Clemson University in Clemson, South Carolina, for his last 2 years of undergraduate study. At that time, he lived in the dormitory. He initially majored in pre-dentistry but the school phased out that program so he switched to zoology and completed a Bachelor of Science degree in that field. He applied to dental school but was not accepted. Dr. Hurst reported that he had decided he wanted to be a dentist when he was in the eighth grade. When he failed to get accepted to dental school the first year, he applied again and was accepted the following year. During this 1-year hiatus, he lived at home, worked in his family's furniture store, and took a few additional courses at USC-Sumter. In 1978 he started dental school at the Medical University of South Carolina in Charleston. He graduated in 1982 and was awarded the degree of Doctor of Medical Dentistry. Although he had initially planned to become an orthodontist (since the eighth grade), he reported that, once he graduated, he was eager to marry, start a family, and start practicing dentistry. Therefore, he opted not to pursue a specialty.

Dr. Hurst reported that he did not drink alcohol at all until he went to dental school. He attributed this primarily to his strong sense of focus on his goals in school and the fact that he had to work very hard to maintain his grades. He currently drinks approximately two mixed drinks per week, usually before dinner. He reported that his wife seldom drinks alcohol. He denies any current or former use of drugs of any kind, including any experimentation with drugs.

When he was approximately 11 years old, his father talked to him about sex. He also received some sex education as part of his science class in the seventh grade. He received his remaining sex education through peers, reading, etc. He started masturbating when he was approximately 12 years old and reported that he had learned about this activity in his sex education class. Although he was never discovered masturbating by his parents, he generally felt guilty about engaging in this activity. He had intercourse for the first time on his wedding night, at age 26. Prior to marriage, he had engaged in "heavy petting" with female partners.

He started dating when he was approximately age 15 and stated that he tended to date one girl at a time. He was somewhat shy with girls and, although he generally had a date for important events, he felt that he dated somewhat less often than his peers in high school. During college, he reported that he dated fairly infrequently, due to his focus on his studies. During the first 2 years of dental school, Dr. Hurst reported that he did not have time to date, due to the demands of his program. He did date some during his last 2 years in dental school. He had his first serious relationship when he was approximately age 23 to 24. This

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relationship lasted approximately 6 to 8 months and ended amicably. Following the termination of this relationship, he started dating the woman who is currently his wife.

He and Teri married when he was age 26 and she was age 24. They met in dental school and dated for approximately 14 months prior to their marriage. She was studying to be a dental assistant while he was studying to be a dentist. He reported that Teri has had seven pregnancies, three of which ended in miscarriages during the first trimester. They have three living children, a son Chase, currently age 14, a son Wade, currently age 11, and a daughter, Lori Lynne, currently age 5. Between Chase and Wade, they had a son who was born prematurely and died approximately 6 to 8 hours after birth. Dr. Hurst stated that he and his wife were devastated by her first miscarriage and were greatly upset by the subsequent two miscarriages. However, the most difficult thing they have ever faced was the loss of their son, Christopher. Dr. Hurst became tearful as he described the death of his second son. He described his relationship with Teri as very loving, supportive and close and stated that their marriage is characterized by mutual respect and satisfaction. He reported that their sex life is very fulfilling and satisfying and denied that either he or his wife have ever engaged in extramarital affairs. He described his family as very close and reported that they are actively involved in the local Methodist church.

Dr. Hurst was asked whether he was ever sexually molested or whether he had ever had any upsetting sexual experiences. When Dr. Hurst was approximately age 3 or 4, an adult male friend of his parents would often pull down Dr. Hurst's pants. Dr. Hurst reported that this happened when they were alone together, as well as when others were in the room. Although he believes that this individual was just teasing him, he reported that he found these incidents to be terribly upsetting to him and stated that he was a very sensitive child who did not handle teasing very well. He does not remember this individual ever touching him inappropriately. When he complained to his mother about this individual's actions, she told him that he needed to tell the friend to stop this behavior. To the best of his recollection, when he did ask this individual to stop, the behavior stopped. Additionally, Dr. Hurst reported that he and his sisters bathed together until he was approximately 5 years of age. His sisters were 3 years younger than he and so were only toddlers at the time. During their baths, his sisters would sometimes grab his penis and he found this very upsetting. He again complained to his mother about his behavior and she then stopped having the children bathe together. He denies any memory or knowledge of having been sexually molested as a child, other than the possible child molestation reported in this paragraph.

In July of 1982, Dr. Hurst opened his own practice in Sumter, South Carolina, where he grew up. His wife worked with him as his dental assistant. His wife quit working as his dental assistant for approximately 10 years, while their children were young. Since their youngest daughter has started preschool, she is now working part-time in his office. This was a solo practice until 1995 when Dr. Hurst took on a partner. He reported that his practice was quite

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successful and that, other than the current complaint, he has had no prior complaints to the Dental Board nor any prior arrests for any type of offense.

MEDICAL HISTORY AND PHYSICAL EXAMINATION

On 6/9/00, Dr. Hurst underwent a history and physical by J. Dale Cannon, Jr., M.D. As a result of that assessment, Dr. Cannon's impressions were a negative maximum exercise stress, a left anterior fascicular block, a normal lipid profile, and epigastric burning, probably dyspepsia. His recommendation at that time was that Dr. Hurst start on an exercise program, that he should try Pepcid PRN for his epigastric burning, and should have an X-ray for his intermittent cough. An X-ray was interpreted as being normal. His laboratory measures showed a total protein that was 5.8 (normal range, 6.0-8.0). His CBC was within normal limits. His PSA was 1.4 (normal). Blood pressure was 134/96, pulse 84, weight 221.6, and height 6' even. He also reported being allergic to penicillin.

NEUROPSYCHOLOGICAL ASSESSMENT

REFERRAL: Charles Hurst was referred for a neuropsychological screening evaluation by Gene Abel, M.D. in order to determine Dr. Hurst's current levels of general intellectual, cognitive and emotional functioning. A specific request was made to determine whether or not Dr. Hurst may be experiencing an organic brain syndrome or process.

HISTORY: Charles Hurst is a 45-year-old, Caucasian male who presents for this screening as part of an evaluation taking place in Dr. Abel's office. Previous medical history is not known to the examiner at this time, but is assumed to be considered noncontributory. Further information can be found in Dr. Hurst's formal psychosocial evaluation and his permanent record.

TESTS ADMINISTERED: MicroCog Assessment of Cognitive Functioning (Note: These instruments were administered in Dr. Abel's office.)

TEST RESULTS: The results of this screening do not suggest evidence of organic dysfunction.

On the MicroCog Assessment of Cognitive Functions, Dr. Hurst did not demonstrate any specific areas of discrepancy. In terms of levels of interpretation, the results are produced on three levels. First is the component level, which is made up of five basic neurocognitive components. They are: Attention/Mental Control; Reasoning/Calculations; Memory; Spatial Processing; and Reaction Time. Level 2 is representative of processing speed and accuracy. Finally, Level 3 indexes reflect global cognitive functioning that includes information processing speed and information processing accuracy. The table below represents the

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various levels, their components and the percentiles achieved. These have been compared against age and education corrected norms.

	<u>%ile</u>	<u>Description</u>
Level 1		
Attention/Mental Control	88	immediate attention, vigilance, concentration, perseverance and resistance to interference
Reasoning/Calculation	77	abstract reasoning with decreased component of recall
Memory	63	short-term memory and long-term memory
Spatial Processing	58	visuospatial information processing
Reaction Time	73	central processing speed, central integration, response readiness, attention, and vigilance
Level 2		
Information Processing Speed	79	time required to complete simple and complex mental tasks without regard to accuracy
Information Processing Accuracy	73	accuracy without regard to speed
Level 3		
General Cognitive Functioning	82	global measure of neurocognitive ability based on information processing speed and accuracy
General Cognitive Proficiency	75	global measure of neurocognitive ability based on average of subtest proficiency*

Average Visual Reaction Time 0.345 ms Average

* Proficiency scores are defined as the speed with which perceptual processing, semantic retrieval, and correct response execution occurs. They represent a sensitive index of mastery and competence.

Level 1 results reflect no clinically significant variation in performance and no specific areas of deficit. The Reaction Time subtests were in the above average range of functioning. In general, these tests measure simple auditory and visual reaction time with selective cueing. Dr. Hurst is capable of reacting to salient environmental events. The Attention/Mental Control subtests measure a full range of simple and complex attentional functions. This score reflects no significant difficulties in Dr. Hurst's ability to focus, hold, divide, and sustain attention. This index score assesses selective attention, processing speed, attentional capacity, working memory, and vigilance. The Reasoning and Calculation subtests were also in the above average range. Speed was appropriate, and mechanics were within normal limits of functioning. These subtests require problem solving in verbal, nonverbal, and numeric areas. The Spatial Processing subtests encompass several aspects of spatial processing such as visual

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discrimination, perception of spatial orientation, spatial relations, and spatial memory. The demands on motor system responses are minimal. His score indicates no clinically significant impairment in Dr. Hurst's non-motor visual-perceptual cognitive processing. The Memory subtests target immediate and delayed recall for meaningful verbal material. This was a average area for Dr. Hurst. Dr. Hurst's score reflects no deficits in his verbal learning and memory. Overall, these results do not reflect any significant organic dysfunction.

