

**NOT DESIGNATED FOR PUBLICATION**

**RANDALL M. SCHAFFER,  
D.D.S.**

**VERSUS**

**LOUISIANA STATE BOARD  
OF DENTISTRY**

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**NO. 2001-CA-1399**

**COURT OF APPEAL**

**FOURTH CIRCUIT**

**STATE OF LOUISIANA**

APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2000-15266, DIVISION "J"  
HONORABLE NADINE M. RAMSEY, JUDGE

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**Chief Judge William H. Byrnes, III**

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(Court composed of Chief Judge William H. Byrnes, III, Judge James F. McKay, III, and Judge David S. Gorbaty)

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**AFFIRMED**

Randall M. Schaffer, D.D.S., appeals from the district court judgment that upheld the findings of the three-member panel Committee of the Louisiana State Board of Dentistry (“Board”), revoking Dr. Schaffer’s license to practice and charging him with costs and attorney’s fees. We affirm.

The Dental Board began investigating Dr. Schaffer in 1995. The Board held an administrative hearing beginning on March 24, 2000. On September 5, 2000, the Board Committee rendered a decision, revoking Dr. Schaffer’s dental license. In its revised decision dated September 20, 2000, the Board Committee substituted initials in place of patients’ names. The Board Committee assessed costs and attorney’s fees in the amount of \$217,852.13. On October 5, 2000, Dr. Schaffer filed a petition in Orleans Civil District Court to review the Board Committee’s decision and to seal the record. On February 9, 2001, the trial court granted Dr. Schaffer’s motion to proceed *in forma pauperis*. On February 9, 2001, the trial court granted Dr. Schaffer’s motion to seal the record but affirmed the Board

Committee's decision in its judgment dated May 14, 2001. Dr. Schaffer's appeal followed.

On appeal Dr. Schaffer contends that the trial court erred in: (1) depriving Dr. Schaffer's constitutional right to fully cross-examine witnesses to determine bias, self-interest or interest in the proceeding; (2) allowing the fact finders to examine and to cross-examine witnesses that prejudiced the proceedings; (3) allowing the introduction of adverse affidavits and reports into the record without Dr. Schaffer's constitutional right to cross-examination; (4) allowing its executive director, a party to the proceedings, to intimidate a witness; (5) by revoking Dr. Schaffer's license, in part, on non-specific allegations; and (6) turning Dr. Schaffer's own witness against him.

#### Standard of Review

Under La. R.S. 37:786(A) and La. C.C.P. art. 2128, a person aggrieved by a decision of the Board may seek *de novo* appellate review from the civil district court. The trial court must render a decision summarily without a jury, and the entire record consists of the Board's transmitted record supplemented by the pleadings, transcripts of oral

arguments and the opinion of the trial judge under La.R.S. 37:786(B) and La. C.C.P art. 2128. Pursuant to La. R.S. 49:964G(6), a reviewing court is required to make its own determination and conclusions of fact by a preponderance of the evidence while granting due regard to the agency's determination of credibility issues.

An appellate court's review of a trial court's judgment pertaining to a cause of action founded under the Louisiana Procedure Act is *de novo*. La. R.S. 49:965; *Nissan North America, Inc. v. Royal Nissan Inc.*, 01-0113 (La.App. 5 Cir. 5/30/01) 794 So.2d 45, citing *Louisiana Automotive Fin. Servs., Inc. v. Dept. of Econ. Dev.*, 98-0981 (La.App. 1 Cir. 5/14/99), 743 So.2d 217.

La. R.S. 49:964(G) provides that this Court may:

- . . . reverse or modify the [Board's] decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
  - (1) In violation of constitutional or statutory provisions;
  - (2) In excess of the statutory authority of the agency;
  - (3) Made upon unlawful procedure;
  - (4) Affected by other error of law;
  - (5) Arbitrary or capricious or characterized by abuse of discretion or

clearly unwarranted exercise of discretion; or

(6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, **due regard** shall be given to the agency's determination of credibility issues. [Emphasis added.]

