

**BEFORE THE DENTAL BOARD
OF THE STATE OF IOWA**

IN THE MATTER OF THOMAS COONEY, D.D.S. RESPONDENT	CASE NOS. 19-0181, 20-0011, 20-0143 & 20-0198 ORDER CONCERNING REQUEST TO LIFT LICENSE SUSPENSION DURING THE PENDENCY OF THIS PROCEEDING
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STATEMENT OF THE CASE

On January 6, 2021, the Dental Board of the State of Iowa (“Board”) issued a Notice of Hearing, Statement of Charges, and Emergency Adjudicative Order (“Order”). Ex. 1. The Order charged Thomas Cooney, D.D.S., (“Dr. Cooney”) with five counts of misconduct and indefinitely suspended his license as of the issuance of the Order. Id. Thereafter, at the request of the parties, the Board bifurcated the issues in the case, with the first issue being whether the Board should lift Dr. Cooney’s license suspension during the pendency of this proceeding. Ex. 2. The remaining issues concern the overarching matter of whether misconduct has occurred and, if so, what discipline is appropriate. Id.

On January 28, 2021, the Board held a hearing on the first issue of whether the emergency suspension should remain in place pending the resolution of the charges. At the hearing, both the State and Dr. Cooney presented witness testimony, and the parties’ exhibits—as well as the answer filed on the eve of the hearing—were admitted into the record. The matter is fully submitted.

FINDINGS OF FACT

Since this matter only involves whether Dr. Cooney should be able to practice dentistry during the pendency of this case, which effectively turns on whether there would be an immediate danger to the public, and not the broader issue of misconduct and discipline, prudence dictates making limited factual finding only necessary to support the Board’s resolution. All of the material facts and the circumstances of this case, as well as their legal significance, will be found at the full hearing on the merits of this matter.

With that in mind, on July 1, 1988, the Board issued Dr. Cooney Iowa dental license 07310. Ex. 6, at p. 28.¹ On August 3, 2018, the Board entered a Statement of Charges, Settlement Agreement, and Final Order that placed Dr. Cooney on probation for five years, restricted his ability to treat periodontal disease, and created several other requirements such as filing certain reports. Ex. 4, at p. 12. On June 5, 2020, the Board entered a Settlement Agreement and Final Order, which added certain conditions to his probation including, but not limited to, infection control requirements such as retaining an infection

¹For convenience, all page numbers refer to the page in the overall exhibit packets and do not refer to the page number in the specific exhibit. Further, all evidence was considered in making each finding of fact, including the demeanor of the witnesses when applicable. The references provided are meant to be a guide to the more pertinent portions of the record and not meant to be an exhaustive list of each and every portion of the record that supports the finding.

control monitor that would inspect Dr. Cooney's office and file reports with the Board. Ex. 5, at p. 25.

As all agree, Dr. Cooney did not comply with all of the terms of probation, and in fact, he was not surprised when the Board finally suspended his license. Hearing Recording, at 2:18:00-:40. On December 2, 2020, the Board sent a letter to him detailing areas of non-compliance, which included the need to complete continuing education, file quarterly reports, pay monitoring feeds, and complete infection control inspections and reports. Ex. 6, at pp. 29-30. While the situation was not fully remedied at that time, the Board did receive an infection prevention report from Dr. Cooney's monitor, Dr. John Campbell ("Dr. Campbell"), on December 22, 2020. Ex. 6, at p. 42. Dr. Campbell inspected Dr. Cooney's office on December 18, 2020, and with its numerous findings, the report effectively indicated Dr. Cooney's office was unsafe for the practice of dentistry. Ex. 6, at pp. 39-59; see also Hearing Recording, at 1:28:31-:37 (Dr. Campbell testifying it was "not a safe environment"). This is a conclusion Dr. Cooney did not appear to materially challenge at the hearing, and he later acknowledged concerning infection control and other safety standards that he "clearly was not in compliance." Hearing Recording, at 2:20:03-:05.

