

SOUTH DAKOTA BOARD OF DENTISTRY

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IN RE PETITION FOR DECLARATORY
RULING FROM THE SOUTH DAKOTA
BOARD OF DENTISTRY

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DECLARATORY RULING 22-01

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The South Dakota Board of Dentistry met on the 14th day of January, 2022, to consider a Petition for Declaratory Rulings and Memorandum in Support of Petition for Declaratory Rulings submitted to the Board pursuant to SDCL §§ 1-26-15 and 36-1C-14.

The Board, by a unanimous quorum vote, ordered that this Declaratory Ruling is an appropriate and accurate response to the Petition and ordered that such Ruling be submitted to Petitioner and incorporated into a formal Declaratory Ruling of the South Dakota Board of Dentistry.

Standard of Review

SDCL § 1-26-15 provides that “each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency.” And rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

The Board of Dentistry is also governed by SDCL § 36-1C-14, which allows “[a] person seeking a ruling as to the applicability to that person of a law, rule, or order of an agency under title 36” to “file with the agency a petition for declaratory ruling.” The Petitioner is required by

that same statute to list the specific statutes or rules in question, state the facts and circumstances that give rise to the issue to be answered by the professional or occupational board's declaratory ruling, and describe the precise issue to be answered by the professional or occupational board's declaratory ruling. *See* SDCL § 36-1C-14.

Pursuant to SDCL § 1-26-15, the Board of Dentistry also has a Rule addressing petitions for declaratory rulings that further clarifies how “any person may petition the board to issue a declaratory ruling by filing a written request that contains the following information:

- (1) The name and contact information of the person submitting the petition;
- (2) The specific administrative rule, statute, or order in question;
- (3) The facts and circumstances which give rise to the issue to be answered by the board's declaratory ruling;
- (4) The precise issue to be answered by the board's declaratory ruling; and
- (5) The signature of the person making the petition.”

ARSD 20:43:01:01.

Notably, a declaratory ruling is not synonymous with a declaratory judgment. Petitioner incorrectly refers to declaratory judgments throughout the Petition and also cites legal authority related to declaratory judgments. But a declaratory judgment is issued by a circuit court within its respective jurisdiction to declare rights, status and other legal relations. *See* SDCL 21-24-1, et seq. (“*Courts of record* within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.”) (emphasis added); *see also* SDCL 1-26-14 (“The validity or applicability of a rule may be determined in an action for declaratory judgment *in the circuit court* for the county of the plaintiff's residence, if it

is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.”) (emphasis added).

The Board of Dentistry does not have authority to address requests for or otherwise issue declaratory judgments. The Petition must be construed and addressed as a request for declaratory ruling, not a declaratory judgment.

Issues

Consistent with the requirement of SDCL 36-1C-14, the Petitioner listed the precise issues to be answered by the Board, which the Board copies below as follows:

1. Whether the Board has exceeded its authority under the Dental Practices Act (SDCL § 36-6A-14) by attempting to regulate the “standard of care as defined in *Appeal of Schramm*, 414 N.W.2d 31 (S.D. 1987), when the Legislature overruled *Schramm* through the passage of H.B. 1045 (SL 2015 Chap. 199, § 72) and established standards of competence and conduct (SDCL §§ 36-6A-59, 36-6A-59.1) to regulate the practice of dentistry?
2. Whether the Board has exceeded its authority under the Dental Practices Act by treating the standard of competence (SDCL § 36-6A-59) as indistinguishable from the standard of conduct (SDCL §36-6A-59.1) when these separate sections regulate two different things and must have a different meaning so as not to render one or the other superfluous or redundant?
3. Whether the Board has incorrectly read the term “inappropriate,” as used in SDCL § 36-6A-59.1(22), so broadly so as to effectively subsume the standard of competence set forth in SDCL § 36-6A-59?
4. Whether the Board has incorrectly read the phrase “conduct which tends to constitute a danger to the health, welfare, or safety of the public or patients” so broadly so as to effectively subsume the standard of competence set forth in SDCL § 36-6A-59?
5. Whether the Board’s Amended Notice has deprived the Licensee to be reasonably certain of the allegations against him to the extent that he can prepare an adequate defense?

