

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

William C. Kerr, D.D.S.,	:	
Petitioner	:	
	:	No. 1539 C.D. 2007
v.	:	Submitted; February 8, 2008
	:	
State Board of Dentistry,	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: April 25, 2008**

William C. Kerr, D.D.S. (Dr. Kerr) petitions for review from an order of the State Board of Dentistry (Board) that imposed a civil penalty of \$1,000.00 and ordered a formal reprimand against him because of his failure to complete 30 credit hours of acceptable continuing education (CE) during the April 1, 2003 through March 31, 2005, biennial period. Dr. Kerr argues the Board's necessary findings lack record support, the Board's regulations are unconstitutionally vague, and the doctrine of equitable estoppel should prevent the Board from imposing a civil penalty against him. Discerning no merit in these assertions, we affirm.

The Pennsylvania Department of State (Department) filed a three-count Order to Show Cause (OSC) against Dr. Kerr in which it alleged Dr. Kerr held a license to practice dentistry that was under suspension through November 2007.

In Count I of the OSC, the Department alleged in May 2005, Dr. Kerr submitted an application for licensure for the biennial renewal period of April 1, 2005 through March 31, 2007. The Department averred that on his renewal application Dr. Kerr indicated he: “attended/completed the required 30 credit hours of [CE] during the period of April 1, 2003 to March 31, 2005 in acceptable courses obtained through approved program sponsors with no more than 50% of the credits obtained through individual study.” R.R. at 5a. The Department further averred in October 2005, the Board notified Dr. Kerr it selected him for participation in a random audit of CE credits for the biennial reporting period of April 1, 2003 to March 31, 2005.

The Department alleged, as part of the audit, it required Dr. Kerr to submit copies of certificates of attendance verifying completion of at least 30 hours of approved CE credits. However, the Department alleged, Dr. Kerr submitted a verification of completion of only 15 hours of approved credits for the period at issue. Based on these allegations, the Board averred it was:

authorized to suspend, revoke or otherwise restrict [Dr. Kerr’s] license, or impose a civil penalty under [Section 4.1(a)(6) of The Dental Law (Dental Law)<sup>1</sup>] by and through [Dr. Kerr’s] violation of 49 Pa. Code §33.401, in that [Dr Kerr] failed to complete at least 30 credit hours of [CE] during the April 1, 2003 to March 31, 2005 biennial period in acceptable courses obtained through approved program sponsors with no more than 50% of the credits obtained through individual study.

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<sup>1</sup> Act of May 1, 1933, P.L. 216, as amended, added by the Act of December 20, 1985, P.L. 513, 63 P.S. §123.1(a)(6).

R.R. at 6a.<sup>2</sup>

Dr. Kerr filed an answer and new matter, in which he averred he completed a total of 33 hours of CE credits during the applicable period. He further averred:

16. On December 13, 2004 [he] contacted [State] Representative Sam Smith's office to inquire if certain online interactive course[s] would be acceptable as lecture credits and to receive an answer from the [Board] in writing. Sam Smith's office contacted Sara Fox, Administrative Assistant for the Bureau of Professional and Occupational Affairs [(Bureau)], faxing a request for an answer in writing, a course description and a copy of [§]33.401 [of the Board's regulations] with particular attention to subsection (c) and was informed that the credits were acceptable as lecture credits but that they would not put it in writing. Sam Smith's office informed [Dr. Kerr] of the same.

17. [Dr. Kerr], reasonably relying on the information that the credits were acceptable submitted the credits to fulfill his [CE] requirements.

R.R. at 43a. A hearing before the Board ensued.

At the hearing, the Department presented copies of the pleadings and the documents attachments to the pleadings, as well as a packet of documents that included all correspondence between Dr. Kerr and the Board. In response, Dr.

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<sup>2</sup> Count II of the OSC charged Dr. Kerr with violating 49 Pa. Code §33.404(b) for failing to submit copies of the documentation supporting the completion of the required credit hours when requested to do so by the Board. Count III alleged Dr. Kerr submitted a false or deceptive biennial renewal to the Board. Ultimately, the Board dismissed Counts II and III; as a result, those counts are not at issue here.