The comments to La. R.S. 49:964 provide:

WHEREAS, the legislature finds this provision [requiring manifest error for reversal] or modification to be an unwarranted constraint on the judicial review process to the extent that it requires the court to find that an error be manifest in order to reverse or modify an agency decision or order; and

WHEREAS, the legislature finds it to be in the best interests of the state and its citizens that a court may reverse or modify an agency decision or order if a substantial right of a person has been prejudiced because the administrative findings, inferences, conclusions, or decisions are erroneous in view of the

reliable, probative, and substantial evidence on the whole record.

In *Adm'rs of the Tulane Educ. Fund v. Johnson*, 2000-0297 (La. App. 4 Cir. 4/4/01), 784 So.2d 769, 770, *writ denied*, 2001-1757 (La. 10/5/01), 798 So.2d 970, this Court reviewed the 1997 amendments and noted that the concept of the “manifest error” standard was no longer in the statute and has been replaced by the term “due regard” provision of subsection 49:964G(6).

In *Doe v. Louisiana State Bd. of Medical Examiners*, 1238 (La. App. 4 Cir. 5/30/01), 788 So.2d 1234, this Court found that under La. R.S. 49:964 (G)(6), the reviewing court may not reverse or modify an administrative decision, unless the reviewing court determines by a preponderance of the evidence after an independent review of the record, that the Board's decision prejudiced substantial rights of the appellant.

Cross-Examination of  
Witnesses on Issue of Bias or Self-Interest

Dr. Schaffer argues that the trial court deprived Dr. Schaffer of his constitutional right to cross-examine the Board's witnesses for purposes of showing bias or self-interest. Dr. Schaffer asserts that the Board's expert witnesses, Dr. John Kent, Dr. Richard Akin, Dr. Dale Misik and Dr. Michael Block were all faculty members of Louisiana State School of Dentistry,

Department of Oral and Maxillofacial Surgery, during Dr. Schaffer's residency and during the time that Dr. Kent developed the Vitek-Kent ("VK") temporomandibular (the "TMJ") medical prosthetic. Dr. Schaffer maintains that these doctors were prejudiced against him because they were committed to protect Dr. Kent from civil malpractice claims involving the VK. Dr. Schaffer avers that Dr. Kent may have profited from Dr. Schaffer's license revocation. Further, Dr. Kent had a close personal relationship with a panelist on the Board Committee.

The record shows that Dr. Kent only testified about the treatment of patient EF, and that charge of dental incompetence was rejected by the Board Committee.

Further, the administrative hearing officer ("AHO") overruled the Board's objections of Dr. Schaeffer's cross-examination of Dr. Kent or Dr. Akin about the Vitek litigation. The administrative hearing officer only restricted the cross-examination of Dr. Kent concerning the disclosure of patient-specific information that was protected by the physician-patient privilege, and Dr. Schaffer did not object. These allegations have no merit.

#### Sequestration

Dr. Schaffer submits that the administrative hearing officer denied Dr. Schaffer's request for sequestration because Dr. Akin and Dr. Kent

conversed after Dr. Akin testified. Because this issue was not raised in the trial court, it is not considered on appeal unless the interest of justice clearly requires otherwise. Rule 1-3 of the Uniform Rules, Courts of Appeal; *Brown v. Harrel*, 98-2931 (La.App. 4 Cir. 8/23/00), 774 So.2d 225, 229, *writ denied* 2000-2665 (La. 11/17/00), 774 So.2d 981.

Further, the record shows that the administrative hearing officer informed the witnesses not to discuss their testimony as the proceedings were privileged. When Dr. Block testified that he conversed with Dr. Kent, Dr. Schaffer objected, and the Board Committee granted the plaintiff's request for sequestration. The administrative hearing officer did not abuse his discretion by declining to strike Dr. Kent's testimony because Dr. Kent and Dr. Block did not testify on the same issues at trial. The subject of the Vitek litigation did not involve Dr. Schaffer or Dr. Block. These allegations lack merit.

