

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL)	
REGULATION, BOARD OF DENTISTRY,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 82-1863
)	
JOHN H. LeBARON, D.D.S.)	
)	
Respondent.)	
_____)	

ORDER OF DISMISSAL

1. An evidentiary hearing was held in this cause on Respondent's Motion to Dismiss the Administrative Complaint herein, at Tallahassee, Florida, on November 12, 1982, attended by Salvatore A. Carpino, Esquire, counsel for Petitioner, and George L. Waas, Esquire, co-counsel for Respondent. An Administrative Complaint against Respondent was filed by Petitioner Department of Professional Regulation, Board of Dentistry, on May 27, 1982, alleging that Respondent had violated subsections 466.028(1)(n), (u) and (y), Florida Statutes, by exercising influence on a patient in a manner to exploit the patient for financial gain, by committing fraud in the practice of dentistry, and by failing to meet the minimum community standards in the construction of dentures. The case was thereafter referred to this Division pursuant to subsection 120.57(1), Florida Statutes. On August 16, 1982, Notice of Hearing was issued for a hearing to be held on October 20, 1982.

2. On September 13, 1982, Respondent filed a Request for Production of Documents requesting Petitioner to produce the tape recording of the Probable Cause Panel's meeting pertaining to the Respondent, and, on the same date, filed a Motion to Expedite Discovery which was granted by ORDER, dated September 22, 1982, which provided that the time for responding to pending discovery requests was shortened to on or before October 4, 1982.

3. By letter dated October 7, 1982, to counsel for Respondent, a staff attorney for Petitioner confirmed that the allegations that Respondent had violated subsections 468.028(1)(n) or (u), Florida Statutes, would not be pursued at the final hearing.

4. By Motion to Dismiss Administrative Complaint, dated October 11, 1982, Respondent contended that Petitioner had refused to produce the transcript or tape recording of the Probable Cause Panel's proceedings, and that therefore Petitioner had failed to show compliance with subsections 455.203(7) and 455.225(3), Florida Statutes.

5. On October 14, 1982, Petitioner responded to Respondent's Request for Production of Documents stating that Petitioner was not in possession of the tape recording of the Probable Cause Panel meeting of the Board and that Petitioner could not be required to obtain documents from the Board because the

Petitioner was the Department of Professional Regulation and not the Board of Dentistry, and that departmental counsel did not represent the Board.

6. By ORDER, dated October 19, 1982, Petitioner was directed within ten days to provide Respondent with the requested transcript or tape recording or, in the absence of same, to provide other evidence that the proceedings of the Probable Cause Panel complied with subsection 455.225(3), Florida Statutes. Ruling on the Motion to Dismiss was reserved pending such submission and any response by Respondent within five days from receipt of same. The ORDER further cancelled the hearing scheduled for October 20, 1982.

7. Petitioner thereafter on October 22, 1982, took the depositions of the members of the Probable Cause Panel in Respondent's case at Tampa, Florida. Notices of taking the depositions were provided Respondent's counsel on the same date. Due to the inadequate notice, Respondent's counsel were not present when the witnesses were deposed. At the motion hearing, Petitioner offered the depositions in evidence and, over objection, they were received for the sole purpose of supplementing other evidence.

8. Subsection 455.203(7), F.S., provides as follows:

455.203 Department of Professional
Regulation; powers and duties.--
The Department of Professional Regulation
shall:

* * *

(7) Require all proceedings of any board or panel thereof within the department and all formal or informal proceedings conducted by the department or a hearing officer with respect to licensing or discipline to be electronically recorded in a manner sufficient to assure the accurate transcription of all matters so recorded.

9. Section 455.225, F.S., provides pertinently as follows: 455.225
Disciplinary proceedings.--

(2) The department shall expeditiously investigate complaints. When its investigation is complete, the department shall prepare and submit to the probable cause panel of the appropriate regulatory board the department's investigative report. The report shall contain the investigative findings and the recommendations of the department concerning the existence of probable cause.

(3) The determination as to whether probable cause exists shall be made by a majority vote of a probable cause panel of the board, or by the department, as appropriate. . . . The probable cause panel or the department, as may be appropriate, shall make its determination of probable cause within 30 days after receipt of it by the department's final investigative report. . . If probable

cause is found to exist, the department shall file a formal complaint against the regulated professional or subject of the investigation and prosecute the complaint pursuant to the provisions of chapter 120.

