
5B

Information

Professional Practices Committee

Review and Designation of Discipline Precedential Opinions

Executive Summary: The Commission will discuss whether to designate published discipline decisions as precedential.

Recommended Action: For information only

Presenter: Mary Armstrong, Director, Division of Professional Practices

Strategic Plan Goal(s): 1

Promote educational excellence through the preparation and certification of professional educators

- ◆ Evaluate and monitor the moral fitness of credential applicants and holders and take appropriate action

December 2009

Review and Designation of Discipline Precedential Opinions

Introduction

Every applicant for a credential or holder of a credential who has received a recommendation from the Committee of Credentials to deny an application or to impose discipline on a credential is entitled to request an administrative hearing with an independent administrative law judge (ALJ) who issues a proposed decision for the Commission's review, adoption and action. If the Commission chooses to designate some of these decisions as precedent decisions, the decisions could provide guidance, consistency and clarity from the Commission to ALJs as well as to school districts, credential holders and teacher preparation programs. This issue was previously discussed as an Information item by the Commission at the August 2009 Commission meeting. At that time, the Commission requested that staff provide further information and schedule an Information item for the December 2009 Commission meeting.

Background

Under current law (Government Code § 11425.60), "an agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. The agency is required to maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register."

Proposal to Designate Precedential Decisions

After a request is made for an administrative review of a Committee recommendation, an administrative hearing is held at which time both the respondent (applicant or credential holder) and the Commission are provided the opportunity to present evidence and testimony. The ALJ then makes findings based on the evidence and testimony presented and issues a proposed decision recommending the discipline to be imposed. In many cases the ALJ's decision is the same recommendation as the Committee's although because it is a *de novo* review, the discipline imposed can be more or less severe than the Committee's recommendation. The Commission reviews the proposed decision and can decide to adopt the decision or, if it disagrees with either the findings or the discipline imposed, it can choose to call for the transcript, review the transcript and issue a decision and order. On average, ten decisions become final each year and approximately nine are adopted from the proposed decisions issued by an ALJ. The Commission calls for the transcript on the average of one to two times per year.

Many agencies utilize the provisions of the Government Code § 11425.60 to provide guidance to both stakeholders and the ALJs assigned to credentialing cases. For example, precedent decisions could be instructive to an ALJ who is unfamiliar with accepted practices at school sites as a way to become familiar with such practices and whether or not failure to adhere to such

practices could result in a determination that misconduct occurred. Other decisions that staff could recommend as appropriate to be designated as precedent are those with a significant legal or policy determination of general application that is likely to recur. The cases chosen could involve unprofessional conduct, moral turpitude and immoral conduct.

One of the Commission's strategic goals is to improve customer service and consistency. School districts, credential holders, teacher preparation programs, all of which are external customers, seek guidance and consistency within the discipline process. Additionally, ALJs, the Attorney General's Office and credential holders and applicants' legal representatives also seek guidance and consistency throughout the discipline process. (See Attachment 1: Letter from Senior Supervising Deputy Attorney General Douglas Press dated November 12, 2009.) Publishing written precedential decisions would provide guidance and consistency as well as improve communication with all interested parties. Additionally, the Commission's precedential decisions become controlling authority which ALJs who deliberate over the Commission's discipline cases would follow in subsequent cases.

Additional Information Requested by the Commission

At the August 2009 Commission meeting, staff was directed to further develop this concept by providing the Commission with the following:

- A discussion of the differences, if any, between legal precedents and precedent decisions.
- Examples of precedent decisions issued by other licensing agencies.

Legal Precedents and Precedent Decisions

The term legal precedent describes a legal principle, created by a court decision, which provides an example or authority for judges deciding similar issues later. Generally, decisions of higher courts (within a particular system of courts) are mandatory precedent on lower courts within that system--that is, the principle announced by a higher court must be followed in later cases. For example, the California Supreme Court decision that unmarried people who live together may enter into cohabitation agreements (Marvin v. Marvin), is binding on all appellate courts and trial courts in California (which are lower courts in relation to the California Supreme Court). Similarly, decisions of the U.S. Supreme Court (the highest court in the country) are generally binding on all other courts in the U.S. Decisions of lower courts are not binding on higher courts, although from time to time a higher court will adopt the reasoning and conclusion of a lower court. Decisions by courts of the same level (usually appellate courts) are considered persuasive authority. That is, they should always be carefully considered by the later court but need not be followed.

The precedent decisions authorized by Administrative Procedure Act are statutory legal precedents. Effective July 1, 1997, Senate Bill 523 (Chap.938, Stats.1995) took effect making substantial changes to the Administrative Procedure Act as it governs administrative disciplinary actions taken against professional and vocational licenses. One of the changes brought about by SB 523 was to allow a board or commission to designate an administrative disciplinary decision as precedential. This and other revisions to the Administrative Procedure Act was done after extensive study and public hearings conducted by the Law Revision Commission. [For a full

discussion of the changes brought about by the Law Revision Commission's proposal to revise the Administrative Procedure Act see Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals* 39 UCLA L. Rev. 1067 (1992).] The rationale offered for establishing precedent decisions was that in addition to the principle that agencies need the ability to make law and policy through adjudication, agencies have the responsibility to let the law and policy they make through their case law be generally known. The Law Revision Commission's recommendation was based, in part, on federal administrative law which has long held that lawmaking through adjudication is acceptable and of equal dignity with lawmaking through rules. [See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).] In support of the concept, Professor Asimow wrote in his background paper for the Law Revision Commission, the following:

“Every agency is confronted by vague statutory terms, such as “unprofessional conduct” or “moral turpitude” or “gross negligence.” Their decisions make law. They should be available and accessible to the public. In addition, agency Decisions generally establish a pattern of appropriate sanctions. This information should also be generally known. The reality is that although adjudicatory decisions of most California agencies are public records...nobody knows about them. There is no convenient way to access them. Of course, the staff has an institutional memory of these precedents and counsel who practice constantly before an agency know about them. But this knowledge is unavailable to everyone else. If precedent decisions were generally available, it would benefit everyone — counsel for both the agency and the parties and the ALJs and agency heads who make the final decisions. It would encourage agencies to articulate what they are doing when they make new law or policy in adjudicatory decisions. And it is more efficient to cite an existing decision than to reinvent the wheel or, worse, decide inconsistently with a prior decision without knowing or without acknowledging that this has occurred. My suggestion would be that each agency be required to designate significant adjudicatory decisions as precedential.”

