

**STATE OF ALASKA
DEPARTMENT OF COMMERCE, COMMUNITY AND ECONOMIC DEVELOPMENT
DIVISION OF CORPORATIONS, BUSINESS AND PROFESSIONAL LICENSING
BOARD OF DENTAL EXAMINERS**

**MINUTES OF TELECONFERENCE MEETING
MAY 2, 2006**

By authority of AS 08.36.040 and in compliance with the provisions of Article 6 of AS 44.62, a scheduled teleconference meeting of the Board of Dental Examiners was held May 2, 2006. Sites for the teleconference were Juneau, Ketchikan, Anchorage, Fairbanks, North Pole, Bethesda, MD., and St. Louis, MO.

These draft minutes were prepared by the staff of the Division of Corporations, Business and Professional Licensing. They have not been reviewed or approved by the board.

The meeting was called to order by Dr. Robert Warren, Chairman at 4:36 p.m.

Those present, constituting a quorum of the board, were:

Roll Call

Dr. Robert Warren, Chairman – Anchorage
Dr. David Eichler – Fairbanks
Mary Cerney – Dental Hygienist – Fairbanks
Gregory Gursey – Public Member – Anchorage
Dr. Rebecca Neslund – Kodiak
Dr. Kevin Gottlieb – Anchorage
Dr. William Gerace – Anchorage
Dr. Arne Pihl - Ketchikan

Those absent and excused were:

Vicki Hauff – Dental Hygienist - Anchorage

In attendance from the Division of Corporations, Business and Professional Licensing, Department of Commerce, Community and Economic Development were:

Brenda Donohue, Licensing Examiner – Juneau

In attendance from the Department of Law were:

Karen Hawkins, Asst. Attorney General – Anchorage

In attendance from the Office of Administrative Hearings were:

David G. Stebing, Administrative Law Judge
Chris Kennedy, Deputy Chief Administrative Law Judge

Guests present were:

Dr. Douglas Ness
Paul Stockler, Esq., Counselor for Dr. Ness

Review Agenda

The only agenda item is review of the Decision and Order in the matter of Dr. Douglas Ness, DDS, Board Case Number 1200-02-016, OAH No. 04-0250-DEN.

Dr. Warren asked guidance from Judge Stebing if the board could table their review and/or action to the regularly scheduled meeting on June 23-24, 2006. Judge Stebing advised they could table the matter to the June meeting. He noted that customarily the boards he has worked with discuss the matter in Executive Session, then come back on the record and act on the matter immediately.

Discussion was held about whether to proceed at this meeting or to table the matter to the June meeting. It was decided to proceed at this meeting.

Upon a motion by Dr. Eichler, seconded by Dr. Gottlieb and approved unanimously, it was:

RESOLVED to enter executive session in accordance with AS 44.62.310(2) and (3), and the Alaska Constitutional Right to Privacy Provisions, for the purpose of reviewing the Decision and Order in the Douglas G. Ness case, #1200-02-016

Before entering Executive Session, Judge Stebing noted he wanted to address the matter of disqualification as there had been allegations that perhaps some board members should disqualify themselves. Judge Stebing then asked Paul Stockler, counselor for Dr. Ness if he wanted to take a moment to explain his position on disqualification of board members.

Mr. Stockler first requested the board conduct their review of this matter in a face-to-face meeting. He noted there was precedent for this request in that the Medical Board met telephonically with a practitioner last summer and subsequently tabled the review to a face-to-face meeting. He also noted that he did not think Judge Stebing should be advising the board, nor should he be in any executive session with the board. Mr. Stockler stated that there were things that happened both during and after the hearing that question the judge's impartiality. He advised the board that Dr. Ness took this issue seriously and has filed a complaint with the Judicial Council and the Alaska Bar Association.

Dr. Warren then asked what Ms. Hawkins, the board's counsel had to say.

Ms. Hawkins stated her office took an entirely different position than Mr. Stockler. The governing statute, AS 44.62.450, addresses disqualification of hearing officers and agency members. The statute states that the hearing officer shall voluntarily seek disqualification and withdraw from cases which the hearing officer cannot afford a fair and impartial hearing and consideration. She observed she has been a part of this proceeding since just after the accusation was filed, and she has not seen anything to question Judge Stebing's ability to be fair and impartial. She added the Chief Hearing Officer for the Office of Administrative Hearings issued a letter to Dr. Ness and Mr. Stockler concerning their motion to disqualify and gave them other options as a way to pursue what they consider to be a problem with Judge Stebing. However, she noted they did not follow-up as far as she is aware.