Factual and Procedural Background

Petitioner set forth a plethora of facts and circumstances that allegedly give rise to the issues to be answered by the Board through the Petition and a separate Memorandum in Support of Petition for Declaratory Rulings. Suffice to say, Petitioner has a pending contested case for which the Board's prosecuting attorney is handling through the Office of Hearing Examiners, which contested case will eventually come before the Board for a formal hearing unless the contested case is otherwise informally resolved.

Petitioner disputes the allegations in the Complaint filed within the contested case and argues that Petitioner's conduct does not amount to a violation of the Dental Practices Act (SDCL Chapter 36-6A). Most of facts presented in the Memorandum relate to discovery deposition testimony from various witnesses who may or may not testify before the Board at the contested case formal hearing. Petitioner argues that the discovery deposition testimony and other evidence thus far developed in the contested case cannot support disciplinary action.

Licensee also argues in the Petition for Declaratory Ruling that the legal standards Petitioner believes are being applied by either the Board's prosecuting attorney or expert witnesses during the investigative and discovery stage of the contested case are incorrect.

A formal hearing for the contested case is scheduled for a later time. The Board has not taken any action in the contested case at this time and will not take any action until the evidence is presented to the Board at the formal hearing or through an agreed upon disposition for an informal resolution.

Analysis

Just as a petition for declaratory ruling is not a petition for declaratory judgment, a petition for declaratory ruling is also not a contested disciplinary case governed by the Administrative Procedures Act, SDCL 1-26-16, et seq., and statutes the Legislature recently enacted in SDCL 36-1C-1 through SDCL 36-1C-12 to address the procedures the Board of Dentistry must follow for imposing disciplinary action.

Pursuant to this statutory authority outside the jurisdiction of the Board of Dentistry, and for which the Board cannot issue a declaratory ruling, the disciplinary process starts when any person submits a written complaint to the Board of Dentistry alleging a licensee has engaged in or is engaged in conduct constituting grounds for disciplinary action, as enumerated in the laws or rules of the agency. *See* SDCL 36-1C-1. Upon receipt of a written complaint, the Board's administrator is required to serve a copy of the complaint on the Licensee, after which the Licensee must submit a response to the complaint. *See* SDCL 36-1C-3.

Thereafter, the Board's administrator assigns an investigative committee, including the agency's legal counsel, to investigate the complaint and determine whether the complaint should be settled by dismissal, informal resolution, or a formal hearing before the Board. *Id.* If a formal hearing becomes necessary to resolve the complaint, the "legal counsel for the agency may commence formal proceedings by serving a formal complaint." SDCL 36-1C-7. Thereafter, the "agency's counsel shall file a notice of hearing pursuant to § 1-26-17."¹ SDCL 36-1C-9.

¹ 1-26-17 dictates the contents requirements for a notice of hearing in contested cases by providing "[t]he notice shall include:

- (1) A statement of the time, place, and nature of the hearing;
- (2) A statement of the legal authority and jurisdiction under which the hearing is to be held;
- (3) A reference to the particular sections of the statutes and rules involved;

The Administrative Procedures Act then provides the procedures governing the contested case proceeding. Notably, the Board members are not involved in the contested case formal proceedings until they are asked to listen to evidence presented at a formal hearing and issue a decision. And SDCL 1-26-18.3 states that, in any contested case, any party to the contested case may require the agency to use the Office of Hearing Examiners. The Office of Hearing Examiners is presiding over the contested case at this time, including issuing procedural decisions until this matter is presented to the Board for a final decision.