Examples of Precedent Decisions issued by other Agencies.

Attachment 2 *In the Matter of the Accusation Against Joseph F. Basile, M.D.*
Precedential Decision No. MBC-2007-01-Q: A decision issued by the Medical Board of California.

Attachment 3 *In the Matter of Rogelio Addun Bacud* DSS No. 6696248001-B: A decision issued by the Department of Social Services.

Attachment 4 *In the Matter of the Appeal By Gordon J. Owens* SPB Case No. 25506
Precedential Decision No. 92-11: A decision issued by the State Personnel Board

Next Steps

If the Commission chooses to designate and publish precedential decisions, the next steps would be to direct staff to identify decisions that would be appropriate for a designation as precedent and return to the Commission with the decisions for the Commission's review and action. Staff could also be directed to establish a procedure for continuing to designate future decisions as precedential as appropriate.

ATTACHMENT 1

EDMUND G. BROWN JR.
Attorney General

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DEPARTMENT OF JUSTICE



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November 12, 2009

Mary Armstrong, Esq., Chief Counsel
Commission on Teacher Credentialing
1900 Capitol Avenue
Sacramento, CA 95814-4213

RE: **Precedential Decisions**

Dear Ms. Armstrong:

At your request, I am providing this letter that describes my observations of precedential decisions generally. This letter should not be construed as either an opinion letter from the Attorney General's Office or a recommendation as to whether the Commission on Teacher Credentialing should commence designating precedential decisions.

General Authority for the COTC to Designate Precedential Decisions

"A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency." (Government Code § 11425.60, subdivision (a).) Subdivision (b) authorizes an agency that renders decisions subject to the Administrative Procedure Act (APA) to "designate [its administrative adjudication] as a precedent decision a decision or a part of a decision that contains a significant legal or policy determination of general application that is likely to recur." Subdivision (b) also makes clear that such designations are "not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340)" of the APA.

Subdivision (c) further requires the agency to "maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register."

Once an administrative decision is designated as precedential, as the term would suggest, the decision should serve as precedent (to the extent that the rule and facts are applicable to another case) on other administrative proceedings for that agency. (See, e.g., Unemployment

Ins. Code, § 409 ["The director and the appeals board administrative law judges shall be controlled by those precedents except as modified by judicial review."].)

Other State Agencies That Designate Precedential Decisions

Based upon my experience and research, at least the following state entities have designated precedential decisions:

- 1) **The Board of Equalization** (*Citicorp North America v. Franchise Tax Board* (2000) 83 Cal.App.4th 1403, 1408-1409);
- 2) **CalPERs** (*Municipal Water Dist. v. Board of Admin.* 2006 WL 3012950)¹;
- 3) **The California Unemployment Insurance Appeals Board (CUIAB)** (*AFL-CIO v. UIAB* (1996) 13 Cal.4th 1017, 1028);
- 4) **The Department of Social Services** (*Megrabian v. Saenz* (2005) 130 Cal.App.4th 468, 476);
- 5) **The Fair Employment and Housing Commission** (*Green v. State* (2007) 42 Cal.4th 254, 272; and
- 6) **The State Personnel Board** (*Alameida v. State Personnel Board* (2004) 120 Cal.App.4th 46, 50 fn. 3).

How Courts Have Viewed an Agency's Precedential Decisions

A. Precedential Decisions May be Relied Upon as Evidence of Statutory Intent.

When a court is tasked with ascertaining the legislative intent of a statute, if there is some ambiguity in the statute's terms, the court may consult, among other sources, the precedential decisions from the agency responsible for administering the statute in question. (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1012-1014.) For example, in *Green v. State*, *supra*, the court noted that, to identify the agency's reasonably contemporaneous interpretation of one of the statutes the agency administers, the court may "defer[] to the [agency's] regulations and precedential decisions interpreting [the statute]." (*Id.* at pp. 271-272.) Precedential decisions can be consulted for this purpose even though they are not published judicial decisions. (*Styne v.*

¹ Some the decisions referenced in this letter are unpublished court decisions, which are discussed herein only for context.

Stevens (2001) 26 Cal.4th 42, 53, fn. 4 ["the rules of court do not bar our citation of such unpublished decisions to demonstrate administrative construction"].)

Precedential decisions can also serve as indicia of legislative intent to confirm the agency's interpretation when the Legislature does not clarify or amend a statute *after* the agency renders its construction of the statute or regulation at issue in a precedential decision. The California Supreme Court explained this principle in *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 235, at fn. 7:

The presumption that the Legislature is aware of an administrative construction of a statute should be applied only on a showing that the construction or practice of the agency had been made known to the Legislature (*Pacific Greyhound Lines v. Johnson* (1942) 54 Cal.App.2d 297, 303 [129 P.2d 32]), or is one of such long standing that the Legislature may be presumed to know of it. [¶] (*El Dorado Oil Works v. McColgan* (1950) 34 Cal.2d 731, 739 [215 P.2d 4].) Because the Legislature authorized the FEHC to establish the system of publication in which precedential decisions are printed (§ 12935, subd. (h); Labor Code, former § 1418, subd. (i)) the Legislature now is presumed to be aware of the two administrative decisions on which the Court of Appeal relied, and thus has reason to be aware of the construction the agency placed on its own regulation.

B. Courts Remain Free to Agree or Disagree with the Agency's Interpretation Set Forth in a Precedential Decision.

Because precedential decisions only offer *evidence* of legislative intent, courts treat precedential decisions as non-binding authority. As such, courts may or may not agree with the agency's construction. (*California Dept. of Corrections v. SPB* (2004) 121 Cal.App.4th 1601, 1618.) Thus, while courts must give careful consideration to the agency's interpretation of a statute, courts are not bound by the agency's interpretation, as the interpretation of a statute is ultimately a judicial function. (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 951 ["although we give the Department's interpretation great weight [citation], this court bears the ultimate responsibility for construing the statute"]; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.)