#### Questions by the Members of the Board Committee

Dr. Schaffer argues that the Board's panelists prejudiced the hearings by cross-examining the witnesses. Dr. Schaffer asserts that the Committee panel functions as the fact finder that was to consider the evidence presented by the parties and to ensure that the evidence was properly admitted, as well as to ensure the accused's constitutional rights. Dr. Schaffer claims that the



panel's examination of the witnesses was outside the scope of the panel's function. Dr. Schaffer considers that the panel rehabilitated the witnesses and undermined credibility determinations.

The Board maintains that Dr. Schaffer did not object during the Committee hearing to witnesses being questioned directly by the Board Committee. Failure to object precludes review of the issue on appeal. *Taylor v. Tulane Medical Center*, 98-1967 (La. App. 4 Cir. 11/24/99), 751 So.2d 949. In a bench trial without a jury, the trial court is within its scope of its duty when it initiates questions from the bench. La. C.E. art. 614; *Midyett v. Midyett*, 32-208 (La. App. 2 Cir. 9/22/99), 744 So.2d 669. In a bench trial the dangers inherent in questions from the bench are greatly mitigated because there is no jury to confuse or mislead. *Williams v. Western Preferred Cas. Ins. Co.*, 465 So.2d 191 (La. App. 3 Cir. 1985). The Committee panel hearing is analogous to a trial before a judge without the presence of a jury. The panel members are knowledgeable about the dental field and would not be confused or mislead as a jury might. The panel has a duty to remain impartial as the panel members are not advocates for one side or the other. Their questions clarify the witnesses' testimony.

The Board Committee's panel members did not infringe on Dr. Schaffer's constitutional or other rights by directly questioning the

witnesses.

### Hearsay Evidence & Inability to Cross-Examine

Dr. Schaffer contends that introduction of affidavits and records of adverse witnesses' testimony precluded cross-examination and is a violation of Dr. Schaffer's constitutional and statutory rights. La. R.S. 49:955(C) provides:

Opportunity shall be afforded all parties to respond and present evidence on all issues of fact involved and argument on all issues of law and policy involved and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

In *Borque v. Louisiana St. Racing Com'n.*, 611 So.2d 742, 743 (La. App. 4 Cir. 1992), this Court stated: "Implicit in all administrative hearings is that a true disclosure of facts is necessary to prevent arbitrary decisions." This Court continued: "administrative findings must be set aside if supported only by hearsay evidence since the defendant is not afforded a fair opportunity to rebut or cross-examine, the offending documents." *Id.*

Dr. Schaffer also asserts that the testimony of Dr. Claudio A. Feller and Dr. Robert E. Marx was presented by an affidavit and a report. The plaintiff was unable to cross-examine these witnesses about these statements. Dr. Schaffer believed that Dr. Marx had a close personal relationship with Dr. Kent. Dr. Schaffer could not cross-examine the witness to show bias or

interest in the proceedings.

Dr. Schaffer further complains that the administrative hearing officer impermissibly allowed the introduction of the Drug Enforcement Agency (DEA) documents against Dr. Schaffer. Dr. Schaffer asserts that his wife, who was addicted to narcotics, assisted him in his dental office and had access to medications. Dr. Schaffer maintains that he had no knowledge of discrepancies in the medications until the DEA investigations, and he took immediate steps to correct the situation. Subsequent to the Board's decision in this matter, an administrative hearing officer found that a preponderance of the evidence did not establish that Dr. Schaffer's continued DEA registration would be contrary to public interest. The administrative hearing officer did not suspend or revoke Dr. Schaffer's DEA license.

With respect to the DEA documents, the record shows that the transcript of the DEA proceeding was introduced at the Board Committee hearing by the stipulation of both parties. Dr. Schaffer's counsel entered a hearsay objection to the documentary evidence relating to the DEA charges.