Level 2 results suggest that Dr. Hurst works at a faster compared to most individuals, in his cognitive performances. The Information Processing Speed Index is a means of measuring the time the individual required to complete simple and complex mental tasks; accuracy is disregarded. His score indicates a performance in the above average range in cognitive processing speed. These speed scores need to be interpreted relative to performance accuracy. The Information Processing Accuracy Index taps domain-based competencies, and its score reflects the accuracy of performance (i.e., correct or incorrect responses) without regard to speed. His scores suggest that basic cognitive abilities are not compromised. Speed is not affecting his accuracy. Thus putting the two scores together, Dr. Hurst responds faster than most individuals, and demonstrates above average levels of accuracy.

Finally, Level 3 results reflect no significant split between General Cognitive Functioning and General Cognitive Proficiency. The General Cognitive Functioning Index score is a global measure of neurocognitive ability based upon performance on the Information Processing Speed and Information Processing Accuracy Indexes. Accuracy and speed are considered equally important. His score indicates no compromises in Dr. Hurst's neurocognitive functioning. The General Cognitive Proficiency Index is a global measure of neurocognitive ability based on the average of subtest proficiency scores. Proficiency scores are defined as the speed with which perceptual processing, semantic retrieval, and correct-response execution occurs. His General Cognitive Functioning Index score does not indicate compromised neurocognitive functioning. The General Cognitive Proficiency Index score represents cognitive competence.

SUMMARY: The results of this evaluation do not suggest the existence of organic pathology. Dr. Hurst's abilities generally appear within the functional range. However, these results should be combined with the materials from Dr. Abel's evaluations. There may be evidence that would be consistent with other specific diagnoses. Based on the results of MicroCog, no further neuropsychological assessment appears indicated.

PSYCHOLOGICAL TESTING

A number of psychological tests were administered during the evaluation. These included:

Abel and Becker Sexual Interest Cardsort: The Abel and Becker Sexual Interest Cardsort is a 75-item self-reported questionnaire in which the patient can identify his or her sexual

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interest in 15 different categories of sexual interest including non-paraphilic and paraphilic areas. The patient scores his interest in the 15 categories from sexually repulsive to sexually arousing.

Results showed a normal heterosexual arousal pattern except for some interest in being sexual with 12-year-old boys.

Beck Depression Inventory: This is a 21-item self-report measure to determine the extent of the patient's reporting various signs and symptoms of depression. A score of 20 or greater indicates a significant depression, a score of 30 or greater indicates a severe depression.

Results showed a score of 26, consistent with moderate depression; in answers to Question I, involving self-injury, Dr. Hurst indicated he did not have any thoughts of killing himself.

Sexual Addiction Screening Test: The Sexual Addiction Screening Test is a 25-item self-administered questionnaire that compares the patient's responses with those of individuals traditionally seen as having repetitive, compulsive or addictive sexual behaviors. A score of 13 or greater is suggestive of sexual addiction.

Results showed a score of 3, inconsistent with the label commonly referred to as sexual addiction.

The MMPI-2: The MMPI-2 is a 567-item, true/false questionnaire to evaluate the patient's personality characteristics. It compares the patient's answers with those individuals previously evaluated and diagnosed, to determine if the patient's pattern of responding matches the diagnostic characteristics of previously diagnosed groups. It has scores related to validity, affect, personality, interpersonal characteristics, cognitive functioning and diagnostic consideration.

Validity scales showed no validity scale greater than 65; he also showed no clinical scales greater than 65. His pattern indicates an individual with average interest in being with others and not being socially isolated or withdrawn. He appears to meet and talk with other people with relative ease and is not overly anxious at social gatherings. The content of his MMPI profile suggested he views his home life in a generally positive manner; he reports that it is pleasant and problem-free; he tends to feel strong emotional support from those close to him. No diagnostic profile was suggested by his MMPI results.

Millon Clinical Multiaxial Inventory-III (MCMI-III): The Millon Clinical Multiaxial Inventory-III is a 175-item, true/false questionnaire. Results reflect the client's response tendencies, personality pattern, possible DSM-4 Axis I (psychiatric illnesses), Axis II (personality disorders) as well as Axis IV (psychosocial and environmental problems)

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problems that are concluded from the client's responding. There is also included a rather detailed treatment guide recommendation. The results from the MCMI-III should always be interpreted in conjunction with additional clinical data gathered from the client.

Results indicated that his profile did not take the form of a distinctive Axis I diagnosis. His Axis II classification was best categorized by the MCMI-III as having obsessive-compulsive personality traits and schizoid personality features. The interpretation of his profile showed that he had an anxious conformity to the expectations of others but notable defensiveness about admitting psychological problems. He appears to have marked feelings of personal inadequacy and insecurity and a tendency to downgrade himself, so as to magnify his weaknesses and to anticipate rejection. His major defense is excessive conformity. Because he fears making mistakes and taking risks, his activities are narrowly restricted to a repetition of the familiar. Because of his dependency, he seeks support in institutional settings, such as the church or the workplace. He shows a consistent rigid behavioral pattern in which his impulses toward autonomy and independence are restrained and his conformity to the rules of others is emphasized. It is suggested that his guilt and self-condemnation have become prominent at times, and he may impose severe, punitive judgments and actions on himself as a form of symbolic expiation. He has a lot of ambivalence toward others and longstanding resentments may conflict with his expressing of them. At times he has stressful tension.

PDQ-4: This questionnaire gathers the self-reported information of the patient that is consistent with a DSM-IV (Diagnostic and Statistical Manual of the American Psychiatric Association-Version 4) categories of personality disorders. It is not a confirmatory test of the personality diagnoses, but must be compared with the patient's clinical presentation.

Results showed Dr. Hurst to have obsessive-compulsive personality characteristics most of his life, which was seen as a personality trait, an occurrence that happened at home, at work and in his relationships with others.

The Wender Utah Rating Scale: This is a 61-item questionnaire. The patient self-reports various behaviors consistent with attention deficit disorder based upon behaviors recalled during one's youth. A score of 36 or greater is consistent with attention deficit disorder or unipolar depression; a score of 46 or greater is consistent with attention deficit disorder and not consistent with unipolar depression.

Results showed a score of 17, inconsistent with a prior history as a child of attention deficit disorder.

The Abel Assessment Questionnaire: This Questionnaire includes over 600 items to gather information regarding 21 common deviant sexual behaviors including exhibitionism, public masturbation, fetishism, frottage, voyeurism, bestiality, obscene phone calls, necrophilia, masochism, coprophilia, rape, sadism, transvestism, professional sexual misconduct (PSM),

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contact with prostitutes, sexual affairs outside of a committed relationship, sexual involvements with partners who were strangers to the patient, telephone sex, the use of pornography and transsexualism. Extensive data is gathered regarding each of these sexual deviations, especially the age of onset, age at which the deviant behaviors stopped, the number of victims, the number of times the behavior was committed and the patient's current reported control of that deviant behavior. Extensive data is also gathered regarding the amount of violence used during the perpetration of a sexual behavior, and the characteristics of the victim. Further information is also gathered regarding the patient's cognitive distortions that may support behaviors such as child molestation, measures of their giving socially desirable answers (so as to appear in a positive light), items that reflect their increasing danger because of the age or amount of aggression used during perpetrations of sex offenses and their history of admissions, accusations, arrests, and convictions for the 21 categories of sex offending listed above.

Results indicate that he describes pedophilic behavior, from age 42 to age 43, involving two victims on one occasion each. He indicates that his involvement was with males under 14 years of age, either his neighbors or acquaintances; he also indicated that a few of his sexual fantasies were of children. In addition, he also reported that he does have sexual fantasies of window-peeping and of looking at erotica. He reported that of the 21 behaviors listed as possible behaviors that would be sexually arousing to him, he indicated that window-peeping and looking at pornographic magazines or videos might be erotic. His cognitive distortions (those frequently seen by individuals involved in child molestation) were at 29%, falling in a moderate range (26-39). His Social Desirability was 60, once again falling in the moderate range (46-64), indicating that he was unwilling to admit to violations of common social mores, such as impatience, feelings of anger, etc. On the Danger Register, he reported that he had been sexually attracted to boys 13 years of age or younger and boys 9 years of age and younger. Regarding accusations, arrests, and convictions, he indicated that he had been accused but was not guilty, but was near an alleged victim. He reports three investigations or arrests for sexual crimes and three convictions or deferred adjudications for sexual crimes.

Reaction Time Assessment: An objective measure of sexual interest in 2-4, 8-10, 14-17 and 21 years or older males and females, Caucasian or African-American and six other categories of potential sexual interest are measured by recording the patient's visual reaction time. The patient is presented 160 slides representing 22 categories of potential sexual interest. The patient's self-reported sexual interest to each slide in each category is then compared with the objective ranking of sexual interest. The reliability and validity of visual reaction time exceeds that of plethysmography, and accomplishes this without presenting slides of nudes to the patient. The results are interpreted specific to the ethnicity of the patient completing the testing.

Results showed that Dr. Hurst admitted to having some sexual interest in 8- to 10-year-old girls and 2- to 4-year-old and 8- to 10-year-old boys, in addition to sexual interest in

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adolescent females and adult females. His visual reaction time was completely consistent with his self-reported sexual arousal, in that he showed sexual interest by VRT in 8- to 10-year-old, adolescent, and adult females, as well as 2- to 4-year-old and 8- to 10-year-old boys.

Polygraph Testing: Polygraphs are used as an adjunct to the clinical interview. Polygraphs do not detect lies and are not admissible in courts of law because they have not passed the Frye Test. The polygraph involves two parts. First, the patient is asked to select one card out of a series of cards and the polygrapher attempts to identify the patient's choice by his or her physiologic responding during the polygraph test. Part two involves presenting the patient with three or four relevant questions pertaining to his or her specific case. Using the Zone Comparison Technique the examiner then gives an opinion regarding whether the patient's physiologic responses would be indicative of deception as they relate to three or four relevant questions.