Accordingly, courts can and have overturned such precedential designations. (See *Plumbers and Steamfitters, Local v. Duncan* (2007) 157 Cal.App.4th 1083, 1095-1096 [successful plaintiff awarded C.C.P. § 1021.5 attorneys fees for overturning Department of Industrial Relations' precedent decision]; *California Dept. of Corrections v. SPB, supra*, 121 Cal.App.4th at p. 1619 [in its precedential decision, in certain respects, the "SPB erred in applying the current statute"] and *Department of Transportation v. State Personnel Board* (2009) 178 Cal.App.4th 568, *4 [SPB designated as precedential its decision that the exclusionary rule applied to incriminating evidence used in a civil disciplinary proceeding; Court

reversed noting that "[t]his is a question of law, which we review independently . . ."; *Department of Youth Authority v. SPB* 2003 WL 21541155, *8-*9 [Court upheld trial court decision, but ruled that three bases of the SPB precedential decision could no longer "be considered as precedent"].)

In addition, at least in the CUIAB context, if a precedent decision is modified on judicial review, the agency must "promptly" modify it to "conform in all respects to the judgment of the court." (Unemployment. Ins. Code, § 409.1.) There is no reason why this expectation should not apply to other agencies whose precedential decisions are overturned.

C. Even Within an Agency, a Precedential Decision Does Not Relieve the Agency of Proving its Case.

A precedential decision is nothing other than another manifestation of the basic doctrine of *stare decisis*, i.e., that like cases should be treated alike. This doctrine is essential to the judicial system because it guarantees predictability of the law and fairness of adjudication. (See R.W.M. Dias, *Jurisprudence* 164, 172 (Butterworth & Co. 1976)[In discussing the factors that brought *stare decisis* into being and are keeping *stare decisis* alive, the author commented: "[I]t is essential to foster confidence in [*stare decisis*] impartiality and in the judges who administer it; and this has given rise to the fundamental principle that like cases should be treated alike [] Equality of treatment, consistency and impartiality are bound up with the need for certainty and predictability."].)

However, the existence of precedential decisions does not render moot any further, meaningful administrative adjudication by an agency. Precedential decisions are simply another source of binding authority *on the administrative agency that issued them*. But just as the existence of binding authority does not relieve a trial or other court from weighing evidence and determining to what extent, if any, the binding authority may apply or control the outcome in a particular case, a precedential decision does not relieve an administrative agency from carrying out its full adjudicatory function to consider on the merits, the unique case before it:

The strong respect for precedent which inheres in our legal system has its qualifications and limitations. It does not call for a blind, arbitrary and implicit following of precedent, but recognizes . . . that it is more important as to far reaching judicial principles that the court should be right than that it merely be in harmony with its previous decisions. Such a respect for precedent balks at the perpetuation of error, and the doctrine of *stare decisis* is, after all, subordinate to legal reason and is properly departed from if and when such departure is necessary to avoid the perpetuation of error.

(*United States v. Minnesota* (8th Cir. 1940) 113 F.2d 770, 774-775.)

Mary Armstrong, Esq., Chief Counsel
Commission on Teacher Credentialing
November 12, 2009
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Please feel free to contact me if you have any further questions about this topic. Thank
you.

Sincerely,



DOUGLAS M. PRESS
Senior Assistant Attorney General

For EDMUND G. BROWN JR.
Attorney General

DMP:sw:

ATTACHMENT 2

Sample

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

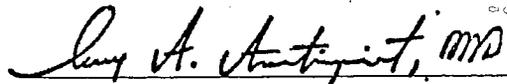
In the Matter of the Accusation Against:)	
)	OAH No. N2002050521
)	
JOSEPH F. BASILE, M.D.)	MBC Case No. 03-2000-108170
)	
Physician's and Surgeon's)	PRECEDENTIAL DECISION
Certificate No. G 74601)	No. MBC-2007-01-Q
)	
Respondent.)	
_____)	

DESIGNATION AS A PRECEDENTIAL DECISION

Pursuant to Government Code section 11425.60 and Title 16 CCR 1364.40, the Division of Medical Quality, Medical Board of California, hereby designates as precedential Decision No. MBC-2007-01-Q those sections listed below of the decision in the Matter of the Accusation Against Joseph F. Basile, M.D.

- 1) Factual Findings 1 and 2; the first sentence of Factual Finding 3; Factual Findings 4 and 5; and Factual Finding 6 except for the last two sentences.; and
- 2) Legal Conclusions 1 through 5.

This precedential designation shall be effective July 27, 2007.



Cesar A. Aristeiguieta, M.D., F.A.C.E.P.,
President
Division of Medical Quality
Medical Board of California

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JOSEPH F. BASILE, M.D.
130 Coffee Road, Suite 7
Modesto, California 95355

Physician and Surgeon's
Certificate No. G 74601

Respondent.

Case No. 03-2000-108170

OAH No. N2002050521

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings on May 24 through 27, and June 16, 2004, in Oakland, California.

Jose R. Guerrero, Deputy Attorney General, represented complainant.

Robert B. Zaro, Esq., represented Joseph F. Basile, M.D., who was present.

The case was submitted for decision on June 16, 2004.

FACTUAL FINDINGS

1. Complainant Ronald Joseph was formerly the Executive Director of the Medical Board of California (Board). The Accusation and First and Second Amended Accusations were issued by him in his official capacity.

2. On July 9, 1992, the Board issued Joseph F. Basile, M.D. (respondent) Physician and Surgeon's Certificate No. G 74601. The certificate was current at all times pertinent to this matter. It was due to expire on May 31, 2004, if not renewed. There has been no prior disciplinary action taken against this certificate.

3. The allegations against respondent arise from his involvement in and operation of a medical office called "The Vein & Cosmetic Enhancement Center" (VCEC).

* * * * *

4. Professional Background. Respondent attended Georgetown University School of Medicine, graduating in 1987. He completed a portion of his residency at Georgetown University before transferring to St. Francis Hospital, affiliated with the University of Connecticut. Respondent became board certified in general surgery in April 1996. Between 1992 and 1999 he was on the medical staff of Salinas Surgery Center in Salinas, California. He also associated with the Monterey Peninsula Surgery Center. He describes his work in Salinas as a "bread and butter general surgery practice" involving hernia repairs, gall bladder, blunt trauma, cancers of all sorts and gastrointestinal surgery. Respondent also served as the medical director of VCEC, a business wholly owned by his wife, Vina Basile. She is neither a physician nor a nurse and she holds no other health profession licenses. VCEC was located in Carmel. Respondent relocated his medical practice to Modesto, where he worked for a short time with the Stanislaus County Health Services Agency. Vina Basile remained behind and continued to work in the Carmel VCEC office for a period before that office was closed in March 2001. VCEC moved to Modesto and respondent continued there in his position as its medical director.

