

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

TERRY J. LEE, D.D.S.,	)	1 CA-CV 06-0613
	)	
Plaintiff/Appellant,	)	DEPARTMENT E
	)	
v.	)	<b>MEMORANDUM DECISION</b>
	)	(Not for Publication -
ARIZONA STATE BOARD OF DENTAL	)	Rule 28, Arizona Rules
EXAMINERS,	)	of Civil Appellate
	)	Procedure)
Defendant/Appellee.	)	<b>Filed 9-18-07</b>
	)	

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Appeal from the Superior Court in Maricopa County

Cause No. LC 2005-000504-001 DT

The Honorable Theodore W. Armbruster, Judge Pro Tem

**AFFIRMED**

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Davis Miles, PLLC	Mesa
By Gregory L. Miles	
Lori A. Curtis	
Attorneys for Plaintiff/Appellant	
Terry Goddard, Attorney General	Phoenix
By Mary DeLaat Williams, Assistant Attorney General	
Attorneys for Defendant/Appellee	

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**I R V I N E**, Presiding Judge

¶1 The Arizona State Board of Dental Examiners ("Board") found Terry J. Lee, D.D.S., a dentist licensed to practice in Arizona, engaged in unprofessional conduct because of his failure to adequately maintain patient treatment records. Dr. Lee appeals the administrative penalties the Board imposed. For the reasons that follow, we affirm.

## FACTS AND PROCEDURAL HISTORY

¶2 Dr. Lee has been a licensed dentist since 1969 and engages in the practice of "holistic" or "biologic" dentistry.<sup>1</sup> In 1999, the Board disciplined Dr. Lee for unprofessional conduct based on his repeated failure to properly maintain patient treatment records. The Board issued a final order ("1999 Order") placing Dr. Lee on five years of probation, the terms of which required him to take continuing education in the areas of record-keeping and diagnosis and treatment planning, subjected him to peer review, and provided for quarterly audits of his diagnostic treatment planning and record-keeping methods.

¶3 As a result of the Board's first audit after the 1999 Order, Dr. Lee's records were again found to be inadequate. The Board initiated disciplinary proceedings, which were eventually resolved by a consent agreement in December 2002 ("Consent Agreement"). Dr. Lee admitted in the Consent Agreement that his continued failure to record a clinically acceptable justification for treatment in patients' records and to properly chart patients'

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<sup>1</sup> Distinct from traditional dentistry, holistic practitioners deal with "nontoxic restoration materials and how hidden dental infections can affect the overall health of the patient or health of the body." As a regular part of their practice, holistic dentists replace traditional mercury-based amalgam dental fillings with composites, and they conduct cavitational surgery, which is the removal of bone material in the mouth that has died due to the mercury fillings. They also believe that metals in the mouth can cause electrical current to reach four to six microamps thereby affecting a person's acupuncture meridians.

periodontal conditions constituted unprofessional conduct. Dr. Lee agreed to place his license on probation for three years, to take continuing education in the area of risk management, and to subject his records to semi-annual audits. The Consent Agreement also ordered that Dr. Lee's "treatment records shall contain a recognizable, legitimate diagnostic method, within the standard of care, that support his diagnosis and treatment of a patient." The Consent Agreement further ordered that Dr. Lee's treatment records must comply with Arizona Revised Statutes ("A.R.S.") section 32-1264 (Supp. 2006)<sup>2</sup> and shall contain clinical and treatment information that is within the standard of care. Finally, Dr. Lee agreed that if he violated any of the Consent Agreement's terms, the Board could suspend or revoke his license after a hearing.

¶4 In October 2003, Dr. William Haggberg, on behalf of the Board, audited fifty-two of Dr. Lee's patient records. The Board reviewed Haggberg's audit report and discovered possibly incorrect violation allegations. Therefore, the Board ordered its Chief Investigator, Dr. Sam Palmer, to review the report and present the

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<sup>2</sup> We cite the current version of A.R.S. § 32-1264 because no revisions material to this decision have occurred. Subsection 32-1264(A) requires a dentist to make and maintain legible written records concerning all diagnosis, evaluation, and treatment of each patient. These records must include all treatment notes, including current health history and clinical examinations, diagnosis and treatment planning, and all radiographs.