Dr. Hurst was asked questions including the following:

1. Since 6/3/99, excluding your own children, have you been alone with any child?
2. Since 6/3/99, have you touched any child for sexual gratification?
3. Since 6/3/99, have you touched any patient for sexual gratification?

We had considered asking Dr. Hurst the question of "Since 6/3/99, have you been on the Web and looked at nude pictures of children?" However, he admitted to having done this as recently as August of 2000.

The results of his polygraph, in response to his answer with a no to each of the above questions, were that his results in terms of his physiologic responding showed evidence of deception on question 1, but no indication of deception regarding questions 2 and 3. He was unable to explain why he had failed question 1.

The remaining psychological tests were consistent with the patient's clinical history, other psychological testing, or were non-contributory.

FORMULATION OF CASE

Dr. Hurst plead guilty to a number of charges of child molestation on the 12th of this month, and his license was temporarily suspended the next day. He was referred here to the Behavioral Medicine Institute of Atlanta for a determination of whether he had some type of psychological problem and, if so, what the treatment should be. It was also suggested that if he did need treatment, he should start in that treatment as soon as possible.

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Dr. Hurst had been involved in legal proceedings leading to his conviction and, up to that time, had not been forthcoming about his sexual interest in boys. Within a few hours of his assessment here, he admitted to having sexual interest in boys since he as 40 years of age, having been involved in "horseplay" at a swimming pool in his backyard, having looked at child pornography on the Web, and having been accused of fondling a boy who was on a jet ski with him. He indicates that he had a curiosity about being around young boys, beginning predominantly when he built a swimming pool in the backyard. He reports considerable naivete about looking at pictures of nude children on the Web, but he does admit to this, a behavior that has occurred as recently as August of this year.

Within a few hours of his beginning his evaluation here, he told his wife for the first time about his sexual interest in young boys, and in a subsequent interview within the next 12 hours, his wife took the position that she would support him, and this couple decided that he would focus on treatment for this condition, beginning as soon as possible. He denies having grabbed any child's penis, masturbated a child, had oral sex or anal sex with a child. He does admit that he may have inadvertently touched a boy's penis or buttocks, in playing the Nerf game described above, but it was not his specific intention to grab any child's penis. He denies any sexual involvement with family members, including not only his own two sons and daughter, but also his nieces and nephews.

In the laboratory, he openly admitted sexual arousal to 8- to 10-year-old girls and 2- to 4-year-old, as well as 8- to 10-year-old, boys. Visual reaction time confirmed his sexual interest in all three of these categories (in addition to a normal heterosexual arousal pattern).

Since he has been practicing under restrictions as a dentist since June of 1999, not being able to treat any child under 16 years of age, the opportunity existed to polygraph him regarding any inappropriate touching of children since his initial arrest in June of 1999. There is no evidence that he has been involved in any inappropriate touching of children, and he also passed the polygraph for whether he has ever touched any patient for sexual gratification. He did not pass the polygraph question related to whether he has ever been alone with a child since his arrest in June of 1999.

DIAGNOSTIC IMPRESSIONS

Psychiatric classification involves a number of Axes, listed as Axis 1-5. Axis 1 describes the major psychiatric diagnoses contributing to the individual's current problems. Axis 2 refers to the individual's personality, that is his or her chronic way of interacting with others. Axis 3 lists concurrent medical illnesses that the individual has. Axis 4 identifies psychosocial and environment problems that contribute to the individual's emotional conflicts. Axis 5 refers to the individual's functioning on a scale from 100 (superior functioning in a wide range of activities) through 1 (severe disability and dysfunctioning).

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Axis I: Pedophilia DSM-IV 302.2, sexually attracted to male and female children; not involved in incest; non-exclusive type.

Adjustment Disorder with Depressed Mood DSM-IV 309.0; it should be pointed out that Dr. Hurst is early in his admission to himself of the extent of his sexual difficulties, and it is highly likely that he will develop a more significant amount of depressive symptoms as he becomes more aware of the repercussions of his recent conviction, license investigation, etc.

Axis II: Obsessive-compulsive personality traits.

Axis III: Epigastric distress of undetermined etiology; allergic to penicillin; post status ankle fracture, responding to surgical intervention; left anterior fascicular block during maximum exercise stress test (no cardiac therapy indicated).

Axis IV: Occupational problems (currently license has been temporarily suspended; patient's partner is also withdrawing from the partnership as a result of his recent conviction); economic problems (currently unemployed).

Axis V: Current Global Assessment of Functioning, 80.

RECOMMENDATIONS

We make the following recommendations:

1. Dr. Hurst has been exceedingly honest and forthcoming about his past history and current behaviors, information that would otherwise not be available other than by his reporting his past history. Furthermore, he has taken the initiative to acquaint his wife with his past history of sexual interest in boys. Finally, he has passed a polygraph confirming he has not touched a child or a patient for sexual gratification since the requirement was placed on him by the dental board. On the other hand, he has continued to search the Web until, by his report, he recently disconnected his Web connection.
2. It has been recommended to him that he enter cognitive-behavioral treatment with a strong relapse prevention component, and, indeed, he entered that treatment the next working day here at the Behavioral Medicine Institute of Atlanta and continues to actively participate in treatment.
3. Regarding the recommendations about his license, I would have the following comment. By the stipulation of the board, shortly after his initial arrest, he was not allowed to treat anyone under 16 years of age. Removing him from treating such

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individuals appears to be an appropriate step. He reports that it will be approximately 1 month before he will appear before the dental board. During that time, he will have undergone intensive treatment here at the Behavioral Medicine Institute of Atlanta, 3 to 4 hours per day, 5 days a week, until the time that he appears before the board. It would be helpful to examine his response to treatment, his participation, etc., before making recommendations regarding how his licensure issues might be dealt with by the board. Of course, ultimately this decision rests with the board, but if the board is seeking information regarding his response to treatment, I would recommend that we await the results of the next 4 weeks of treatment before making that recommendation.

Sincerely yours,



Gene G. Abel, M.D.

GGA:cs

cc: Windy Cartledge, Esq.
South Carolina Dental Licensing Board

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 11-ALJ-11-0037-AP
Appellate Docket No. 2011199506

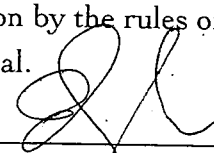
Russell Charles Hurst, D.M.D. *Appellant,*

~ vs. ~

Board of Dentistry of South Carolina *Respondent.*

APPELLANT'S RULE 210 RECORD CERTIFICATION

Counsel for Appellant certifies per Rule 210, SCACR, that the Record hereinabove contains all matter designated by the parties that is permitted for inclusion by the rules of court and that the record contains only matter that is relevant to this appeal.

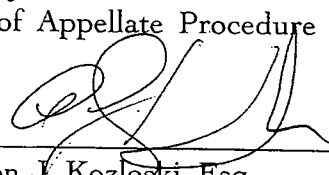


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January 19, 2012
Lexington, South Carolina

CERTIFICATE OF SERVICE

Served upon counsel of record for the Respondent by first class mail at P.O. Box 11289, Columbia, SC 29211 in accordance with the Rules of Appellate Procedure on the 19 day of January, 2012.



Aaron J. Kozloski, Esq.

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 11-ALJ-11-0037-AP
Appellate Docket No. 2011199506

Russell Charles Hurst, D.M.D. *Appellant,*

~ v. ~

Board of Dentistry of South Carolina *Respondent.*

FINAL BRIEF OF THE APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. ARE THE EXTENDED SANCTIONS ON DOCTOR HURST'S DENTAL LICENSE SUPPORTED BY SUBSTANTIAL EVIDENCE?
- II. DID THE DENTAL BOARD ACT ARBITRARILY AND ABUSE ITS DISCRETION BY EXTENDING ITS SANCTIONS ON DOCTOR HURST'S DENTAL LICENSE?

STATEMENT OF THE CASE

On July 5, 2001, the South Carolina Dentistry Board issued a Final Order suspending Dr. Hurst's license for five years after he pled guilty to three counts of committing lewd acts upon a child under 16 and one count of contributing to the delinquency of a minor.

After serving his five-year suspension, Dr. Hurst petitioned the Board to reinstate his license. A hearing on his reinstatement petition was held on July 21, 2006. The Board issued an Order of Reinstatement on August 21, 2006.

The August 21, 2006 Order required Dr. Hurst to take and pass a licensing examination prior to reinstatement. Upon reinstatement, Dr. Hurst's license was placed in a probationary status for an indefinite period, with terms and conditions.

On November 30, 2010, Dr. Hurst petitioned the Dental Board to terminate the conditions imposed on his license. The Board heard and denied the Petition on January 14, 2011. Notice of Appeal was filed in the Administrative Law Court on February 1, 2011.

The Administrative Law Court affirmed the decision of the Board of Dentistry by written order dated August 9, 2011, and served by first class mail on September 28, 2011. Notice of Appeal in this Court was filed on September 9, 2011. An Amended Notice of Appeal was filed on September 30, 2011.

FACTS

Dr. Hurst Pled guilty to three counts of committing lewd acts upon a child under age 16, one count of contributing to the delinquency of a minor on Sept. 12, 2000. He was sentenced to five years probation in the Court of General Sessions. (R-14) Under the terms of probation imposed by the Circuit Court, Dr. Hurst was required to successfully complete sexual offender treatment. (R-14) He was also required to avoid Wilson Hall School, and refrain from exercising any authority or supervision over children. (R-15) The Court imposed no terms upon Dr. Hurst regarding his dental practice, leaving him free to frequent the location of his practice without restriction.