5. PhotoDerm Vasculight Machine. Much of this case revolves around the use of a medical device known as a PhotoDerm Vasculight machine. In 1998, respondent became interested in new equipment that could be used for certain cosmetic procedures in a medical office setting. He leased a PhotoDerm Vasculight machine from a company called ESC Medical Systems, and this machine was delivered to his Salinas office in September or October 1998. The PhotoDerm Vasculight machine was designed for the treatment/removal of pigmented lesions, varicose veins, spider veins, reticular veins, age spots and hair. It works on the principle of light selectively being absorbed into pigment and then being converted into heat energy. The heat induces photocoagulation of blood vessels, a mild thermal destruction, without actually bursting the vessels. The body apparently repairs this damage and absorbs the damaged vein. This process causes the vein or cosmetic blemishes to fade. The concept and technology were developed and tested through the early 1990s, and approved by the Food and Drug Administration in early 1994. It is viewed as a relatively safe and non-invasive alternative to previous modes of removing blemishes. For example, one alternative, sclerotherapy, requires injection of an irritating solution to destroy the inner lining of veins, causing clotting and spasm. The new technology eliminated the need for sclerotherapy for most patients.

There are other light emitting devices on the market similar to the one manufactured by ESC Medical Systems. However, the PhotoDerm Vasculight machine is unique in that it combines two light components into a single unit. The PhotoDerm component emits intense pulse light (IPL) through a hand piece, 5 to 15 mm wide. Filters are used to vary the wavelength of light emitted and this will affect the degree of skin penetration. For example, shorter wavelengths (550 nanometers (nm)) will penetrate 1 – 2 mm, and longer wavelengths (near the infrared spectrum) will penetrate 4 – 6 mm. The amount or dose of light delivered per surface unit area is called fluence, and it is measured in joules per square centimeter (J/cm²). The duration and number of pulses can also be varied. The operator may input these several parameters into a computer software program that allows for individualized settings. Patients are typically categorized according to a Fitzpatrick skin type scale that

incorporates their responses to a questionnaire on genetic disposition, reaction to sun exposure and tanning habits. The resulting Fitzpatrick scaled score (Skin Types I – VI) will guide the operator in making appropriate settings. The PhotoDerm or IPL component is particularly effective for treating the small varicose and “spider veins.”

The second component (Vasculight) is essentially a laser. It is a single very long wavelength (1064 nm) of light amplified by reflecting mirrors. The beam from the laser hand piece is relatively small (4 mm circle) and because it emits a stronger and more coherent light beam it can be used effectively to treat larger veins. The Photoderm Vasculight machine operator can alternate between IPL or laser settings. The machine itself can also provide the operator with recommended settings based on the patient’s skin type and the type of lesion (small, medium or deep) that is being treated. The operator may accept these settings or enter different ones. When the treatment is completed, information about each patient’s treatment is stored in the machine’s computer and can be retrieved later and printed at any time. These records contain patient identifying information, skin type, date and site of treatment, and the settings/figures for wavelength, fluence, pulse duration and number. The operator can also type narrative information under sections describing “Immediate response” and “Note.”

6. Respondent and Vina Basile both received training on the operation and use of the PhotoDerm Vasculight from the manufacturer. Both operated the machine. Vina Basile was VCEC’s only officer and sole shareholder. Respondent was a non-salaried employee of VCEC. His duties as the corporation’s medical director were to obtain patient histories, conduct physical examinations and determine whether individuals were viable candidates for cosmetic procedures. After obtaining the patient’s Fitzpatrick skin typing he would determine the appropriate IPL or laser settings for patients. Respondent also had sole responsibility for preparing and submitting patient medical evaluations and for setting fees. There were times when Vina Basile used the machine on patients without respondent also being present.

* * * * *

LEGAL CONCLUSIONS

Unlicensed Medical Practice

1. Respondent is charged with aiding and/or abetting the unlicensed practice of medicine. The primary issue is whether unlicensed individuals can administer IPL or laser treatments to patients.

The scope of medical practice is defined by statute. It cannot be expanded by consideration of practitioners’ knowledge, skill, experience or what is taught to practitioners in schools and colleges. (See *People v. Mangiagli* (1950) 97 Cal.App.2d Supp. 935, 939; *Crees v. California State Board of Medical Examiners* (1963) 213 Cal.App.2d 195, 204;

Magit v. Board of Medical Examiners (1961) 57 Cal.2d 74, 85.) Neither can the scope of medical practice be determined by the practices which have developed in the medical profession and are allegedly common. (*Crees v. California State Board of Medical Examiners, supra*, 213 Cal.App.2d at pp. 207-208; *Magit v. Board of Medical Examiners, supra*, 57 Cal.2d at pp. 85-86.) The custom and practice of a particular industry or profession is not controlling in determining the intent of the legislature. (*Jacobsen v. Board of Chiropractic Examiners* (1959) 169 Cal.App.2d 389, 395; *Bendix Forest Products Corp. v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465, 471.) Thus, statutory interpretation is purely a question of law.

The fundamental rule of statutory construction is that a court should ascertain the intent of the legislature so as to effectuate the purpose of the law. (*T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 277.) Reference is first made to the words of the statute. They are to be construed in context of the nature and obvious purpose of the statute where they appear. An attempt is to be made to give effect to the usual and ordinary import of the language and to avoid making any language mere surplusage. (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School District* (1978) 21 Cal.3d 650, 658-659.) Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction. (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340.)

2. The relevant statute in this case is Business and Professions Code section 2052, subdivision (a), which provides as follows:

...[A]ny person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of doing a valid, unrevoked, or unsuspended certificate as provided in this chapter or without being authorized to perform the act pursuant to a certificate obtained in accordance with some other provision of law is guilty of a public offense, ...