Board with his own findings.<sup>3</sup> Dr. Palmer found that several of Dr. Lee's patient records did not contain required periodontal charting. Also, for patients who received intravenous vitamin C ("IV-C") and "detox supplements," Dr. Lee failed to record a diagnosis, a rationale or a scientific basis for such treatments. Finally, some records contained inadequate radiographs.

¶15 Based on these findings, the Board again initiated disciplinary proceedings against Dr. Lee through a formal hearing on the matter at the Arizona Office of Administrative Hearings. Dr. Palmer testified that Dr. Lee's inadequate record-keeping fell below the applicable standard of care and was not in compliance with the Consent Agreement or A.R.S. § 32-1264. Dr. Palmer further testified that the standard of care for holistic dentists is the same as that applicable to traditional dentists. Dr. Lee provided only his own testimony; he did not present any expert testimony to support his position that his record-keeping practices fell within the standard of care.

¶16 Following the hearing, the Administrative Law Judge ("ALJ") issued his decision recommending censuring Dr. Lee's license, suspending Dr. Lee's license for one-day, and extending Dr. Lee's probation for three years. On February 8, 2005, the

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<sup>3</sup> Dr. Palmer ultimately determined that the audit report inaccurately concluded, among other things, that Dr. Lee had performed cavitations surgeries, a procedure prohibited by the Consent Agreement.

Board issued its final order ("2005 Order") amending the ALJ's recommended order to reflect a forty-five-day suspension of Dr. Lee's license in lieu of censure and probation. Dr. Lee appealed to the Maricopa County Superior Court seeking judicial review of the 2005 Order. The superior court, in a detailed minute entry, affirmed the 2005 Order and entered a signed judgment to that effect on August 11, 2006. Dr. Lee timely appealed.<sup>4</sup> We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

### **DISCUSSION**

¶7 As he did at the administrative hearing and before the superior court, Dr. Lee admits he made minor record-keeping errors. Nevertheless, he argues these "minor" deficiencies do not justify a forty-five-day suspension of his license, especially in light of the improvements he made in his record-keeping practices since the 1999 Order. In fact, without providing any supporting authority, Dr. Lee argues the suspension is so severe as to constitute punishment rather than a civil remedy. He relies on Dr. Palmer's testimony that no dentist will always have absolutely perfect patient records to support his contention that he substantially complied with the Consent Agreement, and therefore the Board's action was arbitrary and capricious.

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<sup>4</sup> This Court stayed the 2005 Order during the pendency of this appeal. Because the parties did not stipulate to a stay until July 26, 2005, apparently fifteen days after the 2005 Order became a final appealable order, Dr. Lee's license is currently subject to suspension for only the remaining thirty days.

¶18 In reviewing an administrative agency's decision, the superior court examines whether the agency's action was arbitrary, capricious, or an abuse of discretion. *Webb v. State ex rel. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 557, ¶ 7, 48 P.3d 505, 507 (App. 2002). The superior court must defer to the agency's factual findings and affirm them if supported by substantial evidence. *DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 335-36, 686 P.2d 1301, 1305-06 (App. 1984). If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion. *Id.* at 336, 686 P.2d at 1306. We engage in the same review process as the superior court when we review its ruling affirming an administrative decision. *Webb*, 202 Ariz. at 557, ¶ 7, 48 P.3d at 507.

¶19 Pursuant to A.R.S. § 32-1263.01(C) (Supp. 2006),<sup>5</sup> the Board may suspend a dentist's license if the dentist fails to comply with a final order of the Board. The Board may also suspend a license for a dentist's unprofessional conduct. A.R.S. §§ 32-1263(1) (2002), -1263.01(A)(2). Violating a provision of the statutes regulating the practice of dentistry is considered unprofessional conduct. A.R.S. § 32-1201(20)(t) (Supp. 2006).<sup>6</sup>

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<sup>5</sup> We cite the current version of A.R.S. § 32-1263.01 because no revisions material to this decision have occurred.