Dr. Hurst subsequently appeared before the South Carolina Board of Dentistry and stipulated to violating the Dental Practice Act. He was suspended from practicing dentistry for five years on July 5, 2001. (R-17) When the Board suspended Dr. Hurst's license for five years, it imposed absolutely no conditions on Dr. Hurst, leaving him free to own and frequent his dental office as he saw fit. (R-14-17) Thus, Dr. Hurst maintained ownership of his dental practice by employing other dentists and performing practice management duties without incident for over five years.

After serving his five-year suspension, Dr. Hurst petitioned the Dental Board to reinstate his license. The Board issued an Order of Reinstatement on August 21, 2006. However, upon reinstating Dr. Hurst's license to practice dentistry, the Board imposed a number of new conditions for an indefinite period:

- No Patients under age 21;
- No sedation of any patients;
- No use of computers in the office;
- Random patient records reviews at his expense;

Polygraphs as directed by Dr. Gene Abel, M.D., and,
Submission of staff surveillance forms to Dr. Abel.

(R-12-13) When Dr. Hurst was suspended in 2001, he had already commenced treatment with Dr. Abel, as previously ordered by the Board. (R-19) Dr. Abel appeared and testified at the 2006 Final Order hearing. (R-15) When Dr. Hurst was reinstated in 2006, the Board delegated the duty of managing Dr. Hurst's compliance with his new terms of probation. (R-12)

On November 4, 2010, Dr. Abel informed the Board that Dr. Hurst had successfully completed treatment, was no longer in need of therapy or monitoring, and that he was being released from treatment. (R-57) Then on December 2, 2010, Dr. Abel further informed the Board that Dr. Hurst was no longer in need of Dental Board supervision. (R-58)

On November 30, 2010, Dr. Hurst petitioned the Dental Board to terminate the conditions imposed on his license. The Board heard and denied the Petition on January 14, 2011. Despite Dr. Hurst's successful completion of treatment and compliance with the terms and conditions of his reinstatement, the Board summarily denied his request to terminate his probation with no more explanation than "The Board finds there is no reason at this time to alter, amend, or otherwise release Respondent from conditions placed on him by the previous order." (R-8) The entire hearing process, including the Board's deliberation, took a mere 50 minutes, and the two-page Order was drafted and signed the same day. (R-9)

STANDARD OF REVIEW

"The standard of review with respect to orders on appeal from the Administrative Law Court is set forth in the Administrative Procedures Act, section 1-23-610 of the South Carolina Code (Supp. 2010)." South Carolina Dept. of Labor, Lic. & Regulation v. Chastain, Op. No. 4813 (S.C. Ct. App. Filed March 23, 2011).

This court may reverse or modify the decision of the ALC if its findings, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. CODE ANN. § 1-23-610(B). "The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." Id.

A final decision of a Board may be reversed or modified if the substantial rights of an appellant have been prejudiced because the administrative findings or decision are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, are arbitrary or capricious, are in violation of constitutional or statutory provisions, are made upon unlawful procedure, or are affected by other error of law.

S.C. CODE ANN. § 1-23-380(A)(6). Furthermore, a finding of fact by the Board will not be overturned by this Court "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." Lark v. Bi-Lo, 276 S.C. 130, 137, 276 S.E.2d 304 (1981).

"Substantial evidence" is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached. Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453 (1999). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Midlands Utility, Inc. v. South Carolina Dept. of Health & Env'tl. Control, 298 S.C. 66, 69, 378 S.E.2d 256, 258 (1989). The possibility of drawing two inconsistent conclusions from the evidence will not mean the agency's conclusion was unsupported by substantial evidence. Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

Where there is a conflict in the evidence, the agency's findings of fact are conclusive. Id.; see Harbin v. Owens-Corning Fiberglas, 316 S.C. 423, 450 S.E.2d 112 (Ct. App. 1994). This Court cannot substitute its judgment for that of the Board upon a question as to which there is room for a difference of intelligent opinion. Chemical Leamen Tank Lines v. South Carolina Pub. Serv. Comm'n, 258 S.C. 518, 189 S.E.2d 296 (1972). The Board has the benefit of seeing and hearing the testimony of the witnesses and judging their credibility and demeanor. The factual findings of an administrative agency are presumed to be correct and will be set aside only if unsupported by substantial evidence. Kearse v. State Health & Human Serv. Fin. Comm'n, 318 S.C. 198, 456 S.E.2d 892 (1995). Applying the "substantial evidence rule," an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. S.C. CODE ANN. § 1-23-380 (A)(6); Toussaint v. State Bd. of Med. Exam'rs, 303 S.C. 316, 400 S.E.2d 488 (1991).

An abuse of discretion occurs when an administrative agency's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006) (application of standard to circuit court) (citing Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); see also Converse Power Corp v. South Carolina Dept. of Health & Env'tl. Control, 350 S.C. 39, 47 564 S.E.2d 341, 345 (Ct. App. 2002) (quoting Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) ("A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.")).

ARGUMENT

I. THE EXTENDED SANCTIONS ON DOCTOR HURST'S DENTAL LICENSE ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE THEREFORE CLEARLY ERRONEOUS.

Because the Record is void of any evidence to support continued restriction of Dr. Hurst's dental license, the Order below must be reversed.

A final decision of the Board may be reversed or modified if the substantial rights of the appellant have been prejudiced because the administrative findings or decision are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record S.C. CODE ANN. § 1-23-380(5)(e). "Substantial evidence" is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached. Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453 (1999). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Midlands Utility, Inc. v. South Carolina Dept. of Health & Envtl. Control, 298 S.C. 66, 69, 378 S.E.2d 256, 258 (1989).

There is no evidence whatsoever in the Record to explain or justify continued restrictions on Dr. Hurst's license. In fact, the evidence weighs entirely in the opposite direction.

The Record is void of any evidence to suggest that Dr. Hurst poses any danger to the public. The evidence of record is that Dr. Hurst has successfully completed treatment, is no longer a threat, has reached full medical benefit of his 10-year course of treatment, that he is being terminated as a patient, and that he no longer requires board supervision. (R-57, 58) There is no evidence to the contrary in the Record and

nothing to suggest that Dr. Abel's medical opinion is suspect. Dr. Hurst was ordered by the Board to obtain treatment with Dr. Abel in 2000. (R-19) It was the Board who chose Dr. Abel, not Dr. Hurst.

In 2006, Dr. Abel was assigned the task of supervising Dr. Hurst's recovery and compliance by the Dental Board. (R-12) Even in the face of contravening evidence, if it were to exist at all, Dr. Abel's professional opinion would be entitled to substantial weight. But the fact that his opinion is unopposed and stands as the only evidence bearing on Dr. Hurst's fitness to practice quite speaks for itself.

An agency's findings may "not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995). The Board's arbitrary decision to continue its restrictions on Dr. Hurst's license lacks any hint of evidentiary foundation, and is therefore clearly erroneous. It was error for the ALC to affirm.

The Department of Labor, Licensing & Regulation (Department) offers up in the Record the initial assessment of Dr. Hurst, done by Dr. Abel in 2000. There is of course no reason to doubt that it was accurate when rendered 11 years ago. Likewise, there is no reason to doubt that Dr. Abel's current assessment is equally competent. Comparing the two simply serves to prove that Dr. Hurst has come a very long way since the turn of the century, and based on the evidence that was before the Board and in the Record before the ALC, Dr. Hurst is entitled to be freed of the heavy encumbrance placed on his license and his ability to practice his chosen profession.

Dr. Hurst has been suspended, restricted, treated, tested and monitored for over 11 years now. To maintain the present burdens upon his license when he has been declared medically cured is simply punitive. The harshness and fundamental unfairness of imposing such unnecessary conditions upon Dr. Hurst is also aggravated by the passage of time since the original period of misconduct:

It has been over six years since the commencement of this proceeding and more than eight years since the acts of alleged misconduct which Petitioner was found to have committed. There is no indication that, in the meantime, he has further engaged in any unprofessional or unethical conduct. Clearly, the original sanction, if imposed after the passage of many years, becomes a harsher penalty and, moreover, impacts upon the public need for medical services. . . .

Wilson v. State Bd. of Med. Exam'rs, 305 S.C. 194, 406 S.E.2d 345 (1991). It has now been over 11 years since the original incident in this case, with no further episodes or instances of potential misconduct. It is well within the province of this Court to determine that the present sanctions under which Dr. Hurst must labor are unduly harsh as a matter of law. Id. When the facts are undisputed and the question is whether they lead to a certain conclusion, the case presents a question of law and the court need not defer to agency decision making. Indiana State Bd. of Educ. v. Brownsburg, 865 N.E.2d 660 (Ind. Ct. App. 2007). In the instant matter, the evidence of Dr. Hurst's rehabilitation is undisputed.

The right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection; the generally accepted proposition is that the ultimate conclusion to be drawn from undisputed facts presents a question of law for an appellate court. Yakov v. Board of Medical Exam'rs, 68 Cal.2d 67, 435 P.2d 553(1968); Richardson v. Florida State Bd. of Dentistry, 326 So.2d 231 (Fla. 1976).

The facts of record in the instant matter cannot reasonably be disputed. Eleven years ago, Dr. Hurst violated the Dental Practice Act, was diagnosed with a disorder, entered treatment, and has been cured. His physician has released him from treatment and declared him fit to practice dentistry. There is no evidence to the contrary. The Court faces the singular question of whether the sanctions under which he must toil are unduly harsh as a matter of law under the present circumstances, and there exists only one reasonable conclusion in light of the Record.