Kerr testified and presented testimony by Diane Welsh (Welsh), an employee in State Representative Sam Smith's Office, and Sara Fox (Fox), an administrative assistant with the Bureau.

Based on the evidence presented, the Board made the following findings. Dr. Kerr underwent open heart bypass surgery in the latter half of 2004. After his surgery, he believed he had two options in complying with the Board's CE requirements, either to obtain a waiver due to his medical condition, or to have the online interactive CE credits he already obtained accepted by the Board as "lecture" courses under 49 Pa. Code §33.401(c). Dr. Kerr sought to determine if an online interactive CE course provided by Proctor & Gamble entitled "Dental Instrument Sterilization: A Six Step Process" would qualify as a "lecture" course under the Board's regulations by contacting Representative Sam Smith's office. Dr. Kerr asked Welsh, who works in Representative Smith's office, to assist him in finding out "if a Proctor and Gamble interactive course was acceptable." Bd. Op., Finding of Fact (F.F.) No. 9.

Dr. Kerr provided Welsh a copy of the Board's CE regulation with Section 33.401(c) underlined and highlighted and a copy of a sample online interactive certificate on which he underlined "interactive course" and wrote beside it "33.401-c." F.F. No. 10. In turn, Welsh contacted Fox, a Bureau employee, in order to resolve Dr. Kerr's inquiry. Welsh later faxed the request and documents provided by Dr. Kerr to Fox. On the facsimile cover page from Representative Smith's office Welsh wrote "As per our phone conversation our constituent would

like something in writing that this is acceptable. Could you please review this for him?" F.F. No. 13.

Fox testified she maintains a mail log, which logged the following note:

Copy of continuing dental education on line course – dental instrument sterilization-a six step process ... is this CE acceptable to the Board Office? The Rep would like something in writing as to whether the Board accepts this CE. As per Cindy Warner – the Board does not put in writing their acceptance of accredited courses. Sara called Diane at the Reps office to let her know. – 12/14/04.

F.F. No. 15. Fox directed the inquiry to Cindy Warner, Division Chief for the Health Licensing Division at the Bureau; she did not direct it to the Board's administrator. When Fox provided the response, Welsh wrote in the upper right corner of her copy of the facsimile cover page: "Yes, it's acceptable but no they won't put it in writing," and conveyed this information to Dr. Kerr. F.F. No. 17.

Dr. Kerr relied on Fox's response in concluding all online interactive courses would be accepted as "lecture" courses under 49 Pa. Code §33.401(c). Dr. Kerr indicated if he had been told the online course was not acceptable he would have tried to obtain a medical waiver or to take traditional lecture courses.

After submitting his biennial renewal application for the period of April 1, 2005, through March 31, 2007, Dr. Kerr received a notice from the Board that he had been selected for participation in the Board's audit of CE compliance

for the biennial period April 1, 2003, through March 31, 2005. The Board's letter requested Dr. Kerr submit copies of the certificates for the CE credits he received during that period. Dr. Kerr submitted copies of the certificates for the CE credits he received showing that from June 19, 2003 through October 9, 2004, he completed 11 online interactive courses provided by Proctor & Gamble, which totaled 33 credit hours.

The Board subsequently notified Dr. Kerr it would only accept 15 of the credits because more than 50% of the required 30 credits were obtained through individual study. The Board asked Dr. Kerr to submit additional certificates or to submit a letter of explanation. Dr. Kerr responded by submitting a letter in which he explained in the latter part of 2004 he underwent coronary bypass surgery. He indicated that prior to his surgery he completed 33 credit hours of online interactive courses and sought to determine if these courses were acceptable under the Board's regulations.

Dr. Kerr also included copies of the fax transmissions to and from Representative Smith's office to Fox. Attached to the cover page were two pages Dr. Kerr provided to Representative Smith's office. This first page was a copy of the Board's CE requirements at 49 Pa. Code §33.401 with subsection (c) underlined. The second page was a sample certificate issued by Proctor & Gamble for a course entitled "Dental Instrument Sterilization: A Six Step Process." Dr. Kerr inserted "33.401-c" after the phrase "Online Interactive Course" on the sample certificate. F.F. No. 28.