Companion section 2051 of the Business and Professions Code authorizes a physician certificate holder "to use drugs or devices in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, and other physical and mental conditions."

It is clear that the legislature intended to allow only those holding certain certificates to treat blemishes, or other physical conditions. (Bus. & Prof. Code, § 2052, subd. (a).) It is also clear that included within the scope of medical practice is the physician's authority "to penetrate the tissues of human beings and to use any and all other methods" in the treatment of physical conditions. (Bus. & Prof. Code, § 2051.) IPL and laser treatment fall within the

ambit of these statutes. These medical devices are designed to treat blemishes or physical conditions involving the veins and skin. Human tissue is penetrated anywhere from 1 to 6 mm depending upon the machine setting. And such tissue penetration is not without attendant risks. The informed consent form warned the patient of the possibility of rare side effects such as scarring and permanent discoloration, as well as short term effects such as reddening, mild burning, temporary unsightly bruising, and temporary discoloration of skin. These negative outcomes were confirmed by medical expert John Stuart Nelson, M.D., and also by the experience of patient S.S. In short, the use of IPL and laser clearly involves penetration of human tissue and therefore falls within the scope of medical practice.

3. Respondent agrees that Business and Professions Code section 2052 is the governing statute. He contends rather that medical "practice" is a term of art and that unlicensed medical assistants are permitted to provide adjunctive and technical supportive services to physicians under authority of Business and Professions Code section 2069. Subdivision (a)(1) of Business and Professions Code section 2069 provides: "Notwithstanding any other provision of law, a medical assistant may administer medication only by intradermal, subcutaneous, or intramuscular injections and perform skin tests and additional technical supportive services upon the specific authorization and supervision of a licensed physician and surgeon or a licensed podiatrist." "Specific authorization" means a specific written order prepared by the supervising physician authorizing the procedures to be performed and placed in the patient's medical record. (Bus. & Prof. Code, § 2069, subd. (b)(2).) "Supervision" must be by one "who shall be physically present in the treatment facility during the performance of those procedures." (Bus. & Prof. Code, § 2069, subd. (b)(3).) "Technical supportive services" is defined as "simple routine medical tasks and procedures that may be safely performed by a medical assistant who has limited training and who functions under the supervision of a license physician and surgeon...." (Bus. & Prof. Code, § 2069, subd. (b)(4).) Regulations set forth specific technical supportive services that can be performed by medical assistants, including administration of medications orally, sublingually, topically, vaginally or rectally; performing electrocardiogram, electroencephalogram or plethysmography tests; application and removal of bandages and dressings and certain orthopedic appliances; removal of sutures or staples from superficial incisions or lacerations, performing ear lavage; and collection by non-invasive techniques specimens for testing. (Cal. Code Regs., tit. 16, § 1366, subd. (b).)

Respondent notes that medical assistants are allowed by law to perform procedures at least as invasive as IPL or laser treatments, including administration of medication by intramuscular injections. He contends that medical assistants who are merely providing adjunctive services to a physician's medical practice and who are not practicing a particular profession – that is to say, they are not independently exercising discretion and specialized training to prescribe and implement a course of action – are not practicing medicine. (*PM & R Associates v. Workers Comp. Appeals Bd.* (2000) 80 Cal.App.4th 357.) Respondent believes Vina Basile's administration of IPL and laser treatment should be viewed in this same light.

4. Business and Professions Code section 2069 carefully limits the type of, and manner by which medical assistants perform certain procedures. In all cases the procedures must be performed while certain approved supervisors are physically present in the treatment facility. Respondent was not always physically present when Vina Basile administered IPL and laser treatments to patients. The tasks performed by medical assistants are to be "simple routine medical tasks and medical procedures" that may be performed by one who has limited training. In some respects, Vina Basile performed in a strictly adjunctive capacity to respondent. Respondent, and not Vina Basile, was responsible for making overall treatment decisions. For example, it was respondent who obtained patient histories, performed physical examinations, determined whether patients were appropriate candidates for treatment and who determined appropriate machine settings. Vina Basile exercised no independent discretion and she had not authority in these areas. Yet it was Vina Basile who was 100 percent shareholder and sole corporate officer for VCEC. It was her business. Importantly, the treatment was not ancillary to respondent's workup or diagnosis of a patient's condition. Instead, it was the primary treatment mode sought by patients seeking removal of unsightly varicose veins or other cosmetic blemishes. In that regard it differs from most, if not all, of the "technical supportive services" routinely performed by medical assistants. (Cal. Code Regs., tit. 16, § 1366, subd. (b).) When Vina Basile provided IPL/laser treatment to patients, particularly when respondent was absent from the facility, she was not performing adjunctive services for respondent. She engaged in the unlicensed practice of medicine.

Respondent points out that intradermal, subcutaneous or intramuscular injections performed by medical assistants involve more penetration of human tissue than IPL or laser. However, these are limited exceptions, set forth in statute, to the general rule limiting those who are authorized to penetrate tissue for medical purposes. And even before medical assistants can perform intramuscular, subcutaneous and intradermal injections, or venipuncture for the purposes of withdrawing blood, they are required to complete minimum training (10 hours for each of the different procedures) and to demonstrate proficiency to their supervising physicians. (Cal. Code Regs., tit. 16, § 1366.1.) No such regulations are in place to ensure that medical assistants operating IPL/laser machines are adequately trained. The training received by Vina Basile from ESC Medical Systems may have been adequate, but it is irrelevant to the question of whether there is a legislative intent to include procedures such as IPL/laser within the definition of "technical supportive services" that can be performed by medical assistants. That simply does not appear to be the case at this time. Absent further legislative authority and/or regulatory action, medical assistants cannot legally perform IPL/laser treatments on patients.

5. Respondent aided and/or abetted the unlicensed practice of medicine by allowing Vina Basile to use the IPL/laser to treat patients. Business and Professions Code section 2264 provides: "The employing, directly or indirectly, the aiding, or the abetting of any unlicensed person ... to engage in the practice of medicine or any other mode of treating the sick or afflicted which requires a license to practice constitutes unprofessional conduct." A violation of section 2264 does not require a showing of either knowledge or intent on the part of the practitioner. (*Khan v. Medical Board* (1993) 12 Cal.App.4th 1834, 1844-1845.) The

objective of section 2264 is the protection of the public from certain forms of treatment by unlicensed and presumably unqualified persons. (*Newhouse v. Board of Osteopathic Examiners* (1958) 159 Cal.App.2d 728, 734.)