An appellate court is charged with the solemn duty of determining whether a licensing sanction is unreasonable, arbitrary, unlawful or oppressive under the circumstances of each particular case; an administrative body has wide discretion in the area of licensing, but such discretion cannot be abused and must actually be exercised in view of all, not merely some, of the circumstances involved. Kansas State Bd. of Nursing v. Burkman, 216 Kan. 187, 531 P.2d 122 (1975).

The ALC reasoned that "There is no question that the conditions imposed were reasonable attempts to protect the public and were supported by the evidence presented in the 2006 proceedings." (R-7) That is a correct conclusion, based on "evidence presented in the 2006 proceedings." However, the evidence presented in the 2010 proceedings is very different, and there is no indication in the Record that Board properly considered it. It was error for the ALC to affirm the Dental Board's arbitrary and unexplained decision.

Because the Board's continued restriction of Dr. Hurst's license is clearly erroneous and punitive in the face of the evidence, the decision below must be reversed.

II. THE DENTAL BOARD ACTED ARBITRARILY AND ABUSED ITS DISCRETION BY EXTENDING ITS SANCTIONS ON DOCTOR HURST'S DENTAL LICENSE.

Because the Board abused its discretion by arbitrarily continuing the present sanctions on Dr. Hurst's license, the decision below must be reversed.

The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. CODE ANN. § 1-23-380(5)(f).

The sum total of the Board's rationale for its continued restraint of Dr. Hurst's license is expressed in a single sentence: "The Board finds there is no reason at this time to alter, amend, or otherwise release Respondent from conditions placed on him by the previous order." (R-7)

It is "an essential element of the legislatively designed administrative regulatory scheme that the Board, in a disciplinary proceeding, scrupulously consider all factors relevant to continued licensure. It must, therefore, meticulously weigh the public interest and the need for the continued services of qualified medical doctors against the countervailing concern that society be protected from professional ineptitude." Wilson v. State Bd. of Med. Exam'rs, 305 S.C. 194, 406 S.E.2d 345 (1991). See also Huber v. State Bd. of Physical Therapy Exam'rs, 316 S.C. 24, 446 S.E.2d 433 n.2 (1994) (Board must meticulously weigh public interest and need for the continued services of qualified medical professionals against countervailing concern that society be protected from professional ineptitude (following Wilson)).

Both Wilson and Huber require licensing boards to meticulously balance the public need for medical services against public protection, and scrupulously consider all factors bearing on that balance. Under Wilson, it is not enough for the Board to state in cavalier fashion, without explanation, that it sees no reason to relax the sanctions on Dr. Hurst's license, and it was error for the ALC to permit the Dental Board to shirk its duties as mandated by Wilson. It is not enough that there is substantial evidence in the Record to support a sanction.¹ And it is not enough that the imposition of a sanction is technically within the statutory authority of the Board. Section 40-15-200 of the South Carolina Dental Practice Act states in pertinent part that the Dental Board may place a licensee on probation or take other "reasonable" actions short of revocation. Thus, the mere statutory authority to impose sanctions is not enough to justify a particular decision. It must meet a standard of reasonableness.

Is it reasonable here to summarily continue harsh sanctions against Dr. Hurst nearly 12 years after the instance of misconduct, where the evidence proves rehabilitation? Most probably it is not. But if it is, that cannot be discerned from the Board's order, nor from the ALC decision below, which must be reversed.

The Order of the Board is void of any rationale, reasoning, or exercise of discretion. "An abuse of discretion occurs when an administrative agency's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the [board] is vested with discretion, but the ruling reveals no discretion was exercised . . ." State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006). Again, the Record fails to demonstrate that the Board performed the weighing and balancing process

¹ Of particular note is that the Wilson Court found substantial evidence in the record to suspend Dr. Wilson's license, but reversed nonetheless, as this Court should do.

required under Wilson, and the ALC order affirming the Board's order must be reversed.

"A failure to exercise discretion amounts to an abuse of that discretion." Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). "When the [agency] is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). The ALC should have remanded the matter to the Dental Board for proper consideration and deliberation.

Despite a totality of evidence that Dr. Hurst is not in need of supervision and monitoring, the Board ordered it anyway without stating upon what evidence or findings of fact it was based as commanded by Wilson, and that is reversible error. Wilson has consistently been applied in the ALC to determine whether sanctions in any given case are appropriate based on factual findings (or lack thereof) regarding the need for public protection, e.g., Walls v. South Carolina Dept. of Labor, Lic. & Regulation, No. 06-ALJ-11-0715-AP; Bell v. South Carolina Dept. of Labor, Lic. & Regulation, No. 00-ALJ-11-0226-AP. the Wilson process of reasoning ensures that professional sanctions are aimed at remediating or preventing public harm that is judicially palpable rather than merely anticipatory.

But even if it was within the discretion of the Board to order Dr. Hurst into continued restriction, it cannot be discerned from the Board's Final Order, and the matter must therefore be reversed. A Board must insure that a sanction imposed is consonant with the purpose of its proceedings. The discipline of a medical professional's license is designed not to punish him or her, but to protect the life,

health and welfare of the people at large. Wilson, 305 S.C. 196. Absent any reference to evidence in the Record, or other explanation, the decision below can only be presumed arbitrary and fatally infected by error of law. "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Deese v. State Bd. of Dentistry, 286 S.C. 182, 332 S.E.2d 539 (Ct. App. 1985).

The Board may well have had some reason for refusing to release Dr. Hurst and refusing to consider the public's need for his services. Perhaps the Board had concerns about recidivism. But there is no evidence, nor scholarly discourse in the Record to support that unfounded fear. Agency findings may "not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995). The Wilson balancing test ensures that the sanctioning of a professional not be based on guesswork, but on evidence of public danger. Wilson is an indispensable thread in the judicial fabric that cloaks state licensing boards with discretion to determine whether a person's license and livelihood may be placed in jeopardy.

"It cannot be doubted that a man's trade or profession is his property." Byrne's Adminstrs. v. Stewart's Adminstrs., 3 S.C. Eq. (3 Des. Eq.) 466, (1812). "[T]here is no reasonable doubt that the rights of those who have been duly licensed to practice medicine or other professions are property rights of value which are entitled to

protection.” Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177 (1956). A common idiom describes property as a “bundle of sticks” – a collection of individual rights which, in certain combinations, constitute property. See BENJAMIN N. CARDOZO, PARADOXES OF LEGAL SCIENCE 129 (1928) (reprint 2000). In the present matter, Dr. Hurst’s bundle of professional sticks has been arbitrarily, substantially and unconscionably reduced without explanation by the State, and the only just and proper remedy is to reverse and vacate the decision below.

In the face of the evidence presented at the 2010 Dental Board proceedings, continued sanctions upon Dr. Hurst lose their regulatory character and assume a punitive effect, and more so, as noted by the Wilson Court, with the passage of time. Absent any present evidence that Dr. Hurst poses a present public danger, the sanctions serve no regulatory purpose, and Dr. Hurst is entitled to fair consideration of all the evidence

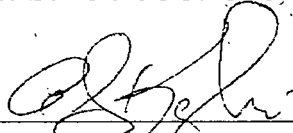
CONCLUSION

Because the Dental Board’s decision to maintain oppressive sanctions against Dr. Hurst is not justified by substantial evidence in the Record, and is therefore clearly erroneous, the Order below must be reversed and vacated.

Because the Dental Board’s decision to maintain oppressive sanctions against Dr. Hurst was arbitrarily made, is not reasonably intended to protect the public, is unduly harsh as a matter of law, and is fatally infected by error of law, the Order below must be reversed and vacated.

The Wilson Court reversed a medical board sanction despite the existence of substantial evidence supporting the challenged sanction in that case. This Court should reverse the decision below for the same reasons set forth in Wilson.

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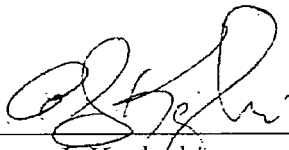


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Served upon counsel of record for the Respondent by first class mail at P.O. Box 11289, Columbia, SC 29211 in accordance with the Rules of Appellate Procedure on the 27th day of January, 2012.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
DEBORAH BROOKS DURDEN, Administrative Law Judge

Docket No. 11-ALJ-11-037-AP

Russell Charles Hurst, D.M.D.

Appellant

v.

South Carolina Department of Labor
Licensing and Regulation
South Carolina Board of
Dentistry

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STATEMENT OF ISSUE ON APPEAL

- I. WAS THE SOUTH CAROLINA BOARD OF DENTISTRY'S ORDER DENYING TERMINATION CLEARLY ERRONEOUS?
- II. DID THE BOARD OF DENTISTRY HAVE DISCRETION TO DENY APPELLANT'S REQUEST?
- III. HAS THE UN-APPEALED PRIOR ORDERS BECOME THE LAW OF THE CASE IN THIS MATTER?

STATEMENT OF THE CASE

Appellant appealed an Order of the South Carolina Board of Dentistry (hereinafter "the Board") dated January 14, 2011, denying Appellant's Petition to Terminate the Conditions imposed upon his license. The appeal was filed before the S.C. Administrative Law Court on February 02, 2011. On August 09, 2011, the Honorable Deborah E. Durden determined that substantial evidence supported the Board's decision to deny the Petition to Terminate the Conditions of Probation. Appellant filed the Amended Notice of Appeal before this Court on September 30, 2011.

On June 7, 2001, Appellant signed a Memorandum of Agreement and Stipulations wherein he admitted, pleading guilty to three (3) counts of committing lewd acts upon a child under sixteen and one (1) count of contributing to the delinquency of a minor. As a result of his guilty plea, Appellant received a sentence of ten (10) years confinement, suspended upon the service of five (5) years probation and sex-offender counseling. Appellant was required to surrender his controlled substance registration issued by the S.C. Bureau of Drug Control.