In January 2006, Board staff referred Dr. Kerr's CE audit file to the Professional Compliance Office for action because all courses Dr. Kerr submitted were through home study/online courses and, therefore, only 15 credits were acceptable under the Board's regulations.

Ultimately, the hearing examiner issued a proposed adjudication and order in which she concluded Dr. Kerr was subject to disciplinary action under Section 4.1(a)(6) of the Dental Law. Specifically, she determined Dr. Kerr violated Board regulation 49 Pa. Code §33.404 by failing to complete 30 credit hours of CE in acceptable courses with no more than 50% in individual study during the period at issue. The hearing examiner stated that Dr. Kerr had to provide the Board with documentation that he completed 15 hours of acceptable CE credits in lecture or clinical presentations. However, the hearing examiner determined no civil penalty or reprimand was warranted.

The Board subsequently issued a notice of intent to review pursuant to 1 Pa. Code §35.226(a)(2) (relating to final orders of agency decisions). Thereafter, the Board issued an adjudication in which it agreed with the hearing examiner that Dr. Kerr violated 49 Pa. Code §33.404 by failing to complete 30 credit hours of CE in acceptable courses obtained through approved providers with no more than 50% in individual study. Contrary to the hearing examiner's proposed adjudication, however, the Board chose to levy a civil penalty of \$1,000.00 against Dr. Kerr (computed as \$75 for each credit hour not completed, up to a maximum of \$1,000.00). The Board also ordered a formal reprimand against Dr. Kerr, and

required him to provide proof that he completed 15 hours of acceptable credits in lecture or clinical presentations.

Dr. Kerr now appeals to this Court,<sup>3</sup> arguing the Board's necessary findings are not supported by substantial evidence, the Board's regulations, as applied, are unconstitutionally vague, and the Board should be estopped from imposing a civil penalty against him.

At the outset, we note, the Board is the ultimate fact finder and may accept or reject the testimony of any witness in whole or in part, and this Court is bound by the Board's credibility determinations. Gleeson v. State Bd. of Med., 900 A.2d 430 (Pa. Cmwlth. 2006), appeal denied, 591 Pa. 685, 917 A.2d 316 (2007). Thus, when reviewing a Board decision, we may not reweigh the evidence presented or assess the credibility of witnesses. Id. Further, it is irrelevant whether the record contains evidence to support findings other than those made by the fact-finder; the critical inquiry is whether there is evidence to support the findings actually made. See, e.g., Haas v. West Shore Sch. Dist., 915 A.2d 1254 (Pa. Cmwlth. 2007). We are bound by the Board's credibility determinations and the derived facts, if supported by substantial evidence. Toms v. Bureau of Prof'l & Occupational Affairs, 800 A.2d 342 (Pa. Cmwlth. 2002).

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<sup>3</sup> Our review is limited to a determination of whether constitutional rights were violated, and whether the Board's decision was in accordance with law and supported by substantial evidence. Mostatab v. State Bd. of Dentistry, 881 A.2d 1271 (Pa. Cmwlth. 2005).



## **I. Substantial Evidence**

Dr. Kerr first argues the Board's necessary findings are not supported by substantial evidence. He asserts the Board's determinations are supported only by documents containing the allegations that he violated the Dental Law. Dr. Kerr contends the Department did not offer any testimony to establish whether the CE courses he completed were individual study or whether the interactive nature of the courses was sufficient to make them "lecture" credits. Dr. Kerr argues his testimony, which was the only evidence concerning the nature of the courses, shows the courses were interactive and should be counted as "lecture" courses.

Under Section 4.1(a)(6) of the Dental Law, the Board has authority to refuse, revoke or suspend the license of any dentist who violates any provision of the Dental Law or a regulation promulgated by the Board. 63 P.S. §123.1(a)(6). When the Board finds that a license or certificate of any person may be refused, revoked or suspended, it may, among other things, administer a public reprimand. 63 P.S. §123.1(b)(3). In addition, the Board may impose a civil penalty of up to \$1,000.00 on any current licensee who violates the Dental Law. See Section 10.1 of the Dental Law, 63 P.S. §129.1, added by the Act of Dec. 20, 1985, P.L. 513.

Section 33.401 of the Board's regulations set forth the continuing dental education credit-hour requirements as follows (with emphasis added):

(a) An applicant shall complete the following [CE] credit hours during the preceding biennial period:

(1) Dentists-30 hours.