A close examination of the submitted report reveals numerous areas of deficiency. One particular area of concern was a lack of written policies and procedures for the operation of the office, including on any infection prevention and control program. See, e.g., Ex. 6, at pp. 42, 47-49, 55; Hearing Recording, at 48:40-:48. As of the hearing, Dr. Cooney had yet to create such policies, historically claiming they were not needed since his office is just himself and his spouse. See, e.g., Hearing Recording, at 2:24:00-2:24:50. At most, he appears to have secured some reference manuals. See, e.g., id., at 2:36:30-2:37:36. A related area of concern was a lack of training for office staff, including ongoing "task-specific training on infection prevention policies and procedures and the OSHA blood borne pathogen standard." Ex. 6, at p. 43. Further, there was a general lack of appropriate safety equipment including, but not limited to, personal protective equipment ("PPE") such as masks and gowns. Ex. 6, at p. 45. There was also a general unawareness of the current pandemic related guidelines for the safe practice of dentistry. Ex. 6, at p. 46; Hearing Recording, at 45:10-:18, 1:35:10-:30, 2:27:07-2:27:36, 2:28:40-:59 (Dr. Cooney acknowledging his lack of knowledge about the Board's safe transition back to practice guidelines and other COVID-19 standards until Dr. Campbell informed him of such). In fact, during the December inspection, Dr. Cooney acknowledged he was not even following the "standard" CDC guidelines for the practice of dentistry, noting he had been "probably been lax" and "he hasn't been doing it the way he should have been." Hearing Recording, at 52:10-:32. Besides these specific concerns, there were overall issues ranging from the office being cluttered, which is problematic for infection control, to failure to have appropriate disposal of medical waste. See, e.g., Ex. 6, at pp. 52, 56; Hearing Recording, at 51:30-:52:05.

In the wake of this inspection report and the continued deficiencies in the terms of probation, the Board issued the Order on January 6, 2021, triggering the present proceeding. See, e.g., Exs. 1, at pp. 1-7 (Order); 6, at p. 38 (January 20, 2021 memo outlining areas of probation non-compliance). At the hearing on January 28, 2021, Dr. Cooney requested the license suspension be lifted during the pendency of this matter, and he indicated a willingness to adhere to additional, reasonable conditions. To support his position, he relied in part on the testimony of Dr. Campbell, who testified he re-inspected the office and, despite certain issues the Board raised during examination, the office was now safe and in compliance with relevant guidelines. Hearing Recording, at 1:29:20-:30, 1:33:20-1:47:18; see also Exs. A-X (current photographs of Dr. Cooney's office). Dr. Campbell did, though, acknowledge there could still be issues with Dr. Cooney's hand-piece sterilization and related practices. Hearing Recording, at 1:39:51-1:40:33; 1:42:26-:47.

Of note, when Dr. Cooney testified at the hearing, he stated he "was slow on the uptake" for safety protocols, but he also could maintain the standards now that he learned them. See, e.g., Hearing Recording,

at 2:13:00-2:15:00. He further indicated he had taken infection control continuing education last fall, and he promised to check his email weekly to ensure he was timely receiving practice related information. Hearing Recording, at 2:16:40-2:17:40, 2:31:06-:46. Importantly, though, he acknowledged he continued using level one masks instead of the required higher grade masks prior to the suspension because he could not secure the more protective masks prior to Dr. Campbell's inspection. Hearing Recording, at 2:13:15-2:14:20; 2:28:45-2:29:14.

CONCLUSIONS OF LAW

A.

Pursuant to Iowa law, the Board was created to regulate the practice of dentistry, dental hygiene, and dental assisting. Iowa Code § 147.13(8). Its authority includes the power to “initiate and prosecute disciplinary proceedings” and “impose licensee discipline.” Id. § 272C.3(e), (f). As part of this, the Board may “revoke a license or suspend a license until further order of the [B]oard or for a specific period of time” upon one of several enumerated grounds. Id. § 272C.3(2)(a). One of these enumerated grounds is for “willful or repeated violations of this chapter [153 pertaining to dentistry] or the rules of the [B]oard.” Id. § 153.34(4). Some of the acts allowing the Board to impose discipline under its rules are the “[f]ailure to maintain adequate safety and sanitary conditions for a dental office”; “[f]ailure to comply with standard precautions for preventing and controlling infectious diseases and managing personnel health and safety concerns related to infection control”; and “[f]ailure to comply with an order of the [B]oard[.]” 650 Iowa Administrative Code (“I.A.C.”) §§ 30.4, .6.