During hearing, the Board heard testimony from Dr. Abel, of the Behavioral Medicine Institute of Atlanta, regarding Appellant's behavior. Dr. Abel recommended that Appellant

return to practice, subject to restrictions that included treating only adult patients, remaining in treatment, establishing a "check and balance" system in his office for feedback from staff and patients, submitting to polygraph exams every six (6) months, and remaining on probation for at least five (5) years. The sanction the Board imposed resulted after weighing the public interest and need for continued services of qualified dentists against the countervailing concern that society be protected from professional misconduct. The Final Order reflects that three (3) computers were seized from Appellant – two (2) from his home and one (1) from his office. The hard drives contained thirty-two (32) images of child pornography and thirty-two (32) images of highly probable child pornography. The high standard for child pornography is defined by federal statutes: (1) visual depictions where minors are depicted engaging in sexually explicit conduct; (2) visual depictions which are, or appear to be, of a minor engaging in sexually explicit conduct; (3) visual depictions which have been created, adapted, or modified to appear to be that of an identifiable minor engaging in sexually explicit conduct; or (4) visual depictions which are advertised, promoted, presented, described, or distributed in such a manner that they convey the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. Mere nudity is not enough for a photo to meet this high standard. The Final Order also states that at the time Appellant petitions for reinstatement of his license, the Board could deny reinstatement, impose requirements, or grant reinstatement upon such terms and conditions as it deems fit. This Order became the law of the case in 2001. During this period, Appellant could not engage in the practice of Dentistry. Appellant, the owner of the business, continued to perform management activities which could be reconciled with Dr. Abel's restrictions and the probationary terms imposed as a result of this Criminal Offenses.

On July 21, 2006, Appellant appeared before the Board to petition the reinstatement of his license to active practice. On August 21, 2006, the Board issued an Order of Reinstatement, where it found that it was in the public interest to grant Appellant's petition and reinstate his license. The Board placed Appellant's license on probation for an indefinite period, with terms and conditions. The Board conditioned Appellant's reinstatement on the passage of either the American Dental Licensure Examination (ADEX) or the Southern Regional Testing Agency, Inc. Dental Examination (SRTA). The Board limited Appellant's practice to the treatment of adult patients over the age of twenty-one (21). In addition, Appellant is required to submit to biannual and event-driven polygraph examinations, as directed by Dr. Abel or another qualified therapist. Appellant must also ensure that his office staff members are regularly provided Staff Surveillance Forms. His patients must regularly provide Patient Satisfaction Forms to Dr. Abel and the Board. Also, Appellant is prohibited from using conscious sedation, oral or IV sedation, or anxiolysis to treat patients. Appellant is prohibited from using a computer in his office. Appellant was also required to submit his professional records to periodic review by the Board, at Appellant's expense. These terms became the law of the case thirty (30) days subsequent to the Order of Reinstatement dated August 21, 2006.

On September 25, 2007, Appellant petitioned the Board to amend its Order of Reinstatement and Probation. In that Petition, Appellant alleged that the conditions imposed in the Order were impractical, vague, arbitrary, and served no meaningful public-protection purpose. The Board denied Appellant's petition and did not issue a written order.

On February 25, 2008, Appellant again petitioned the Board to amend or alter the Order of Reinstatement. Appellant incorporated his previous petition of September 25, 2007. Appellant alleged that the terms and duration of the probation were open-ended and subject to

arbitrary enforcement. Appellant requested that the Board establish clear limits to the duration and specify the terms and conditions upon which probation may be terminated. Appellant fails to realize that his reinstatement was not an absolute right. His conduct could have resulted in permanent revocation. In order to protect the public, the Board imposed a structured program that has prohibited Appellant from engaging in further serious violations contained in the Final Order. Appellant is under the supervision of the criminal justice system at this time. As a registered sex offender, Appellant has numerous restrictions on his conduct.

On May 20, 2008, the Board issued an Order denying Appellant's petition to amend the Order of Reinstatement and Probation, after a hearing held on April 18, 2008. In its Order, the Board stated that the restrictions upon Appellant's practice were implemented to protect the public and the Appellant, and without appropriate medical support for termination of certain terms and conditions, the Board would not amend the Order.

On November 30, 2010, Appellant petitioned to terminate the terms of probation. On January 14, 2011, the Board issued an Order denying Appellant's petition, from which Appellant now appeals. A review of the transcript reveals that Appellant was not in compliance with the existing Order at the time of his January 14, 2011 hearing. See (R. pp. 59, lines 15-18). The Chairman warned the Appellant that this situation puts his license "in danger." (R. pp. 59, lines 22-23).

STANDARD OF REVIEW

The Board has jurisdiction to discipline licensees for violations of any provisions or regulations set forth by statute, as well as for convictions for violation of any federal or state laws relating to the practice of dentistry S.C. Code Ann. § 40-15-200 (Supp. 2009).

A reviewing Court may not reverse or modify an agency's decision unless substantial rights of the Appellant have been prejudiced because the administrative findings are either clearly erroneous, in view of reliable, probative, and substantial evidence on the record as a whole; are arbitrary or capricious, are made upon unlawful procedure, or are affected by other error of law. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); South Carolina Dept. of Labor, Licensing and Regulation v. Girgis, 332 S.C. 162, 503 S.E.2d 490 (Ct. App. 1998); and Marietta Garage, Inc. v. South Carolina Dept. of Public Safety, 337 S.C. 133, 522 S.E.2d 605 (Ct. App. 1999). An administrative agency's factual findings are presumed to be correct and can be set aside only if the findings are not supported by substantial evidence. Kearse v. State Health and Human Services Finance Commission, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The South Carolina Supreme Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Midlands Utility, Inc. v. S.C. Department of Health and Environmental Control, 298 S.C. 66, 69, 378 S.E.2d 256, 258 (1989). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995). Appellant has the duty to demonstrate that the Board abused its discretion in refusing to grant his requested relief. Leventis v. South Carolina Department of Health and Environmental Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000).

The Board has the benefit of seeing and hearing the testimony of the witnesses and judging their credibility and demeanor. The factual findings of an administrative agency are presumed correct and will only be set aside if unsupported by substantial evidence. Applying the

substantial evidence rule, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact (citations omitted).

ARGUMENTS

I. THE ADMINISTRATIVE LAW COURT CORRECTLY RULED THAT THE BOARD OF DENTISTRY'S ORDER DENYING TERMINATION WAS NOT CLEARLY ERRONEOUS?

S.C. Code Ann. § 40-15-200 (1976, as amended) unambiguously states that upon determining that grounds for discipline exist, the Board can "revoke or suspend....or take other reasonable action." In this matter, Appellant stipulated to misconduct. During the hearing relating to this appeal, counsel for the Appellant indicated that he was surprised that his license was not revoked, (R.49, lines 18-19). The Dental Board's Statute affords the Board wide latitude in fashioning an appropriate sanction. This discretion requires the Board to prescribe terms and conditions to be met during probation; but it does not require the Board to specify when conditions terminate, nor does it mandate finite dates for probationary terms. Because the Board is "vested with discretion as to [this] matter, it is not required by law to make a particular decision. Rather, [it] is empowered to make a decision – of its choosing – that falls within a range of permissible decisions." S.E.C. v. TheStreet.Com, 273 F.3d 222, 229 (2d. Cir. 2001). To have discretion is to have the right to choose one course of action over another with immunity from reversal by a higher authority. Id.

The Board ordered that Appellant's license be placed in a probationary status for an indefinite period. The Order does not indicate an ending date. It prescribes terms and conditions that the Appellant must achieve during the indefinite probationary period. South Carolina Code

Section 40-15-200 provides examples of conditions, including: "satisfactory completion of additional education, or a supervisory period, or of continuing education programs." It does not state that successful completion of such conditions will automatically warrant the termination of the probationary period. Rather, the purpose of such conditions is to create a safe work setting in order to facilitate Appellant's continued practice of dentistry.

Appellant argues that the Board's decision was in error because the denial was not supported by substantial evidence. Appellant submits that he has proven himself rehabilitated through performance of the conditions, and that since the Board failed to prove that he poses a danger to the public, the decision was clearly erroneous. Appellant cites numerous cases which caution licensing Boards to relate their original sanction to the underlying conduct being charged. These cases are not applicable to issue of amending sanction based on a Petition to Amend. Based on the language of the statute, the Board is not required to provide current justifications for limiting the scope of a dentist's practice during an indefinite probationary period. If the Board was required to find Appellant was a danger to the public, his license must be removed until such condition no longer exist. At the time of this proceeding, Appellant was not in compliance with the polygraph requirement or the requirement for continued counseling. (R pp.53, lines 22-25). Appellant is also subject to reporting requirements, office and residential checks, and notification of change of address for law enforcement. (R.pp.45-46, lines 24-6). While the Board must recognize improvements in Appellant's condition as reported by Dr. Abel, it is not required to deem those improvements as sufficient reason to remove safety related conditions created primarily to protect the public. Because the Board's Order was within its statutory authority, its finding in favor of continuing the conditions of probation must be affirmed.

In its original Order, the rate of recidivism for child molesters was discussed. It was determined at that time that recidivism was a serious concern in respect to Appellant. (R pp. 16). Appellant possessed material which met the high standard for classification as child pornography on his computer at his dental office. (R.p.15). There is no question that Appellant has openly admitted having sexual arousals after viewing photos of young boys and girls: (R. pp. 72-73). Dr. Abel determined that Appellant continued to view pictures of nude children on the internet almost a year after restrictions were imposed on his practice in June of 1999. (R p. 73). Appellant was diagnosed with Pedophilia and obsessive compulsive disorder. (R p: 75) There is little doubt that substantial evidence exist for the Board's decision to permit Appellant to practice under restrictions.