At this stage in the contested case proceedings involving Petitioner, the Board itself has not taken any action. For this reason, the answer is no to all the questions presented to the Board for declaratory ruling. The Board has not exceeded its authority under the Dental Practices Act or incorrectly read any term or phrase, because the Board has not taken any action at all. As to the procedural question related to whether the Amended Notice has deprived Licensee to be reasonably certain of the allegations against him to the extent he can prepare an adequate defense, this issue is under the jurisdiction of the Office of Hearing Examiners at this time.

It would be improper for the Board to prematurely consider only the evidence presented by Petitioner in the Petition and Memorandum and issue a declaratory ruling on the same issues

(4) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved.

Thereafter upon application a more definite and detailed statement shall be furnished;

(5) A statement of any action authorized by law, which may affect the parties, as a result of any decision made at the hearing, whether it be the revocation of a license, the assessment of a fine or other effect;

(6) A statement that the hearing is an adversary proceeding and that a party has the right at the hearing, to be present, to be represented by a lawyer, and that these and other due process rights will be forfeited if they are not exercised at the hearing;

(7) Except in contested cases before the Public Utilities Commission, a statement that if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request to the agency no later than ten days after service of a notice of hearing issued pursuant to § 1-26-17;

(8) A statement that the decision based on the hearing may be appealed to the circuit court and the State Supreme Court as provided by law."

the Board is to later address within a pending contested case and formal disciplinary proceedings. All the Board can issue for a declaratory ruling at this stage of the proceedings is that the Board will consider and weigh all the properly admitted evidence at the formal hearing and thereafter enter findings of fact related to Petitioner's conduct and conclusions of law as to whether that conduct constitutes grounds for disciplinary action as enumerated in the Board's laws or rules.

This is particularly true here where it appears Petitioner is asking the Board to make evidentiary decisions or weigh evidence that has not even been properly submitted in the formal disciplinary proceedings before the Board. The Board is required to conduct disciplinary proceedings pursuant to the statutory framework and entering any decisions related to the issues pending in the contested case would be improper at this time through a declaratory ruling.

The Board, through this declaratory ruling, can only state that, pursuant to SDCL 36-6A-59, "[e]ach licensee and registrant subject to this chapter shall conduct his or her practice in accordance with the standards established by the board." And the Board has authority to issue disciplinary sanctions "upon satisfactory proof by clear and convincing evidence in compliance with chapter 1-26 of . . . professional incompetence, or unprofessional or dishonorable conduct, or proof of a violation of this chapter in any respect."

As defined by statute, "professional incompetence is a deviation from the statewide standard of competence, which is that minimum degree of skill and knowledge necessary for the performance of characteristic tasks of a licensee or registrant in at least a reasonably safe and effective way. If the services are not commonly provided by a licensee or registrant in this state, professional incompetence is a deviation from the national standard of competence, which is that

minimum degree of skill and knowledge necessary for the performance of characteristic tasks of a licensee or registrant in at least a reasonable safe and effective way.” SDCL 36-6A-59.

“No sanctions may be authorized based solely on monetary concerns or business practices that do not violate any provision of . . . [Chapter 36-6A] or any rule promulgated thereunder.” *Id.*

The term, unprofessional or dishonorable conduct, is further defined by statute in 36-6A-59.1. Without hearing the evidence of Petitioner’s conduct, the Board cannot be sure which conduct enumerated in SDCL 36-6A-59.1 may apply. Petitioner cited the following three subsections in the Petition:

(7) Violating any provision of this chapter or any rule promulgated thereunder;

(22) Providing or prescribing dental services or treatments which are inappropriate or unnecessary;

(23) Any practice or conduct which tends to constitute a danger to the health, welfare, or safety of the public or patients or engaging in conduct which is unbecoming of a dentist, dental hygienist, dental radiographer or registered dental assistant.