For these reasons, cause for disciplinary actions exists under Business and Professions Code section 2264. Respondent engaged in unprofessional conduct by aiding and/or abetting the unlicensed practice of medicine by Vina Basile.

* * * * *

DATED: July 16, 2004

JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings

WELCOME TO
THE MEDICAL BOARD OF CALIFORNIA
Department of Consumer Affairs

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Precedential Decisions

Under the Administrative Procedure Act (APA) a decision that contains a significant legal or policy determination of general application that is likely to recur may be designated as precedential (see Government Code section 11425.60). Once a decision is designated as precedential, the Medical Board of California (hereinafter "Board") may rely on it, and parties may cite to such decision in their argument to the Board and courts. The Board adopted section 1364.40, Title 16, California Code of Regulations to implement its authority to designate decisions as precedential.

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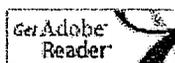
→ **Unlicensed Practice of Medicine**

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* Appealed to the Superior Court, Court of Appeals, or Supreme Court

** Reversed as a precedential decision by the Board

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ATTACHMENT 3

BEFORE THE
DEPARTMENT OF SOCIAL SERVICES
STATE OF CALIFORNIA

In the Matter of:)	DSS No. 6696248001-B
)	OAH No. L-9701109
ROGELIO ADDUN BACUD)	
dba A and C Guest Home)	99 CDSS 01
12411 Magnolia Street)	
Garden Grove, CA 92641)	
("facility #1"))	
)	
dba Gary Guest Home)	
11892 Gary Street)	
Garden Grove, CA 92640)	
("facility #2"))	
)	
<u>Respondent.</u>)	

PROPOSED DECISION

On February 24, 1997, in Orange, California, Greer D. Knopf, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Daniel S. Cohen, Staff Counsel, appeared on behalf of complainant.

Respondent Rogelio Addun Bacud appeared on his own behalf.

Evidence was received, the record was closed and the matter was submitted.

FINDINGS OF FACT

I

The Accusation dated December 26, 1996, is brought by Martha Lopez in her official capacity as Deputy Director, Community Care Licensing Division of the Department of Social Services (hereinafter referred to as "complainant") against respondent Rogelio Addun Bacud, doing business as A and C Guest Home, located at 12411 Magnolia Street, Garden Grove, California (facility #1) and doing business as Gary Guest Home, located at 11892 Gary Street, Garden Grove, California (facility #2).

Respondent filed a Notice of Defense on January 8, 1997 requesting a hearing in this matter.

II

Respondent holds a license to operate adult residential facility #1 known as A and C Guest Home first issued by the Department of Social Services, State of California (hereinafter referred to as "the Department") on March 14, 1995. Facility #1 is licensed to care for up to 18 mentally ill adults ages 18 through 59. Respondent also holds a license to operate adult residential facility #2 known as Gary Guest Home issued by the Department on April 14, 1993. Facility #2 is licensed to care for up to 6 mentally ill adults ages 18 through 59.

III

In July, 1996, client #1 was a resident at facility #1. Client #1 was a 29 year old woman suffering from a mental illness. Respondent began a friendship with client #1 and she would confide in respondent about her personal love life. Respondent allowed the relationship to become very personal. He told client #1 he loved her and encouraged her to consider having a sexual relationship with him. Sometime during July, 1996, respondent had sexual intercourse with client #1. This conduct is a breach of the fiduciary relationship between respondent as a caregiver and client #1 as a resident of his facility. Such conduct is inimical to the health and welfare of client #1 and to the people of the State of California.

IV

On February 22, 1994, the medication log maintained in facility #2 was not kept current for all the clients. Then on May 9, 1995, the medication log in facility #1 was not properly signed. Thereafter, on November 14, 1995, a staff member in facility #2 gave the wrong prescription drug to a client at the facility. The client had not been prescribed the medication that the client was given. Subsequently, on or about February 8, 1996, the medication log at facility #2 for one of the residents was missing.

On November 14, 1995, one client at facility #2 was not given appropriate medical or dental care for a problem with a tooth. On December 12, 1995, there was no regular schedule for the client's dental care in place at facility #2.

V

On January 23, 1996, respondent failed to keep toilet paper available for the residents in the bathroom at facility #1. Respondent would only distribute toilet paper upon request from the clients on an as needed basis. Respondent also did not furnish towels to the clients at facility #1. Respondent now provides toilet paper and towels in the bathroom at facility #1.

On February 22, 1994, the hot water temperature at facility #1 exceeded 120 degrees. On May 9, 1995, the hot water temperature at facility #1 exceeded 120 degrees. On January 23, 1996, the hot water temperature still exceeded 120 degrees. Respondent eventually corrected this problem.

VI

On May 9, 1995, there were no screens on the bedroom windows at facility #1 and there were flying insects present in the facility. On January 23, 1996, there were no screens on the windows and doors of facility #1 and there were flying insects present in the facility. On February 8, 1996, toxics were not locked up and were accessible to the clients in facility #2. Respondent has since corrected these problems at both facilities.

VII

On January 23, 1996, respondent failed to properly maintain the necessary records for clients #1, #2, #3, #4, #5 and #6 at facility #1.

VIII

Respondent likes being a care provider and would like to continue providing a home for his residents. He is worried about where his residents will go if his facilities are closed. Client #1 left respondent's facility and died two months later in a fire. Respondent feels great remorse over this episode with client #1. However, given the aggregious nature of his actions with client #1, remorse is not enough to assure the administrative law judge that something similar would not happen again with another client. Such a relationship can be extremely destructive to a resident and cannot be allowed to happen again. Respondent is married and has children. Neither his family nor his fiduciary duty to his clients stopped him from acting on his emotions with client #1.

There is no evidence to indicate that he would not act on his emotions again if presented the opportunity. It would be against the interest of the public to allow respondent to continue to hold the trusted position of a licensee.