II. THE ADMINISTRATIVE LAW COURT CORRECTLY RULED THAT THE BOARD OF DENTISTRY HAS THE DISCRETION TO DENY APPELLANT'S REQUEST.

An exercise of discretion by an administrative agency will not be disturbed unless there is an abuse of discretion evidenced by a showing that the action of the agency was arbitrary or unlawful. 73A C.J.S. Public Administrative Law and Procedure § 223a (1983). An administrative sanction cannot be said to be unduly harsh if it is within the Board's authority to impose. South Carolina Bd. of Examiners in Optometry v. Cohen, 256 S.C. 13, 180 S.E.2d 650 (1971). The authority to review the findings of and punishment imposed in the Board's Order is confined to the correction of errors of law. This tribunal is not permitted to substitute its judgment for that of the Board, unless the Board's action was influenced or controlled by some erroneous view of the law, was without substantial evidence to support it, or amounted to a manifest abuse of discretion. State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950).

An appellate court will not reverse the trial court's decision (on sentencing) unless that court abused its discretion. White, 218 S.C. at 135, 61 S.E.2d at 756. An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); S.E.C., 273 F.3d at 229. The Board has the obligation to insure that the sanctions imposed are consonant with the purpose of the proceedings. Wilson v. State Bd. of Medical Examiners, 305 S.C. 194, 196, 406 S.E.2d 345, 346 (1991). Appellant admitted to the misconduct in this matter. This Court's review is therefore limited.

Appellant asserts that the Board did not justify a need for supervision and monitoring. The Record on Appeal contains all prior Orders relating to this matter. The May 20, 2008 Order cites to the serious nature of the criminal violations upon minors, a vulnerable patient population. The current Order determined that there was no reason, at this time, to alter, amend, or release the Appellant from the conditions placed upon him in the previous Order. Appellant wrongfully compares this case to Wilson, which challenged original sanction. That case requires a balancing test between the need to protect the public and the need for medical services. It also involved taking the Petitioner out of practice, which the Court determined was impermissibly harsh for a false insurance claim. 305 S.C. at 197, 406 S.E.2d at 346. Wilson indicates that in a disciplinary proceeding, the Board must consider all factors and "meticulously weigh the public interest and the need for the continued service of qualified medical doctors against the countervailing

concern that society be protected from professional ineptitude." See id. at 196, 406 S.E.2d at 346. Wilson is not on all fours with this situation and does not require the Board to act in a manner differently than it has. Counsel for the Appellant conceded that he was surprised that Appellant was not revoked for his misconduct.

The court in Deese v. South Carolina State Bd. Of Dentistry stated that a Board's discretion does not have to be exercised identically in every case. Deese, 286 S.C. 182, 185, 332 S.E.2d 539, 541 (Ct. App. 1985). "A penalty that is within the [Board's authority] is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases, and mere unevenness in the application of the sanction does not render its application in a particular case unwarranted in law." Id. Thus, it is not per se unreasonable for the sanctions in this case to differ from those in Wilson.

Appellant's case may be distinguished from Wilson, further justifying disparate treatment. In Wilson, the Board sanctioned Petitioner after finding him guilty of improperly filing insurance claims and obtaining incomplete surgical consent forms from patients. 305 S.C. at 194, 406 S.E.2d at 345. A number of years passed between misconduct, the hearing in Wilson, and the issuance of the sanctions. Here, Appellant pleaded guilty to three (3) counts of committing a lewd act upon a child under sixteen and one (1) count of contributing to the delinquency of a minor (R. p. 10). The nature of this misconduct is not comparable to that in Wilson. Furthermore, the indication that Appellant has not relapsed during the probationary period is not necessarily sufficient evidence that he will not relapse in the future. As in Wilson, the record contains "relevant evidence with which a reasonable mind might accept as adequately supporting the Board's conclusion." 305 S.C. at 196, 406 S.E.2d at 346. Appellant is here challenging the Board's refusal to reconsider its prior determination. The relevance of Wilson to

this Court's analysis would require this Board to review the un-appealed Final Order of the Board, which suspended the Appellate indefinitely. Appellant has not submitted to this Court that his conduct did not warrant the imposition of the indefinite terms of probation. The Order of Reinstatement containing these terms has never been challenged.

In the Board's Final Order, dated July 5, 2001, the Board's sanction was imposed only after weighing the public interest in access to dental services against the concern for the public's protection against professional misconduct. Subsequently, the restrictions on Appellant's license upon reinstatement resulted after the Board once again balanced these considerations per Wilson.

Appellant argues that his client is not a danger to the public and that the conditions imposed upon the Appellant are unduly harsh as a matter of law. This argument suggests that the Board must continuously justify its sanctions over time where a licensee shows substantial compliance or has not re-offended. In Deese, the Court stated that a licensee's present compliance with the Board's orders did not erase that licensee's prior violations. 286 S.C. at 186, 332 S.E.2d at 542. All licensees are expected and required to comply with the Board's orders. There is no obligation for this Board to remove the restrictions and conditions on a license just because the licensee has presently substantially complied with many of the requirements. Id. That possibility does not support Appellant's contention that the Board's refusal to remove conditions of his probation is an abuse of discretion. While it is true that Dr. Abel's medical opinion shows improvement in Appellant's condition, the Board must determine if the public interest weighs in favor of maintaining the status quo.

The Board has discretion to impose an indefinite period of probationary in this case. It follows that the Board maintains discretion to decide when, if ever, the risks to the public posed by Appellant's unrestricted dental practice have abated. At the time of this proceeding, Dr. Abel

and the Appellant did not continue to follow the requirements of the relevant Board Order. Recidivism should always be a concern in a situation where a person with pedophilia and obsessive compulsive disorder acts as a healthcare professional and owns the practice. It is not only within the Board's discretion to balance the interests at stake and choose whether or not to waive some or all conditions, it is the Board's duty. The decision of the Board was not arbitrary and must be affirmed.

III. APPELLANT'S TERMS AND CONDITIONS ARE THE LAW OF THE CASE

Appellant did not appeal the Re-instatement Order, which imposed the conditions challenged in this appeal. Respondent did not appeal the Board's denial of previous Petitions to alter his terms and conditions.

The doctrine of *res judicata* is based upon the well-established rule that the public interest is served by having an end to litigation, and that no one should be sued twice for the same cause of action. First National Bank of Greenville v. U.S. Fidelity & Guaranty Co., 207 S.C. 15, 35 S.E.2d 47 (1945). It prevents the parties from re-litigating in a second action any issue actually litigated or that might have been litigated in the first action so long as the first and second actions are between the identical parties and the first action culminated in a final judgment. Griggs v. Griggs, 214 S.C. 177, 51 S.E.2d 622 (1949). Administrative *res judicata* is comparable to the doctrine of judicial *res judicata* and precludes not only the re-litigation of the same issues in an administrative hearing but also in a subsequent judicial proceeding. 5 Jacob A. Stein, Glenn A. Mitchell & Basil J. Mezines, Administrative Law § 40.01 (Supp. 1996); see also Earls v. Aycock, 276 S.C. 471, 279 S.E.2d 614 (1981) (holding that the mere fact an

administrative agency rather than a judicial body rendered the previous decision does not prevent the application of *res judicata*).

In order for the doctrine of *res judicata* to apply, there must exist: (1) a prior action; (2) resulting in a final judgment on the merits; (3) with both actions between the identical parties or their privies. If these three elements exist, the subsequent action cannot re-litigate any issues that were or might have been litigated in the previous action. Barry v. South Carolina Department of Health and Environmental Control, No. 96-ALJ-07-0294-CC, 1997 WL 435937 (S.C. ALJD Jan. 31, 1997). Similarly, under the doctrine of collateral estoppel, a showing must be made that the issue sought to be precluded in a subsequent action was an issue actually litigated and *directly determined* in the prior action. Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984). The doctrine of *res judicata* and collateral estoppel are, to an extent, interchangeable.

An award unappealed from is conclusive not only of the issues actually decided, but also of those they that might have been raised before the Commission. See Wall vs. C.Y. Thomason Co., 232 S.C. 153, 101 S.E. 2d 286 (1957). Adjudications and awards of compensation boards or commissions, as well as the judgments of court, in proceedings for the recovery of compensation, are generally held to be conclusive upon the parties and their privies, as to the matters involved or justiciable therein, so as to preclude, under the doctrine of *res judicata*, the re-litigation thereof in subsequent proceedings.

Pursuant to First National Bank of Greenville v. U.S. Fidelity & Guaranty Co., 207 S.C. 15, 35 S.E.2d 47 (1945), USF&G cannot now be used to collaterally attack the single Commissioner's June 11, 2004, and March 2, 2005 Orders because it failed to timely appeal. Since USF&G did not challenge those two Orders in a timely manner, they are considered

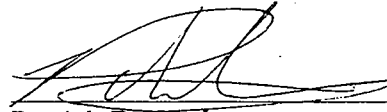
unchallenged rulings, and "and an unchallenged ruling, 'right or wrong, is the law of this case and requires affirmance'". Id. at 175.

CONCLUSION

For the foregoing reasons, or any reason appearing in the record, Respondent respectfully submits that the Board's decision to deny Appellant's Petition be affirmed and this Appeal be dismissed.