The purpose of a declaratory ruling is to address the “applicability of any statutory provision or of any rule or order of the agency.” ARSD 20:43:01:01. The Board can only say, at this time and in this declaratory ruling, that the above statutes apply to the contested case disciplinary proceedings pending with the Office of Hearing Examiners and the Board will further apply these statutes, and any additional statutes or rules that may apply, after all the properly admitted evidence is submitted to the Board through the formal hearing process governed by the statutory framework established in the Administrative Procedures Act.

The Board may further clarify, through this declaratory ruling, that expert testimony will be considered to establish the “statewide standard of competence, which is that minimum degree of skill and knowledge necessary for the performance of characteristic tasks of a licensee or registrant in at least a reasonably safe and effective way.” *See Appeal of Schramm*, 414 N.W.2d 31, 35-36 (SD 1987). Or, if the services are not commonly provided in this state, expert testimony will be considered regarding the “national standard of competence.” *Id.*

In addition, the Board may also take judicial notice of “judicially cognizable or generally recognized technical or scientific facts” within the Board’s specialized knowledge. *See id.* at 37. But if the Board takes such judicial notice, Licensee will be informed of the facts to be judicially noticed and will be provided an opportunity on request to refute the officially noticed facts by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the Board. *See id.* at n. 10. At this stage, without hearing the evidence properly submitted to the Board, the Board cannot enter any judicially cognizable or generally recognized technical or scientific facts within the Board’s specialized knowledge, nor opine on the admissibility or weight to be provided potential expert testimony.

Licensee argues in his Memorandum that expert testimony is not the proper source for determining the standard of competence, citing Oregon law. But South Dakota law, which Licensee recognizes has not been reversed, states that expert testimony and judicial notice must be used to establish the statewide and nationwide standard of competence and whether the Licensee violated that standard of competence. *See Appeal of Schramm*, 414 N.W.2d at 35-36; *see also Matter of Yemmanur*, 447 N.W.2d 525, 529 (SD 1989). The South Dakota Supreme Court specifically rejected the minority of jurisdictions, including Oregon law, which would

allow agency findings of negligence without expert testimony, based solely on the expertise of the board members. *Appeal of Schramm*, 414 N.W.2d at 36.

The Supreme Court adopted the rationale of the majority of jurisdictions, holding that where the issues of competence . . . are of a complicated nature, expert testimony is required to establish the proper ‘competency standards’ and whether or not they are met.” *Id.* According to the Supreme Court, “to do otherwise would render this appellate court’s review meaningless, as absent expert testimony, we cannot, by telepathy, act as mind readers determining from an empty record the factual determinations of the Board members.” *Id.* As Licensee pointed out in footnote 19 of page 17 of the Memorandum, *Appeal of Schramm* and its reasoning on the issue of meaningful judicial review and other matters has not been overturned.

The facts Licensee included in the Petition and Memorandum reference allegations that Licensee provided dental and cosmetic treatment on two patients with moderate to severe periodontal disease; provided dental restoration and cosmetic treatment on a patient with moderate gingivitis without necessary prophylaxis; failed to follow the hierarchy of priority for dental care and treatment; failed to refer patients to a periodontist or treat the periodontal disease prior to providing restorative and cosmetic treatments; failed to inform patients of all available treatment options; and failed to adequately document and maintain dental record-keeping.

As Licensee pointed out on page 16 of the Memorandum, “these allegations, if true, clearly invoke concerns of competent dental practices and thus the standard of competence in Section 36-6A-59.” The contested case hearing in this matter, by Licensee’s own admission, will involve the Board making factual findings and conclusions of law based on the evidence presented at the hearing and the law set forth above and otherwise set forth in South Dakota law,

but the Board cannot issue such findings, conclusions or a decision for a contested disciplinary case through a declaratory ruling.

Dated this 14th day of January, 2022.

SOUTH DAKOTA BOARD OF DENTISTRY

A handwritten signature in black ink, appearing to read "Harold Doerr", written over a horizontal line.

Dr. Harold Doerr, President