DETERMINATION OF ISSUES

I

Cause exists to discipline respondent's license pursuant to Health and Safety Code section 1550(c) in that respondent engaged in conduct which is inimical to the health, welfare or safety of the people receiving services from the facility and the people of the State of California by having sexual intercourse with client #1, as set forth in Findings II, III and VIII.

II

Cause exists to discipline respondent's license pursuant to Health and Safety Code section 1550 (a) and (b) and Title 22 California Code of Regulations sections 80065 and 85065 in that respondent violated regulations regarding personnel requirements by hiring a staff member who was not competent enough to properly administer prescribed medication to the clients, as set forth in Finding IV.

III

Cause exists to discipline respondent's license pursuant to Health and Safety Code section 1550 (a) and (b) and Title 22 California Code of Regulations sections 80075 and 85075 in that respondent repeatedly violated or allowed the violation of regulations regarding health related services for the clients, as set forth in Finding IV.

IV

Cause exists to discipline respondent's license pursuant to Health and Safety Code section 1550 (a) and (b) and Title 22 California Code of Regulations sections 80088 and 85088 in that respondent violated or allowed the violation of regulations regarding fixtures and furniture by failing to provide toilet paper, towels and safe hot water, as set forth in Finding V.

V

Cause exists to discipline respondent's license pursuant to Health and Safety Code section 1550 (a) and (b) and Title 22 California Code of Regulations sections 80087 and 85087 in that respondent violated the regulations regarding buildings and grounds, set forth in Finding VI.

VI

Cause exists to discipline respondent's license pursuant to Health and Safety Code section 1550 (a) and (b) and Title 22 California Code of Regulations sections 80070 and 85070 in that respondent violated the regulations regarding client records, set forth in Finding VII.

ORDER

I

Respondent Rogelio Addun Bacud's license number 306000166 to operate an adult residential home at 12411 Magnolia Street, Garden Grove, California, issued by the Department of Social Services, State of California, is hereby revoked.

II

Respondent Rogelio Addun Bacud's license number 300613158 to operate an adult residential home at 11892 Gary Street, Garden Grove, California, issued by the Department of Social Services, State of California, is hereby revoked.

ATTACHMENT 4

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal By) SPB Case No. 25506
)
 GORDON J. OWENS) BOARD DECISION
) (Precedential)
 From dismissal from the position)
 of State Traffic Officer,) NO. 92-11
 California Highway Patrol at)
 Santa Ana) July 13, 1992

Appearances: Anthony M. Santana, Attorney, California Association of Highway Patrolmen, representing appellant, Gordon J. Owens; Marybelle Archibald, Deputy Attorney General, representing respondent, California Highway Patrol

Before Carpenter, President; Stoner, Vice-President; Burgener and Ward, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the attached Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Gordon J. Owens (appellant or Owens) from dismissal from his position of State Traffic Officer, with the California Highway Patrol (CHP).

The ALJ modified the dismissal to a suspension for one year, finding the case identical to the case of Bobby J. Lee (1988) SPB Case No. 22750, a non-precedential decision of the Board rendered in another CHP case where the Board had modified a dismissal to a one-year suspension. Recognizing that the Bobby J. Lee case was non-precedential, and despite her opinion expressed in the Proposed Decision that dismissal was warranted, the ALJ nevertheless felt bound to follow the Board's decision in that case, in which a State

(Owens continued - Page 2)

Traffic Officer "admit[ted] marijuana use, [was] cooperative with investigators and [sought] professional help to rid himself of the habit."

After review of the entire record, including the transcripts, the written briefs submitted by the parties, and having heard oral arguments, the Board finds that the ALJ's findings of fact are free from prejudicial error. We are also in substantial agreement with her conclusions of law, and adopt her decision as our Precedential Decision, with the exception of the discussion on penalty and application of the Bobby J. Lee case. We find the penalty of dismissal should be sustained for the reasons set forth below.

DISCUSSION

When performing its constitutional responsibility to "review disciplinary actions" [Cal. Const. Art. VII, section 3 (a)], the Board is charged with rendering a decision which, in its judgment, is "just and proper." (Government Code section 19582). One aspect of rendering a "just and proper" decision involves assuring that the discipline imposed is "just and proper." In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board has broad discretion. (See Wylie v. State Personnel Board (1949) 93 Cal. App.2d 838). The Board's discretion, however, is not unlimited. In the seminal case

(Owens continued - Page 3)

of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion which is, in the circumstances, judicial discretion. (Citations) (15 Cal.3d at 217-218).

In exercising its judicial discretion in such a way as to render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly as follows:

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id.)

Harm or potential harm to the public service is almost certain to exist in a case where the employee's off-duty misconduct is of such a nature that it causes discredit to the employer or the employment within the meaning of Government Code section 19572(t).

The courts have consistently recognized that peace officers bring discredit to their employment under Government Code section 19572(t) by violating the laws they are employed to enforce. In Constancio v. State Personnel Board (1986) 179 Cal.App.3d 980, an appellate court held that a group supervisor employed by the

(Owens continued - Page 4)

California Youth Authority was properly dismissed based on his conviction of driving under the influence of PCP. In Parker v. State Personnel Bd. (1981) 120 Cal.App.3d 84, the same court affirmed the dismissal of a group supervisor employed by the California Youth Authority based on his possession of a large amount of marijuana, noting the irreconcilability of the appellant's behavior and his job. In Hooks v. State Personnel Bd. (1980) 111 Cal. App.3d 572, a court affirmed the dismissal of a correctional officer who had possessed marijuana and hashish. In all three cases, the appellate courts found the penalty of dismissal not clearly excessive.

In the instant case, appellant admitted that he would go to bars, strike up conversations with different people, and pay them approximately \$25.00 for an eighth of an ounce of marijuana. The record established that at the time of the incidents at issue, selling marijuana was a felony and purchasing it a misdemeanor. Thus, appellant was seeking out others and encouraging them to commit a felony, while committing a misdemeanor himself in the process. The harm to the public service and potential harm of such misconduct by a State Traffic Officer is serious.

The case of Warren v. State Personnel Board (1979) 94 Cal. App.3d 95 is particularly instructive in assessing the harm to the public service resulting from appellant's behavior in the case

(Owens continued - Page 5)

under consideration. In the Warren case, a California appellate court noted:

A law enforcement agency cannot permit its officers to engage in off-duty conduct which entangles the officer with lawbreakers and gives tacit approval to their activities. Such off-duty conduct casts discredit upon the officer, the agency and law enforcement in general.