Respectfully submitted,

Feb 23, 2012



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
DEBORAH BROOKS DURDEN, Administrative Law Judge

Docket No. 11-ALJ-11-037-AP

Russell Charles Hurst, D.M.D. Appellant,

v.

South Carolina Department of Labor,
Licensing and Regulation,
South Carolina Board of
Dentistry..... Respondent.

PROOF OF SERVICE

I hereby certify that I have this day filed the original with 15 copies of the Respondent's Final Brief by personally delivering them to The Clerk's Office, S.C. Court of Appeals at the Court located at 1015 Sumter Street in Columbia, SC 29211. I have further served a copy thereof on Appellant herein, by depositing a copy, in the United States Mail, postage prepaid on November 08, 2011, properly addressed to his counsel of record, Aaron Kozloski, Capitol Counsel, LLC at PO Box 1996, Lexington, SC 29071, which is the last known address for same.

February 23, 2012.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
DEBORAH BROOKS DURDEN, Administrative Law Judge

Docket No. 11-ALJ-11-037-AP

Russell Charles Hurst, D.M.D. Appellant,

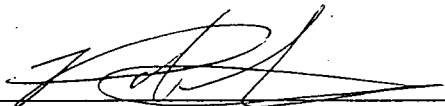
v.

South Carolina Department of Labor,
Licensing and Regulation, State Board of
Dentistry Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

February 23, 2012.


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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Russell Charles Hurst, D.M.D., Appellant,

v.

South Carolina Department of Labor, Licensing, and
Regulation, South Carolina Board of Dentistry,
Respondent.

Appellate Case No. 2011-199506

Appeal From the Administrative Law Court
Deborah Brooks Durden, Administrative Law Court
Judge

Unpublished Opinion No. 2012-UP-502
Submitted August 1, 2012 – Filed September 5, 2012

AFFIRMED

Aaron J. Kozloski, of Capitol Counsel, LLC, of
Lexington, for Appellant.

Patrick Donell Hanks, of the South Carolina Department
of Labor, Licensing, and Regulation, of Columbia, for
Respondent.

PER CURIAM: Russell Charles Hurst appeals the Administrative Law Court's (ALC) order affirming a decision by the South Carolina Board of Dentistry (the Board) that denied Hurst's petition to terminate the probationary conditions placed on his dental license. Hurst argues the ALC erred in finding (1) substantial evidence supported the Board's decision and (2) the Board's decision was not arbitrary. We affirm.¹

"Misconduct which constitutes grounds for revocation, suspension, probation, reprimand, or other restriction of a [dentistry] license or certificate . . . occurs when the holder of a license or certificate: . . . (2) has been convicted of a felony" S.C. Code Ann. § 40-15-190(A) (2011). "If the [B]oard is satisfied that the dentist . . . is guilty of an offense charged in the formal accusation provided for in this chapter, it may revoke or suspend the license . . . , reprimand the dentist, . . . or take other reasonable action short of revocation or suspension" S.C. Code Ann. § 40-15-200 (2011).

We hold the ALC did not err in finding the record contains substantial evidence to support the Board's decision to deny Hurst's petition to terminate the probationary conditions placed on his dental license. "In determining whether the [ALC's] decision was supported by substantial evidence, this [c]ourt need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the [ALC] reached." *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Id.* at 10, 698 S.E.2d at 617 (internal quotation marks and citation omitted). At the hearing before the Board, Hurst admitted to having pled guilty to committing a lewd act upon a child under sixteen. Because committing a lewd act upon a child under sixteen is a felony, the Board had discretion to place and keep the conditions on Hurst's license pursuant to section 40-15-200. *See* S.C. Code Ann. § 16-15-140 (2003) (providing a person who is guilty of committing or attempting to commit a lewd act upon a child under sixteen is guilty of a felony). Additionally, nothing in the order out of which this appeal arises or any other order the Board issued indicates Hurst's conditions would be removed after compliance for a specified time period. Accordingly, the record contains substantial evidence to support the Board's decision.

We hold the ALC correctly found the Board's decision was not arbitrary. "A decision is arbitrary if it is without a rational basis, is based alone on one's will and

¹ We decide this case without oral argument pursuant to Rule 215, SCACR."

not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985). Here, the Board had discretion to take any "reasonable action short of revocation or suspension" pursuant to section 40-15-200 because Hurst pled guilty to committing a lewd act upon a child under sixteen, a felony. Because refusing to terminate Hurst's probationary conditions was such an action, the ALC correctly found the Board did not act arbitrarily.

AFFIRMED.

FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 11-ALJ-11-0037-AP
Appellate Docket No. 2011199506

Russell Charles Hurst, D.M.D. *Appellant,*

~ vs. ~

Board of Dentistry of South Carolina *Respondent.*

PETITION FOR REHEARING BY APPELLANT

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ARGUMENT

Appellant respectfully petitions the the Court to reconsider its September 5, 2012 final decision in this case pursuant to Rule 221, SCACR, on grounds that the decision of the Court conflicts with existing precedent, Wilson v. State Bd. of Med. Exam'rs, 305 S.C. 194, 406 S.E.2d 345 (1991).¹

Dr. Hurst was initially sanctioned for misconduct in 2001 and suspended from practicing dentistry for five years, with no conditions of supervision by the Board of Dentistry. Yet he remained free to run his practice without treating patients. In 2006, he was reinstated with conditions of probation, and in November, 2010, Dr. Hurst's board-appointed physician released him from treatment and declared him fit and safe to practice dentistry.

Despite uncontroverted evidence in the Record of Dr. Hurst's present fitness to practice, the Board summarily, without discussion, denied his request to terminate or modify his conditions of probation. On appeal, the Administrative Law Court (ALC) affirmed solely on the ground that there was substantial evidence in the Record to impose the conditions of probation, albeit 10 years old. The ALC decision made no reference to Wilson.

On appeal from the ALC, this Court affirmed on the same grounds, relying on Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010). "In determining whether the [ALC's] decision was supported by substantial evidence, this [c]ourt need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the [ALC] reached."

However, Hill was not a professional licensing case, thus not subject to the Wilson balancing test, as is the case in the instant matter. At no point in the Record is it indicated that the required analysis was considered and applied by the Board, nor by the ALC, nor by this Court.

¹ It is "an essential element of the legislatively designed administrative regulatory scheme that the Board, in a disciplinary proceeding, scrupulously consider all factors relevant to continued licensure. It must, therefore, meticulously weigh the public interest and the need for the continued services of qualified medical doctors against the countervailing concern that society be protected from professional ineptitude."

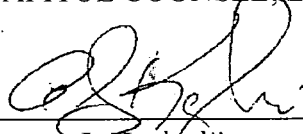
It simply is not sufficient in a professional-occupational licensing case that there be substantial evidence to support a sanction that is within the Board's statutory authority to impose. That sanction must be "reasonable," particularly within the context of the length of time between the original act of misconduct and the present imposition of the sanction. "Clearly, the original sanction, if imposed after the passage of many years, becomes a harsher penalty and, moreover, impacts upon the public need for medical services Wilson, 406 S.E.2d 346, 305 S.C. 197.

The Wilson Court reversed a medical Board sanction despite finding substantial evidence in the record of that case to justify disciplinary action. "We reject Petitioner's contention that the Board's factual findings are unsupported by substantial evidence. The record contains "relevant evidence which a reasonable mind might accept as adequately supporting the [Board's] conclusion...." 406 S.E.2d 346, 305 S.C. 196. Yet the Court reversed with a warning to reconsider Dr. Wilson's sanctions in accordance with its instructions to "scrupulously consider all factors relevant to continued licensure" and to "meticulously weigh the public interest and the need for the continued services of qualified medical doctors," which to date has not been done in Dr. Hurst's case. "[W]e remand for reconsideration by the Board of its sanction in light of this opinion." 406 S.E.2d 346, 305 S.C. 197, which is what this Court should also do.

CONCLUSION

The Court should reconsider its decision to affirm the ALC, and remand this case directly to the State Board of Dentistry with clear instructions to reconsider Dr. Hurst's original Petition in accordance with the requirements set forth in Wilson.

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September 20, 2012
Lexington, South Carolina

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The South Carolina Court of Appeals

Russell Charles Hurst, D.M.D., Appellant,

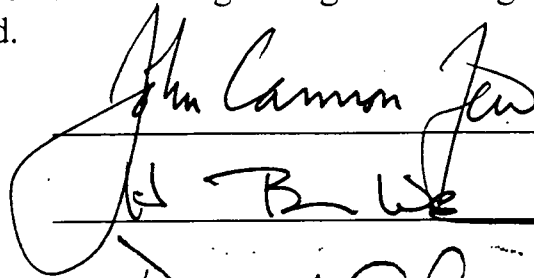
v.

South Carolina Department of Labor, Licensing, and
Regulation, South Carolina Board of Dentistry,
Respondent.

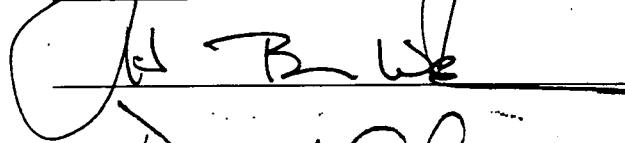
Appellate Case No. 2011-199506

ORDER

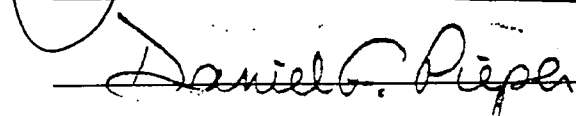
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C. J.



J.



J.

Columbia, South Carolina

cc:
Deborah Brooks Durden
Patrick Donell Hanks
Aaron J. Kozloski

FILED

18 Oct 2012