\* \* \* \*

(b) The required hours shall be taken in the subject areas listed in § 33.402 (relating to [CE] subject areas) from a program sponsor listed in § 33.403 (relating to program sponsors).

(c) At least 50% of the required credit hours shall be taken in lecture or clinical presentations.

(d) A maximum of 50% of the required credit hours, listed in § 33.402, may be taken through individual study.

\* \* \* \*

49 Pa. Code §33.401. The Board’s regulations define “individual study” as “[a] course of [CE] offered by an approved program sponsor, which permits the participant to learn without interacting with an instructor or interactive learning methodologies and which requires a passing grade on a written examination or workbook.” 49 Pa. Code §33.1. The term “lecture” is undefined.

Here, in determining Dr. Kerr did not comply with the applicable CE requirements, the Board found:

20. On May 5, 2005, [Dr. Kerr] signed and filed a biennial renewal application for the period of April 1, 2005, through May 31, 2007, checking the line that stated: “I have completed the required 30 credit hours of [CE] during the period April 1, 2003 to March 31, 2005 with no more than 50% of the required courses obtained through individual study.” (Exhibit C-1)

21. On October 5, 2005, the Board sent [Dr. Kerr] a notice that he had been selected for participation in the Board’s audit of [CE] compliance for the biennial period April 1, 2003, through March 31, 2005. The Board’s letter requested that he submit to the Board copies of the [CE] credits he received during that time period. (Exhibit C-4)

22. On October 12, 2005, [Dr. Kerr] submitted copies of [CE] credits showing that from June 19, 2003, through October 9, 2004, he completed eleven online interactive courses provided by Proctor & Gamble totaling 33 credit hours. (Exhibit C-4, pp. 18-28)

23. Proctor & Gamble online interactive courses require the participant to go on a computer, study the course information, and answer questions. If the participant answers a question incorrectly, the computer prompts the participant to go back and restudy the information until the question is answered correctly. (N.T. 33 – 34)

24. On November 8, 2005, the Board sent [Dr. Kerr] a notice that only 15 credits had been accepted because more than 50 percent of the required credits were obtained through individual study. (Exhibit C-4, p. 11)

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29. On January 23, 2006, Board staff referred [Dr. Kerr's] CE audit file to the Professional Compliance Office for action because all courses [Dr. Kerr] submitted were through home study/online courses and, therefore, only 15 credits were acceptable under the Board's regulations. (Exhibit C-4)

F.F. Nos. 20-24, 29. The Board further stated:

Count One of the [OSC] charges that [Dr. Kerr] is subject to disciplinary action under Section 4.1(a)(6) of the Dental Law ... because he violated the Board's regulations relating to [CE] credit hour requirements ... in that all the credit hours he completed during the 2003 – 2005 biennial period were completed in individual study. The Commonwealth's evidence regarding this count consisted of the Board's audit (Exhibit C-4) and the [11] certificates submitted by [Dr. Kerr] in response to the audit indicating a total of 33 credit hours of [CE] completed from June 19, 2003, through October 9, 2004, in online interactive courses provided by Proctor & Gamble. ...

It is undisputed that all of the 33 credits [Dr. Kerr] submitted to the Board were taken through online courses provided by Proctor and Gamble. Although these courses are “interactive” to the degree that the computer program prompts the learner to go back and review information when an incorrect answer is given and it is possible to email the course’s author for additional information, the learner cannot ask questions and receive immediate feedback or explanations. (NT 33-37) The Board finds that these courses do not qualify as “lecture or clinical presentations” for purposes of meeting the requirements of section 33.401(c). Therefore, [Dr. Kerr] submitted only 15 hours of acceptable [CE] credits and count one of the [OSC] is sustained.

Bd. Op. at 11, 13. Our review of the record reveals adequate support for the Board’s determinations. The Board’s determination that Dr. Kerr did not complete the required amount of CE “lecture” credits is directly supported Dr. Kerr’s testimony regarding the nature of the courses he completed as well as the certificates of completion for these courses. See R.R. at 164a-174a; 80a-86a. Further, based on the certificates of completion for the courses submitted by Dr. Kerr and Dr. Kerr’s limited testimony regarding the nature of these courses, no error is apparent in the Board’s determination that these courses constituted “individual study” rather than “lecture” courses.