(94 Cal.App.3d at 106)

Appellant argues, and the ALJ found, that prior decisions of the Board, in cases where an employee was charged with drug use, compel a different result. Preliminarily, we note that Proposed Decisions of the ALJs, even if adopted by the Board, do not automatically have binding precedential effect. The Board may choose to accord precedential effect to a Proposed Decision of an ALJ [See e.g. In the Matter of the Appeal by Leah Korman (1991) SPB Dec. No. 91-04] or to one of its own decisions by specifically designating the decision as precedential. (Government Code section 19582.5) If, however, a decision is not designated as precedential, it may be cited only as persuasive, not binding, authority.

None of the decisions cited by appellant were designated as precedential. Furthermore, we are not persuaded by those decisions that we should modify the original penalty of dismissal imposed by the CHP, as we find them all distinguishable from the case before us. In Cortez Brown (1988) SPB Case No. 22834, an Employment Program Representative with the Employment Development Department

(Owens continued - Page 6)

was dismissed after his admittedly serious drug and alcohol addiction manifested itself in excessive tardiness and absenteeism over a period of one year. The Board adopted an ALJ's Proposed Decision which modified the dismissal to a suspension based upon the ALJ's findings that Brown was a long-term employee with no prior adverse actions who had successfully rehabilitated himself.

In Brown, the Board saw fit to give a second chance to a non-peace officer employee under specific circumstances it felt warranted that second chance. In a recent Precedential Decision, the Board held that non-peace officers' off-duty conduct is not subject to the same strict scrutiny applied to the conduct of peace officers. [See Charles Martinez (1992) SPB Dec. 92-09].

The peace officer cases cited by appellant are likewise distinguishable from the instant case. In Elliot Veal (1988) SPB Case No. 23854, the Board adopted an ALJ decision modifying the dismissal of a Correctional Officer to a four-month suspension. Although Veal was charged with purchase and use of cocaine, the record established marijuana use only. In reaching his decision to reduce the penalty imposed, the ALJ took note of the fact that the Department of Corrections had not dismissed other Correctional Officers who had used marijuana and concluded that Veal should not

(Owens continued - Page 7)

be the victim of disparate treatment by the Department of Corrections.¹

The ALJ's proposed decision in the case of Mark Thompson, SPB Case No. 27137, cited by appellant for its persuasive authority, was rejected by the Board. On June 11, 1992, the Board issued a non-precedential decision in that case sustaining the dismissal of a lifeguard for using cocaine.

In the Bobby J. Lee case, relied on by the ALJ and appellant, Lee obtained much of his marijuana from his wife without inquiring as to her sources. On one occasion, he accepted three to five joints from house guests. Nothing in the Bobby J. Lee decision suggests that Lee purchased marijuana himself or encouraged others to sell it to him. Thus, even assuming Bobby J. Lee had

¹The case of Ron D. Stevens (1989) SPB Case No. 23002 was also cited by the appellant. The Board's decision in that case was successfully challenged in superior court after a consolidated hearing on cross writs of administrative mandate [Department of Corrections v. State Personnel Bd. (Monterey County Superior Ct. Case No. 89865) and Stevens v. Department of Corrections (Monterey Superior Court Case No. 90262)]. The SPB took a neutral role in that proceeding, filing only a notice of appearance. Before the SPB had had an opportunity to act on the superior court judgment and writ of mandate remanding the case to it for further findings, the trial court judgment was appealed to the Court of Appeal, Sixth Appellate District. [Stevens v. Department of Corrections (Case No. H008001)]. On February 6, 1972, the appellate court remitted the case back to superior court, concluding that the appellant had not exhausted his administrative remedies since the SPB had not had an opportunity to act on the earlier superior court remand. As of the date of the preparation of this Decision, the case has not been again remitted to the jurisdiction of the SPB. Since the case may again come before us, we decline to comment on our original decision in that case or to recognize it as persuasive authority.

(Owens continued - Page 8)

precedential effect, the facts are distinguishable as that case involved personal marijuana use rather than solicitation of felonious activity.²

Appellant argues that "drug abuse is no different than alcohol abuse" and cites several non-precedential decisions as persuasive authority to support for his argument that suspension is the appropriate penalty for appellant's misconduct. We do not agree that drug abuse and alcohol abuse must or should be treated the same way. Alcohol use or abuse, in and of itself, however destructive it might be to the workplace, is not a crime. Had appellant's problem been alcoholism alone, a different result might have inured.

In short, we are neither compelled by prior precedent nor persuaded by the non-precedential authority cited to order a reduction in penalty from dismissal to suspension in this case.

Finally, appellant argues that we should consider his rehabilitation as a factor in assessing penalty. Although the Board has discretion to consider rehabilitation in assessing the "likelihood of recurrence" prong of the Skelly test for assessment of penalty [Department of Parks and Recreation v. State Personnel Board (Duarte) (1991) 133 Cal.App.3d 813], the harm to the public

²We note that the question of whether personal marijuana use by a peace officer warrants dismissal in all cases is not before us, and we do not decide that issue today.

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service remains our "overriding concern" as mandated by Skelly. The court in Duarte specifically noted that post-disciplinary rehabilitation is not enough, in and of itself, to justify overturning a dismissal. (133 Cal. App.3d at 829). In the instant case, we feel that the fact that appellant participated in a rehabilitation program is insufficient to outweigh the harm and potential harm to the public service arising from appellant's misconduct. Based on the factual findings of the ALJ, neither do we find the circumstances surrounding the misconduct sufficient to justify overturning the dismissal.

CONCLUSION

For all of the reasons set forth above, the penalty of dismissal must be sustained.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The above-referenced adverse action of dismissal taken against GORDON J. OWENS is sustained.
2. This decision is certified for publication as a Precedential Decision (Government Code section 19582.5).

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STATE PERSONNEL BOARD*

Richard Carpenter, President

Alice Stoner, Vice-President

Clair Burgener, Member

Lorrie Ward, Member

*Member Richard Chavez did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 13, 1992.

GLORIA HARMON

Gloria Harmon, Executive Officer
State Personnel Board