<sup>6</sup> We cite the current version of A.R.S. § 32-1201(20)(t) because no revisions material to this decision have occurred.

¶10 In this case, Dr. Palmer testified that Dr. Lee's record-keeping practices violated the Consent Order, violated the statutory provisions regulating dentists, and fell below the standard of care. Thus, even if Dr. Lee presented expert testimony to the contrary, there is substantial evidence in the record to support the 2005 Order. See *Curtis v. Richardson*, 212 Ariz. 308, 313, ¶ 22, 131 P.3d 480, 485 (App. 2006) (explaining that we do not reweigh the evidence when reviewing administrative decisions).

¶11 The Board also acted within its discretion in suspending Dr. Lee's license for forty-five days. A disciplinary penalty imposed by any agency is excessive only if it is "so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *Bear v. Nicholls*, 142 Ariz. 560, 563, 691 P.2d 326, 329 (App. 1984). Here, the Board found Dr. Lee's record-keeping to be deficient in 1999 and 2002. Despite being ordered, and apparently attending, continuing education in risk management and record-keeping, Dr. Lee continued to inadequately maintain patient records while he was on probation and five months after he agreed in the Consent Agreement that his records would conform with the standard of care. Dr. Lee admitted that if one of his patients sought treatment from a traditional dentist, that dentist would not understand most of Dr. Lee's records. In light of these circumstances, it is not shocking to a sense of fairness that Dr. Lee received a forty-five-day suspension of his license. Accordingly, the discipline imposed in the 2005

Order does not constitute arbitrary action on behalf of the Board, nor is it otherwise an abuse of the Board's discretion. See *id.* (finding an agency's sanction within its discretion when supported by substantial evidence and authorized by statute).

¶12 We find no merit to Dr. Lee's implications that, because he did not intentionally violate the Consent Agreement and no patient was harmed by his substandard practices, he should be deemed in compliance with the Consent Agreement. The statutory provisions that he violated do not require intentional conduct for a violation to occur. See A.R.S. §§ 32-1263.01(A)(2), (C), -1263(1), -1201(20)(t). Similarly, a dentist's substandard practice is not required to be harmful to find a violation. Indeed, to require a patient be harmed by a dentist's misconduct prior to imposing disciplinary measures would run counter to the Board's responsibility to regulate dentistry for the purpose of protecting the public. See Laws 1990, Ch. 218, § 1 ("The purpose of this legislation [codified at A.R.S. Title 32, Chapter 11, Historical and Statutory Notes, Section 1] is to continue the board of dental examiners in order to protect the public from unregulated dentists . . . ."); see also *Hansson v. Ariz. State Bd. of Dental Exam'rs*, 195 Ariz. 66, 69, ¶ 12, 985 P.2d 551, 554 (App. 1998) (noting State has "paramount right . . . under its police powers to regulate business and professions in order to protect the public health, morals and welfare.").



¶13 Dr. Lee also asserts numerous theories to support his contention that the Board is estopped from disciplining him regarding his failure to document a diagnostic or health history justification for administering IV-C. He argues that because he changed his documentation of IV-C use in response to the 1999 Order, and subsequent audits did not discover a violation in this regard until Dr. Haggberg's audit, the Board cannot now assert his documentation was inadequate. The record, however, does not support this argument, and estoppel is not applicable in this case.

¶14 The record reflects that, after the 1999 Order, Dr. Lee changed his documentation of how he administered IV-C. For example, he began noting the anatomic location of the IV, who delivered it, the amount of the mixture, and the length of time the material was administered. Thus, Dr. Lee thought he was in compliance with the 1999 Order's finding that "whether these substances [IV-C] have any legitimate use [or] not, Respondent failed to adequately document in his records his administering of them, and that omission is sub-standard of care in the area of record keeping." The record, however, also shows that it was Dr. Lee's failure to include a written rationale for administering IV-C that constituted a violation of A.R.S. § 32-1264(A)(3), requiring all records to contain diagnosis and treatment planning. Such failure illustrated a practice below the standard of care, which in turn constituted multiple violations of the Consent Agreement.