She went on to advise that what Mr. Stockler has mentioned as problems, he has raised in an affidavit of his own. His affidavit includes double and triple hearsay, which, in the division's opinion, does not rise to the level of showing an unfairness on the part of the hearing officer. She added that in cases involving judges, actual bias must be shown, and Mr. Stockler failed to make that showing. She added that he also failed to make that showing with respect to any of the agency members who, under AS 44.62.450(c) are required to disqualify themselves if they feel they cannot afford a fair and impartial hearing or consideration. She noted this particular statute applies prior to the hearing taking place. There really isn't a statute that addresses the situation before the board, where there has been a request to disqualify the hearing officer or agency members after the hearing has concluded and all the evidence has been submitted.

There being no further discussion Dr. Warren called for a voice vote on the motion.

Roll Call Vote

Mary Cerney – yes

Gregory Gursej – yes

Dr. Neslund – yes

Dr. Pihl - yes

Dr. Gottlieb – yes

Dr. Eichler – yes

Dr. Gerace – yes

At this point Dr. Warren recused himself and appointed Dr. Gerace as Acting-Chairman.

Ms. Donohue advised that she would contact Dr. Warren, Judge Stebing, Dr. Ness, Mr. Stockler and Karen Hawkins at the conclusion of the Executive Session, so they could dial back into the teleconference.

It was noted for the record the board voted to go into Executive Session without allowing Dr. Ness to address them.

Ms. Donohue advised everyone to hang up, then Judge Stebing and the board members, except Dr. Warren, to call back into the teleconference for the Executive Session.

Off the record at 4:54 p.m.

Back on the record at 5:35 p.m.

Dr. Gottlieb came back on the record as the Acting Chairman as Dr. Gerace and Dr. Eichler recused themselves from the Executive Session.

Dr. Gottlieb offered Dr. Ness and his counsel, and Karen Hawkins, the board's counsel, each three minutes to address the board.

Dr. Ness addressed the board admitting he had made a technical mistake on a procedure, but that he had managed the aftercare appropriately. He noted the patient felt he had taken good care of him even though the outcome was not favorable. Dr. Ness feels he has the skills and knowledge to perform this surgery today, but he will not because of this incident. He implored the board members to reject Judge Stebing's Decision and Order because he feels it will send a terrible message to the dental community in Alaska. As he stated it, "One mistake and you're out". He commented the Alaska medical and dental boards discipline their licensees four to five times the national average, and that needs to be reviewed. He advised he has done all that can be done to make himself a better doctor, to improve himself and his practice. He thanked the board for the opportunity to address them.

Karen Hawkins then addressed the board and reiterated the division supports the board adopting the Decision and Order in its entirety. She stated the division felt it was a very thorough and thoughtful discussion of the issues that were presented by way of accusation. It thoroughly discusses the evidence presented, and explains why more weight was given to some evidence over other evidence. The evidence that was relied upon supports the conclusions in the Decision. She advised the statutes require that there is consistency in treatment of cases, and noted that in the Decision and Order there is quite a bit of discussion of previous cases that have been presented and decided upon by the board. There is ample analysis regarding the similarities and differences between Dr. Ness' case and those other cases, and based on that analysis the sanction imposed on Dr. Ness meets the board's purpose of protecting the public, and ensuring it's members meet or exceed minimum professional standards of the profession. Deference should be given to Judge Stebing because of the fact that he did sit through the full proceedings and had the opportunity to view and observe all the witnesses that testified.

Dr. Pihl asked Dr. Gottlieb to address the issue of timeliness of Dr. Gerace and Dr. Eichler recusing themselves at the start of the Executive Session. Dr. Gottlieb stated for the record they recused themselves immediately upon the board going into Executive Session, and before deliberations commenced.

Dr. Gottlieb then asked for a motion to act on the Decision and Order in this matter.

Upon a motion by Mr. Gurse, seconded by Dr. Neslund and approved unanimously, it was:

RESOLVED to adopt the proposed Decision in it's entirety, under AS 44.62.500(b).

Dr. Gottlieb called for any discussion. There being none, he called for a roll call vote.

Roll Call Vote

Mary Cerney – yes
Gregory Gurse – yes
Dr. Neslund – yes
Dr. Pihl - yes

Ms. Cerney asked if there was a quorum vote. Dr. Gottlieb noted there was a quorum present, and a majority of the quorum voted on the motion.

Mr. Stockler noted for the record that he did not believe the board had a quorum from the start of the meeting as Dr. Gerace and Dr. Eichler should have recused themselves at the start of the meeting. Dr. Gottlieb advised him the board has nine members, and five members constitutes a quorum.

There being no other business to discuss, Dr. Gottlieb called for a motion to adjourn.

Upon a motion by Dr. Pihl, seconded by Dr. Neslund, and approved unanimously, it was:

RESOLVED to adjourn the teleconference meeting of the Board of Dental Examiners.

The board adjourned the meeting at 5:47 p.m.

Respectfully submitted:

Brenda Donohue, Licensing Examiner

Approved:

Kevin L. Gottlieb, DDS, Acting Chairman
Board of Dental Examiners

Date: _____