The Board maintains that the plaintiff did not submit the issue of the admission of the affidavits, reports and DEA documents to the trial court that reviewed the decision of the Board Committee. This precludes a review of the issue on appeal to this Court. *Brown v. Harrell, supra.*

Hearsay evidence is admissible in an administrative hearing. *Williams v. Louisiana Tax Com'n*, 611 So.2d 724, 727 (La. App. 4 Cir. 1992). In *Superior Bar & Grill v. State Through Dept. of Public Safety and Corrections, Louisiana State Police Video Gaming Div.*, 94-1879 (La. App. 1 Cir. 5/5/95), 655 So.2d 468, 470, the First Circuit stated:

The usual rules of evidence need not apply in administrative hearings, and hearsay may be admitted. LSA-R.S. 49:956; *Harris v. State*, 93-1365 p.3 (La. App. 1st Cir. 12/22/94), 648 So.2d 449, 450; *Brouillette v. State [Depart. of Public Safety, License Control and Driver Imp. Div.]*, 589 So.2d 529, 532 (La. App. 1st Cir. 1991). Hearsay evidence can be used, along with other competent evidence, to reach a true factual finding. *Hall v. Louisiana State Racing Comm'n*, 505 So.2d 744, 747 (La. App. 4th Cir. 1987).

Administrative findings must be set aside if **only** supported by hearsay evidence. *Borque, supra*. The admission of hearsay evidence in administrative hearings is commonplace and does not infringe on any Constitutional principles. *Brouillette v. State, supra*, 589 So.2d at 532. However, these precepts apply to the sufficiency of evidence rather than the admissibility of the evidence. In the present case, competent evidence was introduced in addition to the hearsay evidence. The fact findings were not based solely on hearsay evidence.

The trial court did not err in determining that the affidavit, report and

DEA documents were admissible.

### Witness Intimidation

Dr. Shaffer argues that the Board's Executive Director, Barry Ogden, infringed on Dr. Shaffer's right to a fair and impartial proceeding because Mr. Ogden threatened to investigate one of Dr. Schaffer's witnesses immediately after the witness testified. Dr. Shaffer complains that his counsel had to seek an expert witness licensed in another state removed from the influence of the Louisiana Board because counsel was aware that the Board potentially could threaten any of the witnesses with investigation and revocation proceedings. Dr. Schaffer avers that the "threatening of a witness is proof of the Board's underlying purpose to get Dr. Schaffer."

The Board maintains that the fact that this issue was not raised on appeal to the district court precludes a review of the issue on appeal to this Court. *Brown v. Harrell, supra*. Further, when the accusation surfaced during the Board Committee's hearing, Dr. Blackwood, the administrative hearing officer, stated:

If you have proof of anyone being intimidating and refusing to appear for the defendant, I want those names now and the name of the person who allegedly influenced them.

Mr. Niles, Dr. Shaffer's counsel, answered:

Yes, Dr. Blackwood, I understand the request, but I'm not prepared to do that now, nor would I do it

without discussing it with those persons.

Dr. Blackwood replied:

Let's strike your objection from the record then.  
You're alleging something and you don't have any  
proof of it....

Dr. Schaffer's counsel did not provide evidence to support his  
accusation concerning Mr. Ogden, and this allegation lacks merit.

#### Notice of Charges

Dr. Schaffer contends that the Board revoked his license in part on  
non-specific allegations. Under La. R.S. 37:780(A)(2) of the Dental Practice  
Act, and La. R.S. 49:955 of the Administrative Procedures Act, the  
provisions require that the licensee, Dr. Schaffer, be provided with adequate  
notice of the nature of the charges levied against him. Due process requires  
notice of the charges and an opportunity to defend oneself. La. Const. Art.  
1, § 2; *State v. Woodward*, 387 So.2d 1066, 1068 (La. 1980); *White v. Board  
of Sup'rs of Southern University*, 365 So.2d 583 (La. App. 1 Cir. 1978);  
*Benoit v. Louisiana State Racing Com'n*, (La. App. 4 Cir. 1991), 576 So.2d  
578; *Scott v. Louisiana Dept. of Public Safety*, (La. App. 4 Cir. 1993), 622  
So.2d 251.