10. The evidence adduced at the hearing establishes that the proceedings of the Probable Cause Panel were recorded in conformance with subsection 455.203(7), and that the provisions of subsections 455.225(2) and (3) were followed in arriving at a determination of probable cause. The transcript of the tape recording of the meeting of the Probable Cause Panel, which was produced at the hearing pursuant to subpoena directed to the Executive Director of the Board, reflects that the panel members made a reasoned determination to find probable cause after discussion and evaluation of the case. The departmental investigative report had been provided to the individual panel members some ten to fifteen days before their meeting, and they have acknowledged that they considered the same in arriving at their determination. Although the transcript of the tape recording is somewhat ambiguous as to precisely what alleged violations of Chapter 466, Florida Statutes, were the subject of the probable cause determination, the minutes of the panel proceedings specify that probable cause was found "under, but not limited to, Chapter 466.028 (1), d, n, u, y, bb." It is thus determined that the proceedings of the panel meet the test set forth in the recent case of *Kibler v. Department of Professional Regulation*, 418 So.2d 1081 (Fla. 4th DCA 1982), that "To sustain a probable cause determination there must be some evidence considered by the panel that would reasonably indicate that the violation alleged had indeed occurred."

11. Although the foregoing would ordinarily be sufficient to find that the procedural steps taken by Petitioner in the processing of this case were in consonance with the applicable provisions of law, Respondent has presented another ground for dismissal in his Supplement to Motion to Dismiss and Motion for Attorney's Fees and Costs filed subsequent to the evidentiary hearing, to which Petitioner has not responded. Therein, Respondent points to the fact that the transcript of the Probable Cause Panel meeting shows that the Department's prosecutor attended the meeting and recommended that the panel find probable cause to issue an administrative complaint against the Respondent. Although the investigative documents attached to the depositions taken by Petitioner indicate that the staff of the Department had recommended that the complaint against Respondent be dismissed and that only a letter of caution be sent to the Respondent, the prosecutor stated to the panel that the Department's present position was to prosecute first offenses of incompetency on the part of licensees. Counsel for the Board, an assistant attorney general, was also present at the meeting.

12. Respondent contends, and the Hearing Officer concurs, that the presence of and advice given by the prosecuting counsel at the panel meeting violated subsection 455.221(2), F.S., which provides that ". . . no attorney employed or utilized by the department shall prosecute a matter and provide legal services to the board with respect to the same matter." Although it is recognized that subsection 455.225(2) directs the Department to provide its investigative findings and recommendations concerning the existence of probable cause to the panel, it is equally apparent that the departmental attorney prosecuting a matter is proscribed by subsection 455.221(2) from providing advice to the Board, which necessarily includes its Probable Cause Panel, with respect to the same case. It is therefore concluded that the proceedings were tainted by the presence and advice rendered by the prosecutor, and it is

unnecessary to determine the extent to which his statements to the panel may or may not have influenced their ultimate determination. The "appearance of evil" is sufficient to nullify the otherwise proper proceedings of the panel. As stated in Kibler, supra,

"The adherence to rules and statutes by the very agency charged with their enforcement is especially necessary if the public and the parties regulated are to maintain respect and confidence in the decisions rendered by the agency. . ."

13. It should also be noted that throughout the discovery process in this case, Petitioner's counsel has contended that he represents only the Department and not the Board. This position is untenable. The Administrative Complaint was styled in the names of both the Department and the Board. The language of subsections 455.203(7) and 455.207(1), refer to the Board as being "within" the Department of Professional Regulation. It is true that Chapter 455 contains various provisions permitting the Department to challenge actions taken by the boards and vice versa, but in disciplinary proceedings, it is inescapable that the two entities are so intertwined in the decision-making process as to make them virtually one and the same for all practical purposes. Normally, the Department prosecutes only after a probable cause determination is found by a panel of the Board, and it is therefore, in effect, prosecuting in behalf of the Board which will ultimately issue the final order in the matter. The Department therefore is charged with complying with requirements of the discovery process directed to any relevant matters pertaining to the case whether generated by the Department itself or the Board. In short, the Department is simply the prosecutive arm of the Board with respect to a particular administrative disciplinary proceeding of this type.

14. In view of the foregoing, it is

ORDERED:

1. That Respondent's Motion to Dismiss is GRANTED, and this cause is DISMISSED without prejudice, and the file of the Division is hereby closed.

2. Respondent's Motion for Attorney's Fees and Costs is DENIED.

DONE and ORDERED this 8th day of December, 1982, in Tallahassee, Florida.

THOMAS C. OLDHAM
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of December, 1982.

COPIES FURNISHED:

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