## **II. Void for Vagueness**

Dr. Kerr next argues the Board’s CE regulation is unconstitutionally vague. Specifically, he asserts the Board’s regulation requires a licensee to complete 15 hours of “lecture” credits, but the regulations do not define “lecture,” and he could not have anticipated the manner in which the Board interpreted its regulations. Dr. Kerr contends the regulations simply do not provide sufficient

guidance as to what steps a licensee must take to satisfy the Board's CE requirement. He points to his testimony that he reasonably believed the online courses he completed were acceptable "lecture" courses.

In Toms, this Court stated:

[T]he applicable standard for analysis is that a statute or regulation is unconstitutionally vague where it either traps the innocent by failing to give a person of ordinary intelligence reasonable opportunity to know what is prohibited so that he may act accordingly, or results in arbitrary and discriminatory enforcement in the absence of explicit guidelines for its application.

Toms, 800 A.2d at 349.

In rejecting Dr. Kerr's argument that the regulation at issue is unconstitutionally vague because it does not define "lecture," the Board stated:

As [Dr. Kerr] pointed out in his argument, lecture is not defined in the regulations. The Commonwealth argued that the plain meaning of the regulations require at least 15 of the 30 required hours to be completed by attending a lecture or clinical presentation in a classroom or other setting. The Board agrees.

The Board also agrees with the hearing examiner that when read together, the plain meaning of sections 33.401 (c) and (d) and the definition of "individual study" at section 33.1, clearly indicate that the Board intended that at least 50% of the required 30 hours be completed in courses where the participant is physically present and can interact with the course instructor and other participants. As the hearing examiner pointed out, Webster's Third New International Dictionary defines "lecture" as "a discourse given before an audience or class, esp. for instruction," and "clinical" as "involving or

depending on direct observation.” Section 33.401(d) limits the amount of allowable [CE] credits for individual study, or as an author or instructor to no more than 50% of the required 30 hours. All of [Dr. Kerr’s] credit hours were completed in “individual study” as defined in section 33.1 of the Board’s regulations.

In addition, at the time the Board published the [CE] regulations as proposed rulemaking in 1998, the Board explained its rationale for these requirements as follows: “Proposed subsections (c) and (d) identify four sources of [CE] credit: lecture or clinical presentations, individual study, serving as an instructor and authoring a book, article or [CE] program. The Board believes that interacting with an instructor and other participants is beneficial to the learning process. Therefore, the Board believes that at least 50% of the required credits should be taken in lecture or clinical presentations.” (See 28 Pa.B. 3293.) In addition, when the final regulations were published on August 20, 2000, the Board reiterated: “The Board believes that this requirement is necessary and that the opportunity to interact with the instructor and other participants is crucial to learning clinical subject matter whether in didactic or ‘hands-on’ learning experiences.” (See 30 Pa.B. 4246.)

The Board sent copies of the final regulations to all current licensees and in the Summer 2001 edition of the Board’s newsletter, which is mailed to every licensee, the Board explained the new [CE] requirements including the provisions at issue in this matter. In the Summer 2002 newsletter, the Board provided an update on mandatory [CE] at which time the Board again reiterated that at least 50% of the required credits must be taken in lecture or clinical presentations and that a maximum of 50% of the required credit hours may be taken through individualized study, serving as an author of a book or article, or acting as an instructor for a [CE] program. The Board believes that its intent was clearly conveyed to all licensees.

Bd. Op. at 12-13. We discern no error in the Board’s rejection of Dr. Kerr’s argument that Section 33.401 of the Board’s regulations is unconstitutionally vague because it does not define the term “lecture.” More particularly, we agree with the Board that, when read together, Sections 33.401 (c) and (d), and the definition of “individual study” in Section 33.1, are sufficient to provide a person of ordinary intelligence a reasonable opportunity to know what is required to satisfy the Board’s CE requirements.