In the present case, Dr. Schaffer avers that the Board's allegations  
were impermissibly vague. Dr. Schaffer argues that the charges were

general and not sufficiently specific because the allegations do not refer to specific instances or patients.

The Board alleged in part:

**Charge No. 2, Specification No. 3:** In that Randall M. Schaffer, D.D.S., licensed and registered as a dentist under the laws of the State of Louisiana and practicing in this state, did violate the aforesaid statute when he allowed delays as long as two (2) months to make entries relative to professional services he performed **in various patients['] charts**. [Emphasis added.]

**Charge No. 4, Specification No. 4:** In that Randall M. Schaffer, D.D.S., . . . did violate the aforesaid statute when he increased his usual and customary fee for services rendered **on numerous occasions** to offset the fee discount for members of dental plans for dental/oral surgery services. [Emphasis added.]

**Charge No. 4, Specification No. 6:** In that Randall M. Schaffer, D.D.S., . . . did violate the aforesaid statute when **on numerous occasions** he requested and received payment for services from patients with dental insurance, and then refused to tender the balance due the patient after being paid all sums due. [Emphasis added.]

The charges are sufficiently specific to provide notice of the nature of the allegations. The allegations must be proved by a preponderance of the evidence. The testimony of witnesses, including Jamie Cousins, Courtney Pierce, Patricia Boudreaux, and Karen Duke, supported the allegations that Dr. Schaffer routinely used inappropriate charting and corrupt billing

procedures.

Conflict of Interest:  
Dr. Schaffer's Expert Attorney in Two Cases  
Was Hired to Represent the Board Against Dr. Schaffer

Dr. Schaffer complains that Dr. Michael O'Brien performed a review of the records in the treatment of the patient DA, and found that Dr. Schaffer's conduct and treatment of the patient DA were above the acceptable standard of care. Afterwards, Dr. O'Brien became Mr. Brian Begue's associate attorney for the Board. After the Board denied Dr. Schaffer's motion to disqualify the Board's attorney, Dr. O'Brien, and attorney, Mr. Begue, the civil district court disqualified Dr. O'Brien but did not disqualify Mr. Begue. The Louisiana Supreme Court disqualified both Dr. O'Brien and Mr. Begue, finding that it would be prejudicial to allow Mr. Begue and the Begue firm to continue to represent the Board. Any error was not reversible because the change in attorneys was completed before trial.

Disqualified Attorney's Bill

Dr. Schaffer contends that Mr. Begue continued to represent the Board, evidenced by his billing for his services after he was disqualified by the Supreme Court. Mr. Begue's bill shows time charged to this matter in October, November and December, 1999 after Mr. Begue was disqualified. Dr. Schaffer asserts that the Board assessed costs and attorney's fees in the



amount of \$217,852.13, which included approximately \$90,000 attributed to Brian Begue's legal fees and expenses.

The Board points out that that immediately after the Supreme Court disqualified Mr. Begue, the Board hired a new attorney. Mr. Begue continued to be involved for the purpose of transmitting information, reports and evidence to the Board's newly assigned counsel. The Board asserts that the transition ended several months prior to trial. Considering the many charges and complex proceedings involved in this matter, the trial court properly assessed Dr. Schaffer's payment of Mr. Begue's charges for the materials and services rendered during the period of transition from Mr. Begue's representation to the new attorney's representation of the Board.

A review of Dr. Schaffer's claims shows that the trial court properly reached its findings that the Board proved the charges against Dr. Schaffer by a preponderance of the evidence. The Committee Board's decision and the trial court's findings did not prejudice Dr. Schaffer's substantial constitutional and other rights.

Accordingly, the judgment of the trial court is affirmed.

**AFFIRMED**