¶115 "Estoppel may succeed against the state only when its application would promote rather than frustrate the basic intent of the statute." *Hansson*, 195 Ariz. at 70, ¶ 20, 985 P.2d at 555. Estopping the Board from disciplining Dr. Lee based on his failure to document a rationale for administering IV-C would frustrate the purpose of § 32-1264(A)(3), which is to promote uniform standards of quality in the interest of assuring safe practices to protect the public. See *id.* Accordingly, estoppel is inapplicable to this case. Similarly, we can discern no principled distinction between estoppel and the doctrines of res judicata and collateral estoppel that would prevent the application of our reasoning finding estoppel inapplicable. Therefore, we conclude that res judicata and collateral estoppel are similarly not applicable to this case.<sup>7</sup>

¶116 Dr. Lee further argues the Board did not have jurisdiction to discipline him for dispensing "detox" supplements to patients. He supports this contention by claiming these over-the-counter dietary supplements "are not given for a dental condition, are not medication, and are not given for the treatment of any dental condition; their purpose is to facilitate a patient's

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<sup>7</sup> Dr. Lee also raises the prohibitions against ex-post facto laws and retroactive application of statutes as providing a basis for reversing the 2005 Order. He did not, however, raise these arguments at the administrative hearing; therefore, they are waived on appeal. See *Rouse v. Scottsdale Unified Sch. Dist.*, 156 Ariz. 369, 371, 752 P.2d 22, 24 (App. 1987) (finding "failure to raise an issue before an administrative tribunal precludes judicial review of that issue on appeal . . .").

general good health." He compares dispensing the supplements to handing out toothbrushes. The testimony at the administrative hearing, however, belies Dr. Lee's position. For example, Dr. Palmer testified that Dr. Lee noted "detox" supplements in the "treatment" section of patient records. Dr. Lee testified that he made these notations "to help us to know that we have suggested it to them . . . ." This substantial evidence that Dr. Lee dispensed the supplements for treatment of dental conditions supports the ALJ's implicit conclusion that the Board had jurisdiction to seek discipline against Dr. Lee's license based on his dispensing "detox" supplements.<sup>8</sup>

¶17 Finally, Dr. Lee argues the Board was biased based on the erroneous violations found by Dr. Haggberg in his audit report. Our review of the record uncovers no evidence to support this argument. Dr. Lee's mere speculation that the Board "prejudged" him based on the preliminary report is not sufficient. See *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, 357, ¶ 24, 132 P.3d 290, 296 (App. 2006) (finding administrative tribunals are entitled to presumption of honesty and integrity; mere speculation regarding bias will not suffice). Accordingly, the Board did not abuse its discretion on this basis.

#### CONCLUSION

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<sup>8</sup> The ALJ did not specifically address the issue; rather, he generally found the Board had jurisdiction over Dr. Lee "and the subject matter in this case."

¶18 The Board's conclusion that Dr. Lee engaged in unprofessional conduct is supported by substantial evidence, and its suspension of his license for forty-five days is not arbitrary, capricious, or an abuse of the Board's discretion. The Board did not otherwise act contrary to law. Accordingly, we affirm the Board's 2005 Order and the superior court's judgment.<sup>9</sup> Our order staying the 2005 Order is vacated.

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PATRICK IRVINE, Presiding Judge

CONCURRING:

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SHELDON H. WEISBERG, Judge

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PATRICIA K. NORRIS, Judge

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<sup>9</sup> Dr. Lee has moved this Court to award him his attorneys' fees pursuant to A.R.S. §§ 12-348 and -349 (2003). We deny that motion because Dr. Lee has not prevailed on appeal for purposes of § 12-348, and there is no basis for an award of attorneys' fees pursuant to § 12-349.