Further, Watkins v. State Board of Dentistry, 740 A.2d 760 (Pa. Cmwlth. 1999) and Salada v. Commonwealth, 627 A.2d 261 (Pa. Cmwlth. 1993), relied on by Dr. Kerr to support his assertion that the Board’s CE regulation is unconstitutionally vague, are distinguishable.

First, in Salada, this Court held a county health department regulation that prohibited use of a private sewer system where a public sewer was “reasonably accessible” was unconstitutionally vague. We determined the regulation was “susceptible to the evil of arbitrary enforcement” because it was “impossible for a property owner to determine from the regulation what [was] considered accessible ....” Id. at 264-65.

Thereafter, in Watkins, this Court held a Board regulation that required a dentist’s office to have “appropriate monitoring equipment” for the administration of general anesthesia was unconstitutionally vague. We determined the undefined term “appropriate monitoring equipment” did not provide a reasonable standard by which a dentist was supposed to act. We stated, “[t]he lack

of clear guidance as to what constitutes ‘appropriate’ monitoring equipment leads directly to the result our Supreme Court warned about in [State Board of Pharmacy v. Cohen, 448 Pa 189, 292 A.2d 277 (1972)], where standards are left to be defined by the ‘personal or professional views of individual members of the Board.’” Watkins, 740 A.2d at 765.

Unlike the vague terms in Salada and Watkins, we believe the term “lecture,” although undefined, is sufficiently clear when read in context with the CE requirements in subsection (c) (regarding “lecture and clinical presentations”) and (d) (regarding “individual study”) of 49 Pa. Code §33.401, and the definition of “individual study” in 49 Pa. Code §33.1. As stated by the Board, “[a] reasonable dentist of ordinary intelligence reading section 33.401(c) and (d) together would have no difficulty knowing what is expected. The failure to define ‘lecture’ does not make the regulations vague.” Bd. Op. at 18.

To that end, our decision in Oppenheim v. State Dental Council and Examining Board, 459 A.2d 1308 (Pa. Cmwlth. 1983), is instructive. There, two dentists were charged with, among other things, permitting unregistered dental assistants to use “medicaments,” a term undefined by statute or regulation. The dentists argued the undefined term “medicaments,” rendered the Board’s regulations void for vagueness. Responding to this assertion we stated:

There can be no doubt that the Dental Law is a penal statute. Consonant with ordinary notions of fair play and the settled rules of law, the terms of such a statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. A statute which either forbids or requires the doing of an act in terms so vague that men



of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Statutes challenged on the ground of vagueness are not, however, to be tested against paradigms of legislative draftsmanship. Rather, the requirements of due process are satisfied if the statute in question contains reasonable standards to guide prospective conduct.

Id. at 1315 (citations and quotations omitted). Applying these rules, we noted the Dental Law addressed a specific audience of professionals who must be held to a standard consistent with their training and expertise. We stated, while the term “medicaments” “might force the man of common intelligence to guess at its meaning; that term should pose far less of a problem to dentists already warned by statute and regulation that auxiliary personnel may not perform services requiring professional judgment.” Id.

Here, as in Oppenheim, we do not believe inclusion of the undefined term “lecture” in the Board’s CE regulation renders the regulation unconstitutionally vague. Rather, we believe that when read as a whole, the Board’s CE regulation indicates the Board intended at least 50% of the required 30 hours be completed in courses where the participant can interact with the course instructor and other participants. This is clear in light of the ordinary meaning of the term “lecture.”<sup>4</sup> This is especially true when contrasted with the Board’s definition of “individual study,” which is a “[a] course of [CE] ... which permits

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<sup>4</sup> See WEBSTER’S NEW COLLEGIATE DICTIONARY 662 (10th ed. 2001) (defining “lecture” as “a discourse given before an audience or class esp. for instruction.”)

the participant to learn without interacting with an instructor or interactive learning methodologies ....” 49 Pa. Code §33.1 (emphasis added). Thus, as in Oppenheim, the Board’s regulation is sufficient to inform a reasonable dentist of what is required to comply with the applicable CE requirements.

### **III. Equitable Estoppel**

Finally, Dr. Kerr asserts the doctrine of equitable estoppel should preclude the Board from imposing a civil penalty because he justifiably relied on a misstatement by a Board employee (communicated through his state representative’s office) that the online courses he completed would qualify as “lecture” courses under the Board’s regulation.