“To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, . . . the [B]oard may issue a written order . . . to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the [B]oard by emergency adjudicative order[.]” Id. § 51.30(1). Before issuing an emergency adjudicative order, the Board must consider the totality of the circumstances of a matter, including specifically:

- a. Whether there has been a sufficient factual investigation to ensure that the board is proceeding on the basis of reliable information;
- b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;
- c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;
- d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and
- e. Whether the specific action contemplated by the board is necessary to avoid the immediate danger.

Id. “After the issuance of an emergency adjudicative order, the [B]oard shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger,” which in this case is the completion of the disciplinary hearing. Id. § 51.30(4). Generally speaking, the

burden of proof in a disciplinary action is on the State by a preponderance of the evidence. See, e.g., Eaves v. Bd. of Med. Examiners, 467 N.W.2d 234, 237 (Iowa 1991) (discussing the issue).

B.

In this case, Dr. Cooney challenges the license suspension pending the resolution of his disciplinary proceeding. As an initial matter, neither party appears to challenge the propriety of the license suspension when it was issued, with Dr. Cooney testifying the suspension was a valuable “wake-up call” and with no material evidence presented to detract from Dr. Campbell’s report and testimony the office was unsafe as of his first inspection. Instead, the parties dispute whether Dr. Cooney should be allowed to resume practicing during the pendency of this disciplinary proceeding given the changes he has made.

On balance, the Board concludes the magnitude of his deviation from the standard of practice, the difficulty adhering to the conditions of his probation and the historic standards of the profession, and the failure to have written policies in place showing his understanding of the governing rules reveal the license suspension cannot be lifted at this time because there would be an unacceptably high risk to the public that Dr. Cooney would return to practicing dentistry in an unsafe manner. However, in light of the significant progress he has made, he may again request the Board lift the suspension during the pendency of this case if he complies with the conditions set forth in this order.

Allowing Dr. Cooney to return to practice during the pendency of this matter without further conditions would create an unacceptable danger to the public given the record made at the hearing. As the parties agree and as explained above, a core consideration for an emergency order with an immediate suspension such as the one at issue here is public safety, including “whether the specific circumstances which pose immediate danger to the public health, safety or welfare are . . . continuing.” 650 I.A.C. § 51.30(1). While it is true Dr. Cooney has made significant progress towards bringing his dental office into compliance with current safety standards and has stated his desire to practice in accord with all guidelines after the “wake-up” call of the suspension, the Board believes a material risk exists he will not sustain his recent progress and the unsafe conditions of his practice will return.

The record is nearly uniform in establishing Dr. Cooney deviated markedly from the governing safety standards prior to his license suspension. This includes not only failing to be aware of and implement the Covid-19 safe return to practice standards but also adhering to long-established safety protocols. During the December 18, 2020, inspection, he admitted he had been “lax” in the traditional safety protocols, which was apparent in several aspects of his practice including the sterilization and treatment of handpieces. Such large deviations from the standards of the profession cast a shadow on whether he is fully capable of maintaining the progress he has made, particularly should he start treating patients again. Contrary to Dr. Cooney’s statements at the hearing, it is not easy to adhere to the guidelines, and he has only demonstrated progress while on suspension when not treating patients.

The lack of written operating procedures for his office, including on infection control, heightens the concern Dr. Cooney will be unable to practice in accord with all safety standards. From his testimony at the hearing as well as the operation of his practice prior to the suspension, it is unclear the extent to which Dr. Cooney truly comprehends what is required to run his dental practice in a safe and appropriate manner. Written procedures are foundational in the operation of a dental office because drafting such reveals an awareness of all aspects of the practice and because they can be used as a reference guide for unusual events for both dentists and staff. This is why so much of the checklist Dr. Campbell used in his inspection focused on written policies, and the lack of such gives great pause as to whether Dr. Cooney

has considered all aspects of the governing guidelines and how to implement them. The continuing education classes Dr. Cooney appears to have taken did secure his compliance with governing standards prior to the suspension, and the few conversations he had with Dr. Campbell as what he needed to change is unlikely to produce all the lasting change necessary for a safe practice. This is because Dr. Cooney needed to remedy shortcomings in nearly every aspect of his practice. This is not a case where a discrete safety issue exists that can easily be remedied by brief counseling. Also, the concept of not needing written procedures because Dr. Cooney's office only includes himself and his spouse belies reality.