Equitable estoppel prevents a party from acting differently than the manner in which it induced another party to expect. Novelty Knitting Mills, Inc. v. Siskind, 500 Pa. 432, 457 A.2d 502 (1983). The doctrine may be applied to a Commonwealth agency when the party asserting estoppel establishes by clear, precise and unequivocal evidence: the agency intentionally or negligently misrepresented a material fact; the agency knew or had reason to know the party would justifiably rely on the misrepresentation; and, the party acted to his detriment by justifiably relying on the misrepresentation. Forbes v. Pa. Dep’t of Corr., 931 A.2d 88 (Pa. Cmwlth. 2007).

Here, the Board determined Dr. Kerr did not meet his burden of showing by clear, precise and unequivocal evidence that the Board intentionally or negligently misrepresented a material fact. Specifically, the Board stated:

[Dr. Kerr] did not ask the Board whether all Proctor and Gamble interactive online courses would qualify as lecture courses. He asked Representative Smith's staff person, [Welsh], to obtain an interpretation of a regulation [from the Board]. He provided her a sample certificate for a[n] online interactive course provided by Proctor and Gamble entitled "Dental Instrument Sterilization: A Six Step Process" along with a copy of section 33.401 of the Board's [CE] regulations with the letter (c) underlined denoting subsection (c). She, in turn, forwarded the inquiry to [Fox]. [Fox], apparently, passed the inquiry on to Cindy Warner, an administrator for the [Bureau]. [Warner] was not called to testify as to the basis for her response that the course was "acceptable[.]" Without [Warner's] testimony the Board has no way of knowing what the ultimate answer of "Yes, it's acceptable, but no they won't put it in writing" was intended to convey. The Board does not find this evidence to be clear, precise and unequivocal that the Board either intentionally or negligently made a misrepresentation.

It is also clear from the testimony of [Welsh] and [Fox] that they had no idea what the legal significance of [Dr. Kerr's] underlining and reference to section 33.401(c) would be. [Welsh] indicated that [Dr. Kerr] "asked if a Proctor and Gamble interactive course was acceptable." (N.T. 8) On the fax she sent to [Fox], she wrote, "As per our phone conversation: our constituent would like something in writing that this is acceptable. Could you please review this for him?" (Exhibit C-5) [Welsh] testified that the course at issue was "Prevention and Management of Oral Complications of Cancer Treatment." (N.T. 9) The certificate that was faxed to [Fox] was for a course entitled, "Dental Instrument Sterilization: A Six Step Process." [Fox's] mail log contained the following notation: "Copy of continuing dental education online interactive course – dental instrument sterilization – a six step process ... is this CE acceptable to Board Office? The Rep would like something in writing as to whether the Board accepts this CE." Therefore, the question conveyed by [Welsh] was whether a course entitled "Dental instrument sterilization

– a six step process” was acceptable. The question of whether this course would qualify as a lecture course was not the question that was conveyed to the Bureau employees. ...

[Further], even if equitable estoppel applied to prevent the Board from rejecting the two credit hours for this particular course (Dental Instrument Sterilization: A Six Step Process) based on Cindy Warner’s assertion that the course is “acceptable[,]” this course is not one of the [11] courses submitted by [Dr. Kerr] in response to the audit. Yet, it was the only certificate submitted for review. [Dr. Kerr] did not submit all of his Proctor and Gamble online interactive courses and ask if they were acceptable. He asked if that particular course was acceptable. The answer he received was that “it’s” (it is) acceptable. No representative of the Board or the Bureau told him that all of his [CE] courses were acceptable – only the one faxed to [Fox]. (Exhibit C-5) [Dr. Kerr] made the assumption that if one Proctor and Gamble online course would be acceptable, all of them would be. The Board cannot be estopped from enforcing its regulations regarding unrelated courses which were not the subject of his inquiry.

Bd. Op. 16-18. The Board’s determinations are amply supported by the record. R.R. at 57a-74a; 164a-178a. Therefore, we discern no error in the Board’s determination that the doctrine of equitable estoppel is inapplicable here.

For the foregoing reasons, we affirm.

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ROBERT SIMPSON, Judge

Judge Smith-Ribner dissents.