In addition to the material concern that Dr. Cooney may not be capable of sustaining the changes he recently implemented, the Board also has a concern about his commitment to sustain the changes and to operate his dentist office in a safe manner. First, by all accounts, Dr. Cooney has not fully complied with the terms of his probation, which indicates the Board cannot rely on his historical behavior to trust he will act in accord with the standards of the profession. Second, the record indicates he knowingly disregarded some governing standards. While much of the record revealed Dr. Cooney was not aware of the new pandemic guidelines, he did state at the hearing he continued using level one masks when he could not procure higher grade masks prior to Dr. Campbell's inspection. This shows a willingness to disregard known safety protocols, as he knew something more than what he was doing was required and he ignored it. This appears not to be an isolated incident, given he also admitted to Dr. Campbell that he was knowingly lax in other "standard" areas. This cannot be ignored, at least not with the practice-wide deficiencies found in the December 18, 2020, inspection. In short, the current conditions of probation have failed to ensure a safe practice, and the Board concludes the recent changes are insufficient to find the public would be safe should Dr. Cooney return to practice at this time. Thus, the suspension cannot be lifted.

While the record establishes Dr. Cooney cannot be allowed to practice under existing conditions, his recent progress does reveal that, with some additional requirements, he may in the future be able to practice during the pendency of this matter. Prior to the lifting of any suspension, Dr. Cooney must complete the following:

1. File written operating procedures for his dental practice explaining how all CDC guidelines and the requirements in the Board's Safe Transition Back to Practice document will be followed. As noted above, written procedures are foundational to sustained compliance with all relevant guidelines, and they should include operating procedures for any staff as well.
2. File a letter detailing his understanding of the infection control standards that is sufficient to demonstrate his knowledge of the applicable standards, the need for such standards, and his commitment to implementing them in his practice. This is to demonstrate he has the capacity and willingness to follow all relevant safety guidelines that he has not shown to date.
3. Complete Board approved, in-office training for himself and all office personal, including anyone involved in patient care or otherwise in the operation of the office, in standard dental operating procedures, including in infection control and patient care. This should include scenario training, and a report of the training and successful completion must be filed. This will ensure Dr. Cooney has remedied not only deficiencies in his office but also in his procedures.

4. Have a Board approved infection control monitor conduct an inspection of Dr. Cooney's office after the forgoing training. A report must be submitted along with a plan for unannounced inspections of Dr. Cooney's office every two weeks during a time Dr. Cooney is seeing patients. Given Dr. Campbell's statements about his limited availability and his prior dealings with Dr. Cooney, a different Board approved monitor must conduct the inspections. The monitor may be the same individual that completes the training, and this is meant to ensure the all of the changes Dr. Cooney has made to his office and practice are continuing.

Once these materials have been submitted to the Board, Dr. Cooney may again request that the license suspension pending the completion of the disciplinary proceeding be lifted. Granted these conditions will likely be difficult to complete at least prior to the hearing, but it is required to protect the public. What is at issue is the core safety standards of the profession necessary to keep everyone reasonably safe during an unusual time, and the conditions that predated the suspension cannot be allowed to exist again. Finally, in light of some of his testimony at the hearing, the Board would remind Dr. Cooney of his obligations to refer patients as necessary in accord with the rules of the Board. See, e.g., 657 I.A.C. § 27.10.

ORDER

The request to lift the license suspension during the pendency of this case is DENIED. There is, however, leave to request the lifting in the future should the conditions of this order be satisfied. Of note, even if the conditions are satisfied, this does not necessarily mean the license suspension will be lifted, as the Board must always consider the totality of the circumstances when making such a decision including all further developments since the January 2021 hearing.

IT IS SO ORDERED.

Dated this the 26th of February, 2021.



William McBride
Chairperson
Iowa Dental Board

Cc: Kevin Driscoll, Attorney for Respondent
James Blackburn, Attorney for Respondent
Jill Stuecker, Executive Director, Iowa Dental Board
(All parties served by mail and email)